Journal of Law and Policy

Volume 30 | Issue 2 Article 2

6-1-2022

Determining Marriage Length in Support Calculations: Should Cohabitation Count?

Mark Strasser

Follow this and additional works at: https://brooklynworks.brooklaw.edu/jlp

Part of the Family Law Commons, Law and Society Commons, Sexuality and the Law Commons, and the State and Local Government Law Commons

Recommended Citation

Mark Strasser, *Determining Marriage Length in Support Calculations: Should Cohabitation Count?*, 30 J. L. & Pol'y 396 (2022).
Available at: https://brooklynworks.brooklaw.edu/jlp/vol30/iss2/2

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

DETERMINING MARRIAGE LENGTH IN SUPPORT CALCULATIONS: SHOULD COHABITATION COUNT?

Mark Strasser[*]

Many states have sought to make spousal support awards more predictable by linking them to marital length. States doing so must decide whether to include premarital cohabitation within the calculation determining marriage duration, which for many couples will significantly affect the ultimate determination. This Article discusses some of the difficulties in achieving consistency and predictability in marital length determinations, focusing on how the supreme courts in Massachusetts and North Dakota have sacrificed those goals in their attempts to achieve what they likely thought to be more equitable results in individual cases.

INTRODUCTION

State statutes specify several factors for courts to consider when determining whether or how much spousal support to award at the time of divorce. Many of these statutes simply list the factors without specifying how much weight each should be given,[1] and

[*] Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

[1] *See* Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 579 (1990) ("[S]pousal support statutes typically list a range of factors to be considered in setting support."); For example, see OHIO REV. CODE ANN. § 3105.18(C)(1) (2019)

> In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:
>
> (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided,

may include a catch-all category of whatever the court believes relevant, appropriate, or equitable.[2] Such an approach virtually guarantees inconsistent results across cases.

> disbursed, or distributed under section 3105.171 of the Revised Code;
>
> (b) The relative earning abilities of the parties;
>
> (c) The ages and the physical, mental, and emotional conditions of the parties;
>
> (d) The retirement benefits of the parties;
>
> (e) The duration of the marriage;
>
> (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
>
> (g) The standard of living of the parties established during the marriage;
>
> (h) The relative extent of education of the parties;
>
> (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
>
> (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
>
> (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
>
> (l) The tax consequences, for each party, of an award of spousal support;
>
> (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
>
> (n) Any other factor that the court expressly finds to be relevant and equitable.

[2] *See* ALASKA STAT. ANN. § 25.24.160(a)(2)(G) (2021) ("other factors the court determines to be relevant in each individual case"); ARIZ. REV. STAT. ANN. § 25-319(B) (2022) ("The maintenance order shall be in an amount and for a period of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors"); CAL. FAM. CODE § 4320(n) (2019) ("Any other factors the court determines are just and equitable."); COLO. REV. STAT. ANN. § 14-10-114(2) (2018) ("An award of maintenance shall be in an amount and for a term that is fair and equitable to both parties and shall be made without regard to marital misconduct."); FLA. STAT. ANN. § 61.08(2)(j) (2011) ("Any other factor necessary to do equity and justice between the parties.");

Some states have tried to increase consistency and predictability by providing spousal support guidelines linked to the longevity of the marriage.[3] If there are two spouses who qualify for

---

IOWA CODE ANN. § 598.21A(1)(j) (2005) ("Other factors the court may determine to be relevant in an individual case."); ME. REV. STAT. tit. 19-A, § 951-A(5)(Q) (2021) ("Any other factors the court considers appropriate."); MO. ANN. STAT. § 452.335(2)(10) (2021) ("Any other relevant factors."); NEV. REV. STAT. ANN. § 125.150(9) (2020) ("In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider . . . "); OHIO REV. CODE ANN. § 3105.18(C)(1)(n) (2013) (Any other factor that the court expressly finds to be relevant and equitable."); S.C. CODE ANN. § 20-3-130(C)(13)(1976) ("[S]uch other factors the court considers relevant."); WASH. REV. CODE ANN. § 26.09.090(1) (2008) ("The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to . . . "); W. VA. CODE ANN. § 48-6-301(b)(20) (2018) ("Any other factors as the court determines necessary or appropriate to consider in order to arrive at a fair and equitable grant of spousal support and separate maintenance."); WIS. STAT. ANN. § 767.56(1c)(j) (2014) ("Such other factors as the court may in each individual case determine to be relevant.").

[3] *See, e.g.*, FLA. STAT. ANN. § 61.08(4) (2011)

> For purposes of determining alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater. The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage.

N.J. STAT. ANN. § 2A:34-23(c) (2014)

> For any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union. Determination of the length and amount of alimony shall be made by the court pursuant to consideration of all of the statutory factors set forth in subsection b. of this section.

CAL. FAM. CODE § 4336(b) (1994)

> For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration. However,

support and they are similar in all relevant respects except that one has been in a marriage for five years while the other has been in a marriage for twenty years, the latter spouse would be eligible for an award of much longer duration.[4] Linking support to the longevity of the relationship forces states to decide, implicitly or explicitly, whether premarital cohabitation should be included when determining the relationship's duration.[5]

Part I of this Article discusses the laws of many states, which accord judges great discretion with respect to whether and how much spousal support to award at the time of divorce. This discretion permits judges to reach better outcomes in particular cases but sacrifices consistency and predictability across cases. Part II discusses some state attempts to limit awards based on the longevity of the marriage with a special focus on how some states treat premarital cohabitation for purposes of determining the length of the marriage. The Article concludes that when deciding whether and how to treat premarital cohabitation, some courts seem to go out of their way to undermine any attempts to achieve greater consistency in spousal support awards, thereby not only making it more difficult for attorneys to advise clients but also undermining equity. While it is understandable for courts to want deserving individuals to receive their due or, perhaps, for undeserving individuals to be unable to game the system to gain an economic windfall, courts sometimes undermine the very purposes they

---

> the court may consider periods of separation during the marriage in determining whether the marriage is in fact of long duration. Nothing in this subdivision precludes a court from determining that a marriage of less than 10 years is a marriage of long duration.

N.H. REV. STAT. ANN. § 458:19-a (III) (2021) ("The maximum duration of term alimony shall be 50 percent of the length of the marriage, unless the parties agree otherwise or the court finds that justice requires an adjustment under paragraph IV.").

[4] J. Thomas Oldham, *An Overview of the Rules in the USA Regarding the Award of Post-Divorce Spousal Support in 2019*, 41 HOUS. J. INT'L L. 525, 539 (2019) ("All current guidelines now agree that spousal support award duration should be a function of marital duration.").

[5] *See infra* Part II (discussing state analyses of when premarital cohabitation should be included in the determination of marriage length).

purportedly wish to promote through their internally inconsistent approaches to awarding spousal support.

I. RELEVANCE, EQUITY, AND CONSISTENCY

Many states afford judges wide discretion with respect to whether or how much spousal support to award, listing a number of factors without specifying their corresponding weights.[6] The failure to specify the differing factors' relative weights builds into the system an increased likelihood that cases relevantly similar will nonetheless be decided differently.[7] In addition, many states include a factor permitting a judge to consider anything that he or she believes relevant or appropriate, which almost guarantees that relevantly similar cases will have very different outcomes.[8] Unsurprisingly, affording this great deference has permitted more equitable distributions in particular cases but has resulted in less consistency in and predictability of outcomes across cases.[9]

---

[6] Jessica Feinberg, *Gradual Marriage*, 20 LEWIS & CLARK L. REV. 1, 17 (2016) ("Notably, the statutes are completely silent with regard to how the court should weigh each of the many factors listed, which leaves the court to use its discretion in considering an unwieldy list of diverse factors.").

[7] *See, e.g.*, In re Marriage of Gust, 858 N.W.2d 402, 408 (Iowa 2015) ("According to the critics, the terms of the statutes embracing multifactored tests for spousal support are not well defined and the standards are so vague that just about any outcome, including those based on the personal preference of an individual judge, may be justified by citation to pliable statutory factors."). The same difficulty has been noted with respect to child support determinations. *See* Abraham Kuhl, *Post-Majority Educational Support for Children in the Twenty-First Century*, 21 J. AM. ACAD. MATRIM. L. 763, 778 (2008) ("Because different judges used their own discretion in assigning different weights to each of the factors, child support awards became very unpredictable and lacked consistency even within the state.").

[8] *See, e.g.*, Charles J. Aldrich, *The Spousal Support Scheme in Ohio Under 3105.18: Trial Courts Have Too Much Judicial Discretion*, 22 OHIO N.U. L. REV. 815, 827 (1996) ("[T]he fragmented and confusing purposes used by trial court judges for awarding spousal support . . . result[] in inconsistent outcomes.").

[9] *See* Jeremy Gradwohl, *Electric Utility-Caused Wildfire Damages: Strict Liability Under Article I, Section 19 of the California Constitution*, 92 TEMP. L. REV. 595, 624 (2020) ("Using multifactor tests . . . can lead to less predictable results . . . ."); *see also* Marsha Garrison, *How Do Judges Decide Divorce*

The lack of consistency and predictability of support awards has costs, not least of which is that public confidence in the fairness of courts is undermined.[10] States have tried to rein in some of the discretion by limiting the kinds of factors that may be considered in support determinations. Those attempts have not had the success that might have been desired, which has meant that individuals in relevantly similar situations still might be treated very differently with respect to how much support they might be awarded.[11]

A. On Relevance and Equity

In many states, judges decide whether and how much spousal support to award in light of several specified factors including whatever is relevant or appropriate. The desire of states to afford judges this great latitude is understandable in that an open-ended approach[12] might promote equitable results in individual cases,[13]

Cases? An Empirical Analysis of Discretionary Decision Making, 74 N.C. L. REV. 401, 412 (1996) ("Nor can discretionary standards provide as much certainty to litigants who want to settle their cases as would rules . . . .").

[10] Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 604 (1987) ("[I]nconsistency and vacillation in decisions undermine public confidence in the judiciary as a whole, thus lessening respect for and obedience to the law."); Leslie Herndon Spillane, *Spousal Support: The Other Ohio Lottery*, 24 OHIO N.U. L. REV. 281, 282 (1998) ("Disparate treatment of similar cases undermines the public's confidence in the judicial system . . . .").

[11] David E. Braden, *Judicial Discretion v. Predictable Outcomes: A Review of the 2016 Amendments to the Illinois Marriage and Dissolution of Marriage Act*, 92 CHI.-KENT L. REV. 249, 256 (2017) ("[P]arties with similar factual circumstances could experience widely varying outcomes due to different judges' discretion and value judgments.").

[12] *See* Ira Mark Ellman, *The Place of Fault in A Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 784 (1996) (noting "the open-ended list of factors that a court may consider"); Rutheford, *supra* note 1, at 579 ("Because alimony standards are usually both vague and conflicting, judges have a tremendous amount of discretion in setting the awards."); John C. Sheldon & Nancy Diesel Mills, *In Search of A Theory of Alimony*, 45 ME. L. REV. 283, 284 (1993) ("In short, the [Maine] statute grants judges almost unlimited discretion in awarding alimony.").

although such an approach likely assumes more consensus than actually exists.[14] For example, there may well be disagreement about whether marital fault should play a role in whether or how much spousal support should be paid.[15] The Supreme Judicial Court of Maine has suggested that "[a]limony is intended to fill the needs of the future, not to compensate for the deeds of the past."[16] In contrast, the Utah Supreme Court explained that "when an important or significant cause falls into a category of conduct specifically identified in section 30-3-5(8), courts are authorized to consider it in an alimony determination, even if the at-fault party can point to other potential causes of the divorce."[17] Thus, courts and legislatures across jurisdictions take very different views of the purposes of support. That lack of unanimity about the purposes behind support is also represented within jurisdictions, where individual judges may have very different views of the purposes behind support and may make support decisions accordingly.[18]

---

[13] Garrison, *supra* note 9, at 403 ("Divorce law has traditionally relied on judicial wisdom to achieve fair results."); *id.* at 413 ("But these inevitable aspects of discretion do not inexorably produce arbitrariness, bias, or uncertainty.").

[14] *Cf.* In re Marriage of Gust, 858 N.W.2d 402, 408 (Iowa 2015) ("[A] multifactored legal test in which all factors are relevant and none are dispositive can be extraordinarily difficult to consistently apply.").

[15] Ellman, *supra* note 12, at 812 (quoting Skelton v. Skelton, 490 A.2d 1204, 1207 (Me. 1985)). *Compare* Ellman, *supra* note 12, at 785–86 ("[F]ault can be relevant only to vindicate interests not addressed by the basic alimony award-interests that in a given case require a concurrent financial award which can be added to, or offset against, the award based upon the compensatory payment rationale."), *with* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 319 (1997) ("Fault-based statutory factors for determining spousal support awards or for determining the distribution of marital property on divorce, therefore, should *not* be abolished or abrogated in those states that continue to recognize and properly utilize these factors, without clear and compelling evidence that fault-based factors do *not* in fact serve an important underlying moral, social, economic, and public policy function.").

[16] Skelton v. Skelton, 490 A.2d 1204, 1207 (Me. 1985).

[17] Gardner v. Gardner, 452 P.3d 1134, 1143 (Utah 2019).

[18] *See* Oldham, *supra* note 4, at 535 ("[I]n a number of states, the standards being applied are quite inconsistent, even within one city or state.").

While affording judges great discretion[19] means that they will not be hamstrung with respect to the factors that might be considered,[20] such discretion also likely leads to unfair and regrettable consequences.[21] For example, permitting judges to include whatever they believe is relevant, appropriate, or equitable will result in the consideration of certain factors in some but not other relevantly similar cases.[22] Judges may well have very different notions about what is reasonable to consider and may not be greatly helped by the Nebraska Supreme Court's guidance that "[i]n determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion . . . is one of reasonableness."[23] Unless these open-ended criteria are

---

[19] Sheldon & Mills, *supra* note 12, at 284 ("In short, the statute grants judges almost unlimited discretion in awarding alimony.").

[20] *Cf*. Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 L. & SOC'Y REV. 411, 412 (2014) (noting that "judges had been relatively hamstrung from exercising individualized sentencing discretion since the Guidelines were put into effect in 1987").

[21] *Cf.* Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 210 (1991) ("Broad discretion in family law decisionmaking is detrimental to the judicial system and to the parties seeking to resolve disputes. Vesting judges with such discretion does not enhance their ability to make just decisions . . . .").

[22] *See* Heather H. v. W. Shane H., No. 19-0058, 2020 WL 3263933, at *9 (W. Va. June 17, 2020) (Workman, J., concurring in part and dissenting in part) ("Although the statutory factors set forth by the Legislature appear comprehensive in terms of relevant considerations, the subjective consideration of these factors by statewide family court judges yields little parity."). *Cf.* Michelle Dorsey Deis, *Gross v. Gross: Ohio's First Step Toward Allowing Private Ordering of the Marital Relationship*, 47 OHIO ST. L.J. 235, 256 (1986) ("A study on Ohio domestic decisions has shown that domestic judges, left to their own discretion, produce a wide variety of sustenance alimony orders when given the same factual case."); Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 21 (2015) ("When indeterminate systems give judges the discretion to select punishments on a case-by-case basis, similar cases inevitably receive dissimilar sentences, depending on each individual judge's perspectives on sentencing philosophy, views on what sentencing factors are relevant or irrelevant, and race, gender, or class biases.").

[23] Kosnopfl v. Kosnopfl, 293 N.W.2d 854, 856 (Neb. 1980); *see also* Pyke v. Pyke, 321 N.W.2d 906, 909 (Neb. 1982) ("The relevant considerations will

suitably cabined, judges may end up undermining state policies, "unwittingly or otherwise."[24] States have tried to provide some guidance to courts, although those attempts have not always yielded satisfactory results.[25]

B. Spousal Support and Considerations of Fault

States differ about whether marital fault is an appropriate factor to consider in the allocation of support.[26] Some states expressly preclude the use of fault.[27] Others expressly permit but do not require consideration of fault,[28] while still others allow judges to consider any relevant factors, which impliedly suggests that judges may but need not consider marital fault.[29] Further, the quantum of

---

vary from case to case.") (citing Magruder v. Magruder, 209 N.W.2d 585, 587 (Neb. 1973)).

[24] Skinner v. State of Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[25] *See* Catherine M. McFadden, *Alimony in Pennsylvania: The Constancy of Change*, 92 PA. BAR ASS'N. Q. 55, 62 (2021) ("The American Law Institute observed in 2002 that, 'the modern law of alimony has no coherent rationale . . . its application varies considerably both among and within jurisdictions,' and 'vague standards governing alimony in most existing law yields inconsistent and unpredictable adjudication.'") (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.02 (AM. L. INST. 2002)).

[26] *See* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 871 (1994) (discussing "the enactment in many states of no-fault divorce with the simultaneous removal of fault (breach) as a consideration in grants of spousal support and property division"). *But see* Sandi S. Varnado, *Avatars, Scarlet "A"s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371, 388 (2013) ("Many jurisdictions do consider marital fault in fashioning spousal support awards."); Brittany Ranson Stonestreet & Andrea Cozza, *A Brief Primer on Alimony*, 43 FAM. ADVOC. 25, 27 (2020) ("Most states can consider a party's fault or marital misconduct in an award of alimony.").

[27] Amanda Nannarone, *Adding Insult to Injury: The Unconscionability of Alimony Payments from Domestic Violence Survivors to Their Abusers*, 69 AM. U. L. REV. 253, 275 (2019) ("[F]our states expressly note that no inquiry shall be made into, and no evidence shall be presented regarding, marital misconduct.").

[28] *Id.* at 275 ("[T]welve states . . . permit, but . . . do not expressly require, the consideration of marital fault when determining alimony.").

[29] *See id.* at 276 ("The largest category is the third, which contains thirty-three states where the statutes are silent on marital fault and instead allow judges

evidence needed to make marital fault applicable for determinations of spousal support is not equivalent to the quantum of evidence necessary to grant a divorce based on that fault. For example, the evidence necessary for alleged adultery to play a role in determining support may not suffice to provide a basis for granting a divorce on that ground.[30]

In cases where there is no question that infidelity took place, judges may be afforded discretion with respect to how heavily to weigh that factor in the determination of spousal support.[31] States may focus on the harm caused by the marital fault, for example, whether the commission of that fault substantially contributed to the break-up of the marriage.[32] Where the marital fault

---

to decide alimony using any other factors deemed relevant."); *but see* Kogod v. Cioffi-Kogod, 439 P.3d 397, 401 (Nev. 2019) ("The district court may also consider any other relevant factor, but it must not consider the marital fault or misconduct, or lack thereof, of the spouses.") (citing Rodriguez v. Rodriguez, 13 P.3d 415, 419 (Nev. 2000)).

[30] *See* Pelayo v. Pelayo, 303 P.3d 214, 220 (Idaho 2013) (distinguishing "the standard for showing 'fault' with the standard for granting a divorce based on adultery"); Ballard v. Ballard, 77 S.W.3d 112, 118 (Mo. Ct. App. 2002) ("While misconduct found to cause or contribute to cause the breakup of a marriage would logically constitute an added burden, misconduct not rising to that level could still be found to constitute an added burden on the marriage, justifying a disproportionate division of marital property.").

[31] *See, e.g.*, Saltzman v. Saltzman, 218 A.3d 551, 561 (R.I. 2019), *as corrected* (Jan. 3, 2020) ("Although Adam's infidelity is certainly relevant to the inquiry, it does not follow that it should outweigh all other factors. In this case, we conclude that the trial justice permissibly exercised his discretion in not placing more emphasis on this factor."). *But see* Gerty v. Gerty, 265 So. 3d 121, 133 (Miss. 2018) ("The law is settled that a chancellor must consider fault when determining alimony.") (citing Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993)); Ex parte Evans, 875 So. 2d 297, 300–01 (Ala. 2003) ("[W]e find 'probable merit' in the wife's contention that the trial court should have granted the divorce on the ground of adultery and should have considered the husband's adultery in dividing the marital property and making its award of alimony."). *See also* GA. CODE ANN. § 19-6-1(b) (2022) ("A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adultery or desertion.").

[32] *See* Gardner v. Gardner, 452 P.3d 1134, 1142 (Utah 2019) ("[A] spouse's participation in an extramarital affair constitutes fault if it 'substantially

substantially contributed to the breakdown of the marriage, the court might be directed to compensate for the harm done to the other party.[33] Or, state law might provide that adultery not causing the break-up of the marriage may nonetheless affect support.[34]

Accordingly, courts' discretion regarding whether marital fault should play a role in support determinations may yield inconsistent judgments because individual judges' divergent moral views may play an important role in determining the award.[35] Further, it is not always easy to determine who is at fault for the breakdown of a marriage,[36] or even which faults should count.[37] Because there are

---

contributed' to the breakup of the marriage."). *Cf.* N.H. REV. STAT. ANN. § 458:16-a(II) (2019)

> The court shall presume that an equal division is an equitable distribution of property . . . unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors: . . . [t]he fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:
>
> (1) Caused substantial physical or mental pain and suffering; or
>
> (2) Resulted in substantial economic loss to the marital estate or the injured party.

[33] *Gardner*, 452 P.3d at 1149 ("[W]here one party's fault has harmed the other party, the court may attempt to re-balance the equities by adjusting the alimony award in favor of the party who was harmed by that fault.").

[34] *See* Davis v. Davis, 832 So. 2d 492 (Miss. 2002) (permissible to consider post-separation adultery as basis for divorce and as factor in determination of support).

[35] *See* Kirsten Gallacher, *Fault-Based Alimony in No-Fault Divorce*, 22 J. CONTEMP. LEGAL ISSUES 79, 85 (2015) ("[P]arties may be subjected to the discretion of an individual judge's sense of morality.").

[36] *See* Mani v. Mani, 869 A.2d 904, 917 (N.J. 2005) ("Not only is non-economic fault nearly impossible to factor into an alimony computation, but any attempt to do so would have the effect of generating complex legal issues regarding the apportionment of mutual fault, which is present in nearly all cases.").

[37] *Cf.* Allen v. Allen, No. 2781-06-2, 2007 WL 3071502, at *2, *5 (Va. Ct. App. Oct. 23, 2007) ("[T]he commissioner found that during the marriage, husband 'was of ill-temper, consumed alcohol on almost a daily basis, acted in an indifferent, inconsiderate and demeaning manner toward wife,' was 'hateful, manipulative' and 'callous,' and 'had a general nasty attitude.'" Nonetheless, the

so many variables, the likelihood of inconsistency across cases is very high.[38]

Some states distinguish between economic and noneconomic marital fault, permitting consideration of the former but not the latter when determining spousal support.[39] In an approach considering only economic fault, a relevant or appropriate factor would involve a party having dissipated marital assets but would not involve a noneconomic fault such as adultery.[40] Yet, the distinction between economic and noneconomic fault may be harder to draw than first thought—if state policy permits "marital misconduct . . . [to] be taken into consideration in the calculation of alimony"[41] to the extent that the "marital misconduct affects the economic *status quo* of the parties,"[42] then such conduct might come into play frequently.[43] It would be unsurprising if one party's marital fault led to the other party's feeling anxious or depressed,[44]

---

wife who decided "to 'extricate herself from an unpleasant and dysfunctional marriage,'" was denied spousal support.).

[38] *Cf.* Joanne Hughes Burkett, *Myths About Marriage & Divorce in South Carolina*, 17 S.C. L. 14, 17 (2005) ("Today, predicting the success of a request for alimony is very difficult because South Carolina law has no guidelines or formula. Judges have wide discretion in weighing 13 factors that affect an award for spousal support.") (citing S.C. CODE ANN. § 20-3-130(C)).

[39] *See* Jeannette C. Griffo, *How Fault Remains A Factor in Property Division Upon Divorce: An Analysis of Equitable Distribution in Michigan After* Sparks v. Sparks, 71 U. DET. MERCY L. REV. 421, 422 (1994) ("[A] significant number of states have distinguished 'traditional' fault (i.e., conduct that would have been grounds for a divorce before no fault) from fault that has a direct impact on marital resources ('economic fault'), overwhelmingly favoring application of the latter but not the former.").

[40] *See* Fountain v. Fountain, 559 S.E.2d 25, 34 (N.C. Ct. App. 2002) ("A factor is just and proper, within the meaning of section 50–20(c)(12), if it is an action related 'to the economic condition of the marriage.'") (citing Smith v. Smith, 331 S.E.2d 682, 687 (N.C. 1985)); *see also Mani*, 869 A.2d at 916 ("[I]n cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony.").

[41] *Mani*, 869 A.2d at 917.

[42] *Id.*

[43] *See* Blickstein v. Blickstein, 472 N.Y.S.2d 110, 114 (App. Div. 1984) ("[M]arital misconduct will often have economic ramifications . . . .").

[44] *See* Smith v. Smith, 362 N.E.2d 123, 125 (Ill. App. 1977) ("[H]er statements that she suffered from anxiety and depression were uncontradicted.").

which might translate into reduced productivity in the workplace[45] and a reduction in salary or the loss of other opportunities.[46]

Unsurprisingly, judges may believe that certain factors are relevant or appropriate even if not entirely in accord with the state's articulated policy.[47] Perhaps the judge will articulate the reasons actually motivating his or her decision, especially if the state requires that judges justify a spousal support decision with an express evaluation of each factor.[48] Where there is no such requirement, reviewing courts might have some difficulty knowing whether a judge had been improperly influenced by his or her own notions of what was relevant, appropriate, or equitable when

---

[45] *See* Troy v. Prudential Ins. Co., 649 N.Y.S.2d 746, 747 (App. Div. 1996) (discussing depression and anxiety that affected work performance).

[46] *See* Murphy v. Murphy, 2019 Ohio App. LEXIS 3525, at *10 (Ohio Ct. App. Aug. 26, 2019) (reduced productivity led to reduced salary); *see also* Robert F. Cochran, Jr., *"Good Whiskey," Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury*, 45 S.C. L. REV. 269, 310 (1994) ("[R]educed productivity also carries with it lost opportunity costs.").

[47] Ellman, *supra* note 12, at 777 ("Experienced practitioners in some states have suggested that trial courts do not always honor the 'official' limitations on consideration of fault[.]"); *see also id.* at 831 ("[A]ppellate courts have attempted to establish rules that explain when findings of fault may appropriately affect the award, but such guidelines do not seem to create effective bounds on trial court discretion.").

[48] *Compare* Krueger v. Krueger, 748 N.W.2d 671, 674 (N.D. 2008) ("In deciding spousal support issues, the district court is not required to make specific findings on each factor, provided we can determine the reasons for the court's decision.") (citing Ratajczak v. Ratajczak, 565 N.W.2d 491, 494–95 (N.D. 1997), *and* Debowsky v. Debowsky, 532 A.2d 591, 592 (Conn. App. 1987) ("The trial court is not obligated to make express findings on each of the statutory criteria.") (citing Weiman v. Weiman, 449 A.2d 151, 153 (Conn. 1982)), *with* Kuiper v. Kuiper, No. 197640, 1997 WL 33343860, at *3 (Mich. Ct. App. Oct. 31, 1997) ("The Supreme Court does not make any of the nine factors enumerated above discretionary; if they are relevant, they *must* be considered, and the trial court must issue '*specific* findings of fact regarding those factors.'") (citing Sparks v. Sparks, 485 N.W.2d 893, 901 (Mich. 1992)); Ruberg v. Ruberg, 858 So. 2d 1147, 1155 (Fla. Dist. Ct. App. 2003) (discussing "[t]he requirement of section 61.08(1), that in all dissolution actions, the court shall include findings of fact relative to the statutory factors supporting an award or denial of alimony").

assessing whether or how much support should be ordered.[49] According judges such discretion might produce more equitable results in some cases but less equitable results in other cases.[50] The more open-ended the criteria, the more one might expect inconsistent results.[51] States have noted the inconsistency with dismay and have tried to develop ways to increase predictability.[52]

---

[49] *See* Ellman, supra note 12, at 780 (discussing "the shroud of trial court discretion that usually obscures alimony decisions . . . .").

[50] *See* Garrison, *supra* note 9, at 411 ("In recent years many commentators have argued that judicial discretion at divorce should be sharply curtailed. Some argue that indeterminate standards have produced decisions that are arbitrary rather than equitable."); Deborah J. Morris, *"Breaking Up Is Hard to Do": Proposing Legislative Action in Order to Address the Problems Surrounding Alimony and Related Divorce Matters in South Dakota*, 61 S.D. L. REV. 81, 83 (2016) ("Proponents of statutorily defined calculations believe this framework achieves more consistent results, eliminates judicial unfairness, and provides equity to both parties.").

[51] *Cf.* Amy C. Lohr, *Employer's Motivations: The Framework for Analyzing First Amendment Rights of Political Activity in O'Hare*, 8 GEO. MASON U. CIV. RTS. L.J. 65, 83 (1998) ("the flexibility of this open-ended test affords judges too much discretion and leads to inconsistent results"); Bethany Poppelreiter, *When Words Are Weapons: Using Tinker and Premises Liability Doctrine to Keep Schools Safe in a Digital Age*, 86 MISS. L.J. 643, 678 (2017) (discussing "the open-ended 'balancing' that often leads to inconsistent results").

[52] *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-114(1)(b) (2018)

> The general assembly further finds that:
>
> (I) Because the statutes provide little guidance to the court concerning maintenance awards, there has been inconsistency in the amount and term of maintenance awarded in different judicial districts across the state in cases that involve similar factual circumstances; and
>
> (II) Courts and litigants would benefit from the establishment of a more detailed statutory framework that includes advisory guidelines to be considered as a starting point for the determination of fair and equitable maintenance awards.

II. MARRIAGE LENGTH AND PREMARITAL COHABITATION

Many states include the duration of marriage as a consideration in spousal support,[53] sometimes emphasizing the importance of that consideration by specifying that spousal support should be of short duration if awarded at all in marriages not meeting a certain threshold length.[54] In contrast, spousal support may be awarded for a much longer period in marriages of sufficient length.[55] Other

---

[53] *See* ALASKA STAT. ANN. § 25.24.160(a)(2)(A) (2018); ARIZ. REV. STAT. ANN. § 25-319(B)(2) (2018); CAL. FAM. CODE § 4320(f) (2019); COLO. REV. STAT. ANN. § 14-10-114(3)(a)(II)(A) (2018); CONN. GEN. STAT. ANN. § 46b-82(a) (2013); FLA. STAT. ANN. § 61.08(2)(b) (2011); HAW. REV. STAT. ANN. § 580-47(a) par. 2 (3) (2022); IDAHO CODE ANN. § 32-705(2)(c) (2022); IOWA CODE ANN. § 598.21A(1)(a) (2022); LA. CIV. CODE ANN. art. 112(B)(7) (2018); ME. REV. STAT. tit. 19-A, § 951-A(5)(A) (2021); MINN. STAT. ANN. § 518.552 (Subd. 2)(d) (2016); MO. ANN. STAT. § 452.335(2)(6) (2020); NEV. REV. STAT. ANN. § 125.150(9)(d) (2020); N.M. STAT. ANN. § 40-4-7(E)(5) (2022); N.C. GEN. STAT. ANN. § 50-16.3A(b)(5) (1999); OHIO REV. CODE ANN. § 3105.18(C)(1)(e) (2013); 23 PA. STAT. & CONS. STAT. ANN. § 3701(b)(5) (2016); 15 R.I. GEN. LAWS ANN. § 15-5-16(b)(1)(i) (2015); S.C. CODE ANN. § 20-3-130(C)(1) (2002); TEX. FAM. CODE ANN. § 8.052(3) (2011); UTAH CODE ANN. § 30-3-5(9a)(iv) (2021); VT. STAT. ANN. tit. 15, § 752(b)(4) (2019); WASH. REV. CODE ANN. § 26.09.090(1)(d) (2008); W. VA. CODE ANN. § 48-6-301(b)(1) (2018); WIS. STAT. ANN. § 767.56(1c)(a) (2014).

[54] *See* 750 ILL. COMP. STAT. ANN. 5/504(b)(1)(B) ("The duration of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies: less than 5 years (.20)"); VT. STAT. ANN. tit. 15, § 752(9) (in marriages of less than five years, there should be no spousal support or only short-term spousal support for up to one year). *See also* COLO. REV. STAT. ANN. § 14-10-114(3)(b)(II)(B) (2018) (guideline maintenance table in terms of months).

[55] *See* 750 ILL. COMP. STAT. ANN. 5/504(b)(1)(B) (2019) ("For a marriage of 20 or more years, the court, in its discretion, shall order maintenance for a period equal to the length of the marriage or for an indefinite term."); VT. STAT. ANN. tit. 15, § 752(9) (2019) (suggesting that for a marriage of over 20 years, support might last for 45% of the length of the marriage or 9-20+ years); COLO. REV. STAT. ANN. § 14-10-114(3)(b)(II)(B) (2018) (suggesting 50% of applicable amount for 10 years).

states have the same priorities, even if those priorities are not expressly reflected by statute.[56]

This policy choice might be justified because a long-term marriage results in increased reasonable reliance by the parties.[57] Further, if the couple has been together for a long period and one member of the couple has not been working outside the home, that individual might have sacrificed a great deal for the sake of the marriage[58] and, in addition, might have great difficulty in entering

---

[56] *See, e.g.*, Greenwald v. Rivkind–Greenwald, 31 So.3d 250, 251 (Fla. Dist. Ct. App. 2017) ("Permanent alimony is generally inappropriate in a short term marriage."); Peterson v. Peterson, FA165006992S, 2017 WL 6947744, at *4 (Conn. Super. Ct. Dec. 7, 2017) ("This marriage is a short-term marriage. The parties were married for a period of two years and eight months when the dissolution of marriage was filed. Alimony is not ordered."); In re Marriage of Pavlovec, 908 N.W.2d 881, at *4 (Iowa Ct. App. Sept. 13, 2017) ("This was a short-term marriage, lasting only six years . . . . We conclude Andrew is entitled to spousal support in the amount of $1500 per month for twelve months beginning on August 1, 2016."); Odeh v. Abushmaies, No. 319181, 2015 WL 1227569, at *4 (Mich. Ct. App. Mar. 17, 2015)

> In light of the fact that this was a short-term marriage without children, neither of the parties had significant physical challenges or special needs, both of the parties were within working age and had employable skills, and plaintiff presented no evidence that her emotional problems prevented her from working, the lower court did not abuse its equitable discretion in awarding plaintiff $1,967 in spousal support for 15 months following the divorce.

But see Coe v. Coe, 477 P.3d 371 (Nev. App. 2020) ("Importantly, NRS 125.150(9)(d), which directs the district court to consider the 'duration of the marriage,' does not act as a limitation or a barrier in awarding a specific amount of alimony based on the length of marriage.").

[57] *Cf.* The Honorable David A. Hardy, *Nevada Alimony: An Important Policy in Need of A Coherent Policy Purpose*, 9 NEV. L.J. 325, 334–35 (2009) ("Alimony based upon a reliance theory of marriage continuation for long-term marriages also appears to be a viable Nevada rationale."); Spillane, *supra* note 10, at 322 ("There is also embedded in the term spousal support the concept that the longer a marriage endures, the more each spouse is entitled to rely upon a continuation of the standard of living the couple has achieved.").

[58] *Cf.* Laura W. Morgan, *A Nationwide Review of Alimony Legislation, 2007-2016*, 51 FAM. L.Q. 39, 50 (2017) (discussing "the income inequality wrought by divorce, with rules of gender neutrality masking the need to compensate the stay-at-home parent (usually women) for their sacrifices").

the workforce.[59] Thus, states seem to be suggesting that as a matter of fairness spousal support might be awarded for a longer period when long-term marriages end.

Over the past several decades, the incidence of premarital cohabitation has increased substantially.[60] State justifications for linking support determinations to a *marriage's* longevity[61] will in many cases also justify linking support determinations to the *relationship's* longevity, which might include both the years of marriage and the years of premarital cohabitation.

Some states have expressly addressed the degree to which years of premarital cohabitation should be included within the support calculus, although most legislatures have not done so.

---

[59] *Cf.* Gales v. Gales, 553 N.W.2d 416, 421 (Minn. 1996)

> [O]ur family law jurisprudence establishes that, to consider an award of permanent maintenance, there must be an exceptional case such as the dissolution of a long-term traditional marriage in which there is an older, dependent spouse who has little likelihood of achieving self-sufficiency because of an absence from the labor market for a long period of time.

[60] *See* Renata Forste, *Prelude to Marriage or Alternative to Marriage?*, 4 J. L. & FAM. STUDS. 91, 91 (2002) ("Census estimates indicate that in 1977 there were 1.1 million cohabiting couples, about 1.5% of all households in the U.S. twenty years later in 1997, the number of cohabiting households had grown to 4.9 million or 4.8% of all households." "More than half of first marriages formed in the U.S. are now preceded by cohabitation."); Linda J. Lacey, *Mimicking the Words, but Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1, 30 (1993) (discussing "the increased trend toward premarital sex and cohabitation before marriage").

[61] Feinberg, *supra* note 6, at 20

> Maine restricts the types of alimony that can be granted for marriages lasting fewer than ten years and sets a rebuttable, maximum duration of half the length of the marriage for spousal-support awards granted for marriages lasting between 10 and 20 years. Similar to the approach in Maine, Delaware imposes a maximum duration of half the length of the marriage for spousal-support awards for marriages lasting fewer than 20 years. Under Utah law, an award of spousal support cannot be of a duration that is longer than the length of the marriage, and Texas altogether prohibits spousal support for marriages lasting fewer than ten years.

Further, courts have reached no consensus about the conditions, if any, under which the years of premarital cohabitation should be added to the years of marriage when determining support. Instead, in many instances, courts are left with the discretion to decide whether to consider premarital cohabitation when making support awards.

Yet, leaving the decision whether to consider the years of premarital cohabitation up to court discretion only increases the likelihood that inconsistent judgments will be made.[62] Further, such a decision is a matter of some moment for many couples who may have lived together prior to marriage for an extended period—adding the years of cohabitation might make a short-term marriage qualify as a long-term marriage, which could significantly affect the support award. In any event, the approach adopted by a particular state with respect to whether the premarital cohabitation years will affect marriage length has important public policy implications, and states should adopt clear policies with respect to whether and how premarital cohabitation should be considered in spousal support determinations.

---

[62] *Compare* Davis v. Davis, No. 2011-G-3018, 2013 WL 310652, at *16 (Ohio Ct. App. Jan. 28, 2013)

> Given that the nature of the parties' relationship in this action was virtually the same both before and after their actual marriage, the evidence supported the factual finding that the parties' de facto marital relationship began in April 1991. Therefore, since the parties' de facto marriage lasted for approximately seventeen years, six years of spousal support is consistent with the total duration of their relationship.

with Abernethy v. Abernethy, No. 80406, 2002 WL 1880142, at *3 (Ohio Ct. App. Aug. 15, 2002) ("[W]e have concluded that the trial court abused its discretion in this regard. Simply put, it is not equitable to commence this marital relationship while the parties were married to other people."). Yet, the criterion suggested in *Davis* (consideration of the parties' de facto relationship) differs from the criterion used in *Abernethy*, in that the parties' de facto relationship in *Abernethy* might not have changed at all after the divorces from their respective former spouses were finally obtained.

A. The Massachusetts Approach

Massachusetts is one of the few states that has specified statutorily both the presumptive range of spousal support for marriages of particular durations and the conditions under which premarital cohabitation may be added to marriage length for purposes of the spousal support presumptions. While other states might disagree with some of the particulars, the Massachusetts approach could lead to more consistent and predictable results across cases. However, the Supreme Judicial Court of Massachusetts has given contradictory signals about when premarital cohabitation should be included in the relevant calculation, which will likely reduce the consistency in and predictability of the duration of spousal support awards.

Massachusetts provides guidelines for spousal support duration based on the length of the marriage[63] with the beginning and

---

[63] *See* MASS. GEN. LAWS ANN. ch. 208, § 49(b) (2012)

> Except upon a written finding by the court that deviation beyond the time limits of this section are required in the interests of justice, if the length of the marriage is 20 years or less, general term alimony shall terminate no later than a date certain under the following durational limits:
>
> (1) If the length of the marriage is 5 years or less, general term alimony shall continue for not longer than one-half the number of months of the marriage.
>
> (2) If the length of the marriage is 10 years or less, but more than 5 years, general term alimony shall continue for not longer than 60 per cent of the number of months of the marriage.
>
> (3) If the length of the marriage is 15 years or less, but more than 10 years, general term alimony shall continue for not longer than 70 per cent of the number of months of the marriage.
>
> (4) If the length of the marriage is 20 years or less, but more than 15 years, general term alimony shall continue for not longer than 80 per cent of the number of months of the marriage.

See also MASS. GEN. LAWS ANN. ch. 208, § 49(c) (2012) ("The court may order alimony for an indefinite length of time for marriages for which the length of the marriage was longer than 20 years.").

ending points of the marriage statutorily defined.[64] In addition, the statute specifically authorizes courts to increase the length of the marriage "if there is evidence that the parties' economic marital partnership began during their cohabitation period prior to the marriage."[65] Those added years can make a substantial difference in the support's duration,[66] depending upon whether and when the premarital "economic marital partnership" began.

The Massachusetts high court has been less clear than desired about the criteria for determining when such partnerships begin. *Duff-Kareores v. Kareores* involved a couple who had married, divorced, lived together again after having lived separately for about four years,[67] and then remarried.[68] The second marriage only lasted for several months,[69] and an important issue involved determining the length of the marriage for purposes of the presumptive duration of spousal support. The trial court held that the marriage began when the couple first married and lasted until the husband was served with the divorce complaint to end the second marriage.[70]

---

[64] *See* MASS. GEN. LAWS ANN. ch. 208, § 48 (2012) ("'Length of the marriage,' the number of months from the date of legal marriage to the date of service of a complaint or petition for divorce or separate support duly filed in a court of the commonwealth or another court with jurisdiction to terminate the marriage.").

[65] *Id.*

[66] *See* sources cited *supra* note 3.

[67] *See* Duff-Kareores v. Kareores, 52 N.E.3d 115, 120 (Mass. 2016) (discussing "the slightly more than four-year period that they were neither married to each other nor living together").

[68] *Id.* at 117.

[69] *Id.* ("In December, 2012, the parties remarried. In June, 2013, Ellen filed a complaint for divorce on the ground of an irretrievable breakdown of the marriage and served the complaint on Christopher the following month.").

[70] *Id.* ("[A] judge of the Probate and Family Court concluded that . . . the length of the parties' marriage for purposes of calculating the durational limits of a general term alimony award to Ellen was eighteen years, the period from the date of the parties' first marriage through the date that Christopher was served with the complaint in the second divorce.").

The Supreme Judicial Court of Massachusetts reversed,[71] suggesting that four different periods had to be considered when determining the length of the marriage for spousal support purposes: the first marriage, the period between the first filing for divorce and when the (post-divorce) cohabitation began, the cohabitation period prior to the second marriage, and the second marriage.[72] The court then considered each of the periods in turn, analyzing whether that period in particular should be included within the calculus of the marriage's duration.[73]

The Massachusetts high court began its analysis by suggesting that the period after the filing for the first divorce but before the couple began to cohabit again should not be included within the length of the marriage for purposes of determining support.[74] While there was interdependence during that period, since one party was paying court-ordered support to the other party,[75] the court reasoned that interdependence alone could not suffice to establish an economic partnership.[76] After all, if the payment of spousal support alone sufficed to establish economic partnership, then there would be economic partnership whenever anyone was paying court-ordered support to a former spouse. If the court should consider economic partnership *both* before the marriage and after the divorce when determining marriage length, then post-divorce support might significantly extend the length of the marriage for support purposes. Such an approach might justify indefinite support until one of the parties dies or the ex-spouse

---

[71] *Id.* at 125 ("Because the alimony award was based on an incorrect calculation of the length of the parties' marriage, the judgment establishing the amount and duration of alimony is vacated.").

[72] *See id.* at 117.

[73] *Id.*

[74] *Id.* ("We conclude that the judge's findings do not support a determination that the parties had an economic marital partnership . . . during the period following the service on the husband of the divorce complaint in the first marriage in April, 2003, until the parties began cohabiting in May, 2007.").

[75] *Id.* at 123 ("While it often may be the case that there is some measure of mutual dependence and benefit enjoyed by formerly married parties where one party is paying the other court-ordered alimony, that alone would not convert court-ordered payments into an economic marital partnership.").

[76] *Id.* ("[T]hat alone would not convert court-ordered payments into an economic marital partnership.").

receiving support remarries or begins a relationship with someone else,[77] which would undermine the state statute calibrating the support duration to the marriage length.[78]

The trial court was not implying that *anyone* paying spousal support should be viewed as in an economic partnership with the support recipient. Instead, the court was suggesting that, in this particular case, because the period during which support was paid and the couple was not living together was sufficiently short in light of their overall relationship, they should be treated as economically interdependent during the entire period.[79] The Massachusetts high court impliedly rejected the trial court's assessment that the separation period was sufficiently short.[80] The high court also suggested that there had been no indicia of an economic partnership during this period—"the parties did not share a primary residence, did not present themselves to their community or otherwise refer to each other as husband and wife, and did not plan their daily activities and schedules together."[81]

Yet, the court's reliance on those factors may have been misplaced. Consider a bi-coastal couple with separate residences because of work commitments.[82] They would not share a primary residence and would be unlikely to plan their daily activities and schedules together, given work responsibilities, the time difference, etcetera. They might not refer to each other as spouses

---

[77] MASS. GEN. LAWS ANN. ch. 208, § 49(d) (2012) ("General term alimony shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household, as defined in this subsection, with another person for a continuous period of at least 3 months.").

[78] Gardner v. Gardner, 452 P.3d 1134, 1149–52 (Utah 2019).

[79] *Duff-Kareores*, 52 N.E.3d at 124–25 (quoting the trial court's conclusion that "[t]he parties have been in a relationship, with only a brief period of separation, for eighteen years").

[80] *See id.* ("Even accepting the judge's description of this fifty-month period as 'brief' within the context of a relationship spanning eighteen years . . . .").

[81] *Id.* at 125.

[82] *See* Twila L. Perry, *Housing the "New" Household*, 43 FORDHAM URB. L.J. 1205, 1210 (2016)
(discussing "the phenomenon of bi-coastal marriages and intimate relationships").

precisely because they had not yet officially married. But the couple's failure to meet any of these criteria would hardly demonstrate that this couple was less economically interdependent than a couple who lived in the same town and thus might plan their daily activities together. It hardly should count against an economically interdependent couple that a decision had been made to reserve "husband" or "wife" for when the couple had celebrated their wedding, and the whole point of the economic interdependence analysis is to determine when extension of the marriage beyond the official date of the ceremony is justified. A bi-coastal couple pooling resources and trying to find jobs in the same city might be at least as economically interdependent as other couples who might more readily qualify in the eyes of the Massachusetts high court.

The court's comments might be confusing for a different reason as well. By noting that the parties did not live together *or* present themselves publicly as spouses *or* plan their activities together,[83] the court left open what would have sufficed to establish an economic partnership—some activity and schedule planning? The court did not simply hold that there could not have been an economic partnership because the couple did not share a primary residence,[84] which creates uncertainty as to whether sharing a primary residence is a necessary factor or simply one of several.[85] Indeed, one might wonder which of those criteria would have sufficed to establish the necessary degree of economic partnership.

---

[83] *Duff-Kareores*, 52 N.E.3d at 125.

[84] The court could well have done so. *See id.* at 121 ("[T]the Legislature intended that it is only where parties share a common household, and are engaged in an economic marital partnership that a judge has discretion to increase the length of a marriage."). Even if sharing a residence were a necessary condition, it might not be a sufficient one. *Cf.* Cynthia Lee Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 FAM. L.Q. 261, 283 (2016) ("[H]ow often must parties live together—must they share an exclusive residence, or can they also maintain separate residences?").

[85] The statute suggests that sharing a primary residence is a necessary condition. *See* MASS. GEN. LAWS ANN. ch. 208, § 49(d)(1) (2012) ("Persons are deemed to maintain a common household when they share a primary residence together with or without others . . . .").

The *Duff-Kareores* court discussed whether to extend the length of the second marriage by including the first marriage and whether to extend the length of the second marriage by including the cohabitation period prior to the second marriage. When explaining why the first marriage should be included, the court noted that "[t]he Legislature could not have intended to exclude from the length-of-a-marriage calculation a previous period of time during which the parties were legally married (and thus presumably engaged in an economic marital partnership and maintaining a common household), while including a period of cohabitation that involves participation in an economic marital partnership."[86] Such an approach would be "absurd."[87]

Yet, it would not necessarily be absurd to include premarital cohabitation immediately prior to a marriage but exclude a previous marriage, even assuming that the Legislature did not statutorily require that any period added to a marriage must directly precede the marriage.[88] Suppose, for example, a couple marries and then divorces. Each party marries someone else. Years later, perhaps after each is widowed, they remarry. If they were to divorce again, it would hardly be absurd to suggest that their having lived such separate lives after their first marriage ended precluded adding the length of the first marriage to the length of the second marriage for support purposes.[89]

A separate issue is whether, as a matter of public policy, Massachusetts might want to add the length of the first marriage to the length of the second marriage for support purposes. If the first marriage was not includible for support purposes, individuals required to pay support would have a great incentive to remarry

---

[86] *Duff-Kareores*, 52 N.E.3d at 124.

[87] *Id.*

[88] *Id.* ("Nothing in the act requires that the period of cohabitation that results in a 'legal marriage' and 'the parties' economic marital partnership' must directly precede the date of the marriage.").

[89] The Supreme Judicial Court of Massachusetts does not always require that first marriages be included when considering the length of a second marriage for spousal support purposes. *See* Popp v. Popp, 75 N.E.3d 1118, 1119 (Mass. 2017) (upholding trial court order that "based on the length of the parties' *second* marriage, Robert's alimony obligation would terminate in August, 2020") (emphasis added).

their ex-spouses for a very short period and then claim that the support ordered after the second divorce could only be for the duration specified for a very short marriage. Such a policy would provide an incentive for payors to feign interest in getting back together (to avoid paying support for a long period), and also provide a large disincentive for payees to get back together with former spouses,[90] even if the adults and children might benefit from the parents getting back together again.[91] The Massachusetts high court might have been thinking that, as a matter of public policy, the state should not impose a financial penalty on the support recipient for giving the marriage another chance.

It is simply unclear whether *Duff-Kareores* has implications for two individuals who cohabit for several years, break up, and then after a long period get back together again and eventually marry. On the one hand, the couple who had cohabited for several years might well have had an economic partnership during that period, even if they subsequently broke up and lived separate lives.[92] If the couple eventually rekindled their relationship and married, and if there is no requirement that a previous economic partnership immediately precede the marriage for the years of that economic partnership to be added to the years of the marriage for support

---

[90] The court was clearly focusing on instances in which divorced spouses contracted a second marriage with each other. *See Duff-Kareores*, 52 N.E.3d at 124 ("The alimony reform act does not provide direct guidance on the calculation to be used where two individuals previously were married to each other, subsequently were divorced, remarried, and then were divorced a second time.").

[91] In the interest of promoting reconciliation, states sometimes imposed a waiting period before a divorced party could remarry anyone other than the ex-spouse. *See* Taylor Simpson-Wood, *As Seen Through the Eye of the Camera: A Portrayal of How Cultural Changes, Societal Shifts, and the Fight for Gender Equality Transformed the Law of Divorce*, 42 WOMEN'S RTS. L. REP. 1, 51 (2020).

[92] *Cf.* Dasler v. Dasler, No. 2018-301, 2019 WL 2359608, at *3 (Vt. June 3, 2019) (upholding trial court refusal to include premarital cohabitation because the court "recognized that the parties had periods of cohabitation before the marriage but found that the parties separated for a time after their initial cohabitation and that there was no indication at that time that they would resume their relationship").

purposes,[93] then the economic partnership period should presumably be tacked onto the marriage for support purposes were that marriage to ultimately end in divorce, even if each of the parties had had a different spouse between the time of their economic partnership and the time that they eventually married.[94] On the other hand, the *Duff-Kareores* court was clearly focused on instances in which couples married, divorced, and then remarried each other without either partner having married someone else in the intervening years,[95] so it is not clear that the court's analysis should be extended to couples who cohabit for a period, do not marry, but later renew their relationship and ultimately marry (and then divorce).

The *Duff-Kareores* court considered the period post-divorce but prior to cohabitation as absurd to include in the duration of the second marriage but did not reject tacking on the first marriage to the duration of the second marriage, *notwithstanding the couple having formally ended their first marriage through divorce*.[96] But given that the first marriage was included in the duration of the second marriage, it hardly seems absurd for the trial court to have included in addition the period after the first divorce and prior to the couple again cohabiting, especially after having taken into account that the couple not only subsequently began living together again but also remarried.

States have long grappled with how domestic relations law should treat cohabitating couples. Consider an agreement between cohabiting partners about how assets should be distributed in the event their relationship breaks down. Some states enforce such

---

[93] *See* MASS GEN. LAWS ANN. § 49(d)(1) (2012).

[94] *But see* Popp v. Popp 75 N.E.3d 1118 at 1119 (explaining that it would not be absurd to refuse to tack on the years of a previous relationship if the parties had married different people in the interim).

[95] *See Duff-Kareores*, 52 N.E.3d 115 at 124 ("The alimony reform act does not provide direct guidance on the calculation to be used where two individuals previously were married to each other, subsequently were divorced, remarried, and then were divorced a second time.").

[96] *Id.*

agreements while others do not.[97] States also differ about whether they recognize cohabiting relationships for other purposes.[98]

Traditionally, spousal support ends upon the death of either party or the remarriage of the payee spouse.[99] But if spousal support continues as long as the living payee ex-spouse does not remarry, then that ex-spouse has an incentive to cohabit with but not marry a new romantic partner.[100]

Many states, including Massachusetts,[101] have reduced or eliminated the payee ex-spouse's incentive to choose cohabitation

---

[97] *Compare* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (upholding such agreements), *with* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (holding such agreements unenforceable as a matter of public policy).

[98] *See infra* notes 99–102 (discussing whether an individual receiving spousal support should have that support ended if living with someone else).

[99] *See, e.g.*, CAL. FAM. CODE § 4337 (2013) ("Except as otherwise agreed by the parties in writing, the obligation of a party under an order for the support of the other party terminates upon the death of either party or the remarriage of the other party."); FLA. STAT. ANN. § 61.08(8) (2021) ("An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony."); MD. CODE ANN., FAM. LAW § 11-108 (2021) ("Unless the parties agree otherwise, alimony terminates: (1) on the death of either party; (2) on the marriage of the recipient; (3) if the court finds that termination is necessary to avoid a harsh and inequitable result."); OKLA. STAT. ANN. tit. 43, § 134(B) (2021) ("The court shall also provide in the dissolution of marriage decree that upon the death or remarriage of the recipient, the payments for support, if not already accrued, shall terminate."); TEX. FAM. CODE ANN. § 8.056(a) (2021) ("The obligation to pay future maintenance terminates on the death of either party or on the remarriage of the obligee."); WASH. REV. CODE ANN. § 26.09.170(2) (2022) ("Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.").

[100] Mark Strasser, *The Possible Lingering Effects of Mini-Domas*, 47 CAP. U. L. REV. 679, 688–89 (2019)

> Consider divorce decrees specifying that spousal support must be paid until the recipient spouse either dies or remarries. One effect of that kind of termination provision is that if the recipient ex-spouse starts another relationship sometime after the divorce, that ex-spouse will have an incentive to cohabit with but not marry his or her new romantic partner.

[101] *See* MASS. GEN. LAWS ANN. ch. 208, § 49(d) (2012).

over remarriage by treating both remarriage and cohabitation as a basis upon which to reduce or eliminate spousal support.[102] But such a policy requires some way to distinguish between couples who are cohabiting and couples who are not, and Massachusetts has specified the relevant factors to make that determination.[103]

The *Duff-Kareores* court interpreted the premarital economic marital partnership provision permitting the extension of marriage length[104] as incorporating the elements used to determine whether a party is cohabiting with someone for purposes of reducing or

---

[102] *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/510(c) (2021) ("Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis."); LA. CIV. CODE ANN. art. 115 (2018) ("The obligation of interim spousal support or final periodic support is extinguished upon the remarriage of the obligee, the death of either party, or a judicial determination that the obligee has cohabited with another person of either sex in the manner of married persons."); N.D. CENT. CODE ANN. § 14-05-24.1(2–3) (2015) ("Unless otherwise agreed to by the parties in writing, spousal support is terminated upon the remarriage of the spouse receiving support . . . [or] upon an order of the court based upon a preponderance of the evidence that the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.").

[103] *See* MASS. GEN. LAWS ANN. ch. 208, § 49(d)(1) (2012)

> Persons are deemed to maintain a common household when they share a primary residence together with or without others. In determining whether the recipient is maintaining a common household, the court may consider any of the following factors:
>
> (i) oral or written statements or representations made to third parties regarding the relationship of the persons;
>
> (ii) the economic interdependence of the couple or economic dependence of 1 person on the other;
>
> (iii) the persons engaging in conduct and collaborative roles in furtherance of their life together;
>
> (iv) the benefit in the life of either or both of the persons from their relationship;
>
> (v) the community reputation of the persons as a couple; or
>
> (vi) other relevant and material factors.

[104] *See generally*, MASS. GEN. LAWS ANN. ch. 208, § 48 (2012).

eliminating spousal support.[105] Because the same criteria for extending the length of a marriage are used for reducing or eliminating support from an ex-spouse,[106] the payee ex-spouse might be prevented from receiving support from two different sources—the payor ex-spouse and the cohabiting paramour.[107]

If ex-spouses do not want their spousal support to end, they might consider the ways that the same elements are used to establish cohabitation in these differing contexts and adjust their practices so that a new relationship does not trigger the termination of support from the ex-spouse. For example, to assure continued spousal support, the ex-spouse might avoid living together with a new love interest[108] or, perhaps, might refuse financial contributions from that love interest.[109]

Suppose that an ex-spouse in a relationship with a new love interest continues to receive spousal support from the ex-spouse. Given that the criteria for economic partnership mirror the criteria

---

[105] *See* Duff-Kareores v. Kareores, 52 N.E.3d 115, 121 (2016) ("Given the use of the term "cohabitation" in each of these provisions, and their similar purpose to permit an adjustment of the duration or amount of an alimony award, we conclude that the Legislature intended that it is only where parties share a common household, and are engaged in an economic marital partnership, that a judge has discretion to increase the length of a marriage, or to suspend, reduce, or terminate a general alimony award.").

[106] *See id.* ("Viewing the statute as a whole, we conclude that the Legislature intended to use the terms cohabitation, economic marital partnership, and common household to describe a relationship that, if established, would affect a court order for alimony, either by increasing the amount and duration of alimony ordered or by reducing, suspending, or eliminating the award.").

[107] *See* Moell v. Moell, 649 N.E.2d 880, 883 (Ohio App. 1994) ("The purpose of a cohabitation clause is to prevent inequity . . . when an ex-spouse would receive support from two sources, each of whom is either legally obligated or voluntarily undertakes the duty of total support.") (citing Perri v. Perri, 608 N.E.2d 790, 792 (Ohio Ct. App. 1992)).

[108] *See, e.g.*, Keith v. Keith, 2011-Ohio-6532, ¶ 13 (Ohio App.) ("Wife and Hudson, who she classifies as a 'friend' for whom she had known for over 20 years, do not live together, but instead, maintain separate residences.").

[109] *See* Moell, 649 N.E.2d at 884 ("[A]ppellee and her companion have not assumed the mutual obligations of financial support required to establish cohabitation between the parties.").

for establishing cohabitation to justify reducing spousal support,[110] the continued receipt of spousal support suggests that the relationship with the new love interest does not qualify as an economic partnership—otherwise, the support from the ex-spouse would likely have stopped.[111] In *Connor v. Benedict*, the husband argued that current law "permits either an alimony relationship with a former spouse or an economic marital partnership with a current partner, but not both."[112] The Supreme Judicial Court of Massachusetts rejected that analysis, citing *Duff-Kareores* in support,[113] where the receipt of spousal support did not preclude the recipient from simultaneously being in an economic marital partnership.[114]

Yet, *Duff-Kareores* was distinguishable because the economic partnership was between the supported ex-spouse and the very individual who was both paying support *and living in the household*. Normally, the individual paying support is contributing to the ex-spouse's standard of living and not to his/her own. As the Massachusetts high court recognized, the amounts given in spousal support "make it possible for a [former] spouse to support himself or herself and the parties' children in a lifestyle similar to that which had been enjoyed by the family during the marriage, even though the spouse who had been the breadwinner is no longer part

---

[110] *See supra* notes 104–06 and accompanying text.

[111] Connor v. Benedict, 118 N.E.3d 96, 101 (Mass. 2019) ("The husband argues that it was error to consider the 6.33 years as an economic marital partnership, because, as a matter of law, the wife was precluded from entering an economic marital partnership during the time when she was receiving alimony from a former spouse.").

[112] *Id.* at 102.

[113] *Id.*

[114] Duff-Kareores v. Kareores, 52 N.E.3d 115, 120, 123 (Mass. 2016)

> [W]here a party continues to make such payments after he or she returns to live in the former marital home with the former spouse and enjoys the benefits of daily family interaction and connection, and the parties present themselves to the community as married . . . there was no error in the judge's decision to include in the length of the parties' marriage the approximately five and one-half years that the parties lived together and maintained a common household.

of the household."[115] But in *Duff-Kareores* the ex-husband was back living in the marital home, which meant that the support payor was himself benefiting from the support, given that the ex-wife was paying the majority of the household expenses by using the monies received in support.[116]

Suppose that there had been no court-ordered support and that the formerly married couple had resumed living together. The ex-husband might be handing his ex-wife the same monthly check to pay for household expenses as he would have been paying as a result of court-ordered support,[117] especially if the former spouses had separate accounts (so the ex-wife could not be paying out of a joint account).[118] But if the ex-husband might be making out the same check whether or not there had been a court order to do so, then it would seem unduly formalistic to consider one scenario (where the support was not court-ordered) an economic partnership but the other scenario (where the support was court-ordered) not to be an economic partnership.

Suppose that the *Duff-Kareores* court had reached a different conclusion and had held that the fact that the spousal support was court-ordered precluded the ex-husband and ex-wife from having an economic marital partnership. Then, the ex-husband would have benefited not only because the spousal support was used to purchase goods that he himself enjoyed,[119] but also because a finding that there had been no economic partnership would mean that the second marriage's length would be shorter, and his support would also have been of a shorter duration.

---

[115] *Id.*

[116] *Id.* at 122 ("Ellen paid the majority of the expenses of running the parties' combined household.").

[117] *Cf. id.* at 118 ("The judge found that, after Christopher returned to living in the family home, 'the parties functioned exactly as they had during their previous marriage,' with Christopher acting as the primary wage earner and Ellen as the primary caretaker of the children and the home.").

[118] *Id.* at 122 ("The parties maintained separate bank accounts.").

[119] That said, the ex-husband used his own checking account to pay for some household expenses. *See Duff-Kareores*, 52 N.E.3d at 122 ("At some point, around 2010, Christopher paid for certain improvements to the family home and began contributing towards the utilities.").

While *Connor* is distinguishable from *Duff-Kareores*, since in the latter case the very person paying the support was benefiting from the expenditure, the two cases nonetheless have certain parallels. In *Connor*, the cohabitants were sharing expenses.[120] The spousal support (which the eventual husband knew his partner was receiving)[121] helped defray household expenses,[122] which meant that the eventual husband was himself benefiting from the spousal support that his romantic partner was receiving,[123] just as in *Duff-Kareores* the ex-husband, himself, was benefiting from the support that he was paying.[124] Had the *Connor* court rejected that this couple had an economic partnership prior to their marriage,[125] the eventual husband would have benefited from his eventual wife's spousal support from her ex-spouse and then benefited again when the years of cohabitation could not be added to supplement the length of their marriage, making their actual marriage appear to be short-term[126] even though they had been together for a much longer period.[127]

---

[120] Connor v. Benedict, 118 N.E.3d 96, 98 (Mass. 2019) ("[T]he parties shared the mortgage payments, as well as the costs of utilities, groceries, and other household expenses.").

[121] *Id.* at 99 ("By 2006, the husband was 'at least somewhat aware' of the alimony payments, which ceased in 2011.").

[122] She was also receiving disability payments. *See id.* at 98 ("In 2003, she began receiving disability payments.").

[123] *Cf.* Moell v. Moell, 649 N.E.2d 880, 883 (Ohio App. 1994) ("The purpose of a cohabitation clause is to prevent inequity . . . when the ex-spouse who is receiving spousal support uses such payments to support a nonrelative.").

[124] *See supra* note 116 and accompanying text.

[125] *But see* MacKenzie v. MacKenzie, 180 A.3d 855 (Vt. 2017). The Vermont Supreme Court upheld the trial court refusal to consider the couple's cohabitation period during which the one of the parties was still receiving support from her ex-husband. *See id.* at 859 ("[T]he superior court acted within its discretion in not including the parties' premarital relationship and cohabitation period in calculating the duration of the marriage as a factor in determining an equitable property distribution and just maintenance award.").

[126] *Connor*, 118 N.E.3d at 99–100 ("The parties were married on February 18, 2012 . . . . The wife filed a complaint for divorce in the Probate and Family Court on June 2, 2014 . . . .").

[127] *See id.* at 98 ("The parties began living together in the Maynard house in August 2001, along with the wife's minor son."). The parties began living together in 2001, although the court found that the economic partnership began

The *Connor* court emphasized that the trial court had found that, even before their marriage, "[t]he parties acted as a married couple in all respects,"[128] including representing that they were domestic partners so he could put her on his insurance.[129] The *Duff-Kareores* court emphasized that during their nonmarital cohabitation the couple had not only treated each other as spouses, but also held themselves out to the community as spouses.[130] Further, the Massachusetts statute itself lists the couple's reputation in the community as one of the relevant factors,[131] which adds yet another complicating factor to the economic partnership analysis.

In both *Duff-Kareores* and *Connor*, the public actions of the respective couples supported that they had established an economic marital partnership prior to their marriages.[132] Suppose, however, that in a different case there is a contested claim that the couple had established an economic marital partnership prior to their marrying. In this hypothetical case, the parties have not held themselves out to the community as married or as domestic partners prior to their marriage, even though they had been economically interdependent for several years before they had finally tied the knot.

In this hypothetical example, it is simply unclear whether the couple should be viewed as having had an economic marital relationship in light of the analyses offered in *Duff-Kareores* and *Connor*. Unlike the couples in those cases, the hypothetical couple would not have made the kind of public representations that

---

after she returned from a stay in Australia for medical care; *see id.* at 100 ("Here, the judge determined that the parties had cohabited and engaged in an economic marital partnership for approximately 6.33 years, from November 2005, when they lived together in Shirley, to the date of their marriage in February 2012.").

[128] *Id.* at 103.

[129] *Id.* ("During the same period, the husband repeatedly represented his wife to his employer as his 'domestic partner.'").

[130] *See* Duff-Kareores v. Kareores, 52 N.E.3d 115, 122 (Mass. 2016).

[131] MASS. GEN. LAWS ANN. ch. 208, § 49(d)(1)(i) (2012) ("oral or written statements or representations made to third parties regarding the relationship of the persons"); MASS. GEN. LAWS ANN. ch. 208, § 49(d)(1)(v) (2012) ("the community reputation of the persons as a couple . . . .").

[132] *Connor*, 118 N.E.3d at 103; *Duff-Kareores*, 52 N.E.3d at 122.

militated in favor of a finding of an economic marital partnership. But many cohabiting couples do not hold themselves out to the public as married, especially if one of the parties is receiving spousal support from an ex-spouse. The legislative purpose behind reducing or eliminating spousal support when the recipient is cohabiting with someone else for at least three months would likely be undercut if this provision would only be triggered if the members of the couple held themselves out to the public as married.[133] Those reading the *Duff-Kareores* and *Connor* opinions might be misled by the court's emphasis on the couples' public presentations.

Consider the attorney representing a member of the hypothetical couple at the time the couple is ending the marriage. An important issue might involve the marriage length for support purposes, and the attorney might not know what the court would say about that, especially because courts are permitted, but not required, to find that an economic marital partnership existed prior to the marriage[134] and because courts are permitted to consider "other relevant and material factors."[135]

The individual who reaches an agreement about property division, for example, based on an assessment of the marriage's duration for support purposes will be at a disadvantage if that assessment proves to be inaccurate and the court finds that the marriage is much shorter or longer than had been anticipated. To make matters worse, that inaccurate assessment, and the detrimental reliance thereon, would likely not provide sufficient

---

[133] *See* MASS. GEN. LAWS ANN. ch. 208, § 49(d) (2012) ("General term alimony shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household, as defined in this subsection, with another person for a continuous period of at least 3 months.").

[134] *See* Jones v. Jones, No. 19-P-902, 144 N.E.3d 301, at *2 (Mass. App. Mar. 31, 2020) ("[T]he question of an economic partnership is discretionary as reflected in the statute's permissive language ('may').") (citing MASS. GEN. LAWS ANN. c. 208, § 48 (2012)); *see also* MacKenzie v. MacKenzie, 180 A.3d 855, 859 (Vt. 2017) ("[T]he superior court acted within its discretion in not including the parties' premarital relationship and cohabitation period in calculating the duration of the marriage as a factor in determining an equitable property distribution and just maintenance award.").

[135] MASS. GEN. LAWS ANN. ch. 208, § 49(d)(1)(vi) (2012).

justification for a court modification of the official length of the marriage in the interest of justice.[136] An individual might have second thoughts about making an agreement with respect to other marital matters if such an agreement would only be made if that individual were confident about how support matters would be resolved.[137] Further, when reaching an agreement about support, the parties would be greatly helped if they had a good understanding of the range of support awards and durations that might be ordered if no agreement could be reached.[138]

Certainly, it is fair to suggest that attorneys must frequently make assessments of the likelihood that a court will rule in a particular way.[139] Yet, adding yet another matter about which there is uncertainty may make reaching agreements and promoting a client's interests that much harder.[140] Individuals might simply refuse to settle any property or support issues because so much would depend upon the unknown of the marriage's length for support purposes.[141]

---

[136] *See, e.g.*, George v. George, 63 N.E.3d 380, 384–85 (Mass. 2016) (overruling a trial court judge's application of the "in the interest of justice" standard where the "judge [had] concluded that had Jacquelyn known that her alimony would terminate prior to the date in the merged portion of the separation agreement, she would likely have 'bargained for' a different division of property.").

[137] Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 226–27 (2006) ("[P]arties do not always reach agreement, because they do not have adequate information, i.e., too many uncertainties involved.").

[138] *See* Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 569 n.291 (1989) (discussing "the need to replace pervasive uncertainty and discretion in divorce law with more precise standards").

[139] *Cf.* Richard Birke, *Bargaining in the High Courts: Settlements and the Oregon Court of Appeals*, 31 WILLAMETTE L. REV. 569, 583 (1995) (discussing "the appellate attorney . . . [who must] assess the likelihood of a successful appeal").

[140] *Cf.* Willard H. DaSilva, *Where We Are and How We Got Here*, ASPATORE (Jan. 2016), 2016 WL 676262, at *12 ("The predictability in determining both temporary and post-divorce maintenance is an asset in preparing strategy in the divorce process and advising clients of decisions to be expected if the issues are to be determined by a judge.").

[141] *Cf.* Brett R. Turner, *Property Acquired: Unitary vs. Mixed Property*, 1 EQUIT. DISTRIB. PROP., 4th § 5:20 (Dec. 2020 update) ("The lack of consistency

B. The North Dakota Approach

The Supreme Judicial Court of Massachusetts is not the only court offering mixed messaging about how premarital cohabitation should be treated. The North Dakota Supreme Court has issued various decisions discussing how cohabitation should be treated, but it has sent so many mixed messages that trial courts will have difficulty discerning which guideposts should be used for decision-making.

Consider *Paulson v. Paulson*,[142] in which the North Dakota Supreme Court established that premarital cohabitation could be considered in determining the length of a marriage.[143] The Paulsons had been married for fourteen years,[144] and the North Dakota high court both noted that "[t]here is no bright-line rule to determine whether a marriage should be considered long- or short-term"[145] and that marriages of both twelve years and fifteen years had been recognized as long-term.[146] Lest courts overemphasize the importance of the length of the marriage, the court explained that "[w]hile the duration of the marriage is a factor, spousal support is sometimes appropriate even when the duration was short."[147]

In *Paulson*, the North Dakota Supreme Court reversed the trial court's refusal to award spousal support[148] because the trial court failed to offer an analysis in light of the required factors.[149] When noting in passing that the couple had lived together for seven years

---

among cases with similar facts was itself a significant problem, but its more important effect was to make . . . issues very difficult to settle.").

[142] Paulson v. Paulson, 783 N.W.2d 262 (N.D. 2010).

[143] Schultz v. Schultz, 920 N.W.2d 483, 487 (N.D. 2018) ("[T]he district court may consider how long the parties lived together before marriage.") (citing Paulson v. Paulson, 783 N.W.2d 262, 268 (2010)).

[144] *Paulson*, 783 N.W.2d at 265 ("Mark Paulson and Cheryl Paulson were married in 1994 . . . . Mark Paulson filed for divorce in June 2008.").

[145] *Id.* at 268 (citing Hitz v. Hitz*,* 746 N.W.2d 732, 738 (N.D. 2008)).

[146] *Id.*

[147] *Id.* (citing Weigel v. Weigel*,* 604 N.W.2d 462, 465 (N.D. 2000).

[148] *Id.* at 265.

[149] *Id.* at 267 ("The trial court is not required to make a finding on each factor, but it must explain its rationale for its determination.").

prior to the marriage,[150] the high court did not say that factor would have made any difference or even that the trial court had erred in failing to consider the premarital cohabitation.[151] Nonetheless, in *Schultz v. Schultz*, the North Dakota Supreme Court pointed to the *Paulson* court's remark about cohabitation to support both its finding that premarital cohabitation was appropriate to include and that the marriage at issue before it was long-term.[152]

Schultz v. Schultz involved an appeal of the trial court's determination that a marriage was long-term.[153] The North Dakota high court reiterated that there was no clear line between short- and long-term marriages,[154] although the court did not dispute the significance of the characterization. "Generally, a long-term marriage supports an equal division of all marital assets."[155] In contrast, where there is "a short-term marriage, the district court may distribute property unequally and award the parties what each brought into the marriage."[156]

Even after denying that there is a bright-line rule for distinguishing a short- versus a long-term marriage, the North Dakota Supreme Court explained why the trial court could have found the marriage at issue was long-term.

> The district court here considered the parties' cohabitation for a year and a half before marriage.

---

[150] *Id.* at 269 ("Cheryl Paulson and Mark Paulson were married in 1994 and had been living together since 1987.").

[151] *Cf.* Hoffman v. Hoffman, 727 A.2d 1003, 1009 (N.H. 1999) ("We need not decide whether it was improper for the trial court to consider the parties' period of premarital cohabitation in awarding alimony and dividing the marital estate. Even without considering the five-year premarital relationship, the court could have regarded the twelve-year marriage as long-term for purposes of its support and property distribution rulings.").

[152] Schultz v. Schultz, 920 N.W.2d 483, 487 (N.D. 2018).

[153] *Id.* at 486 ("Chad challenges the district court's overall allocation of the parties' marital property. He contends the district court erred by finding the marriage was 'long-term.'").

[154] *Id.* (citing Hitz v. Hitz, 746 N.W.2d 732, 738 (N.D. 2008)) ("There is no bright-line rule to distinguish between short and long-term marriages.").

[155] *Id.* (citing Bladow v. Bladow, 665 N.W.2d 724, 726 (N.D. 2003)).

[156] *Id.* at 486–87 (citing Buzick v. Buzick, 542 N.W.2d 756, 759 (N.D. 1996)).

> Second, because the parties' marriage did not end until the issuance of the final decree of divorce, the district court could exercise its discretion and consider the time subsequent to the filing of the action to be included within the marriage.[157]

Because of the discretion afforded both before the marriage began and after the divorce filing, the parties could be viewed as having been married for over ten years. "[T]he parties had a one and one-half year period of cohabitation, were married for approximately seven and one-half years before the divorce proceedings began, and were separated for approximately two years before the final decree of divorce was entered."[158]

The *Schultz* court offered numerous reasons that the trial court acted within its discretion,[159] but in doing so did not offer much guidance for when cohabitation should be considered in determining the length of a marriage. For example, if the trial court can treat the marriage as in existence until the final decree of divorce is issued, then the marriage at issue in *Schultz* would have lasted for nine and a half years even without consideration of the period of premarital cohabitation. Given that there is no bright line between short-term and long-term marriages, the trial court would presumably have been acting within its discretion in finding that the marriage was long-term even without considering the premarital cohabitation. By the same token, the trial court was likely acting within its discretion in finding that the marriage was long-term if the court included the premarital cohabitation but not the separation period before the final decree was issued, because the length would then have been nine years.

The *Schultz* court denied that ten years was an official cut-off point between short-term and long-term marriages,[160] but nonetheless showed how this marriage met that threshold.[161] Perhaps the court was merely pointing out that the challenge to the

---

[157] *Id.* at 487.

[158] *Id.*

[159] *Id.* at 491.

[160] *See id.* at 487 ("[W]e decline to draw a bright-line at ten years to define short and long-term marriages.").

[161] *Id.*

trial court holding that the marriage was long-term failed even in light of the challenger's own asserted criteria for what counted as long-term[162] or, perhaps, the court was merely emphasizing the broad range of discretion possessed by trial courts when making the relevant determination.[163] After *Schultz*, trial courts would not know when to include cohabitation before marriage or when to include the period between the divorce filing and the issuance of the final divorce decree, although they might feel confident that they had the discretion to do what they thought appropriate.[164] The *Schultz* court had made clear that while trial court discretion is not completely unfettered,[165] trial courts are nonetheless given wide latitude when deciding whether to include premarital cohabitation or the time between the divorce filing and the time when the final decree was issued.

Yet, the North Dakota Supreme Court undercut the degree of deference accorded to trial courts in *Lizakowski v. Lizakowski*.[166] The trial court had found that the couple had a short-term marriage[167] after considering the following timeline. "Adam Lizakowski and Tonia Lizakowski began dating in 2002 and started living together in 2003. They were married in 2008 and have two children. Tonia Lizakowski sued for divorce in

---

[162] *Id.* ("[E]ven if we were to adopt Chad's argument that our prior cases establish a bright-line at ten years, the evidence provided to the district court supports the court's determination that this was a long-term marriage.").

[163] *Id.* ("The court's determination that the parties' marriage should be considered long-term for the purpose of allocating their marital property was not induced by an erroneous view of the law, was not lacking in some evidence to support it, and we are not left with a definite and firm conviction a mistake has been made. The district court's determination of a long-term marriage was not clearly erroneous.").

[164] *Id.* at 490 (citing Buchholz v. Buchholz, 590 N.W.2d 215, 218 (N.D. 1999)) ("When the district court *may* do something, it is generally a matter of discretion.").

[165] *Id.* at 490 (citing Krueger v. Grand Forks Cnty., 852 N.W.2d 354, 359 (N.D. 2014)) ("A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination.").

[166] Lizakowski v. Lizakowski, 930 N.W.2d 609, 615 (N.D. 2019).

[167] *Id.* at 612 ("The district court found the parties had a short-term marriage . . . .").

2017 . . . [and there was] a three-day bench trial in March 2018."[168]

The trial court found that the couple had only been married for nine years (the period between the marriage ceremony and the divorce filing) and that the marriage was therefore short-term.[169] The North Dakota Supreme Court reversed—"the court erred in finding the marriage was short-term without considering the period of cohabitation before the marriage."[170] Yet, the North Dakota Supreme Court was unwilling "to hold [that] Tonia and Adam Lizakowski had a long-term marriage as a matter of law,"[171] instead remanding the case for reconsideration.[172]

The *Lizakowski* trial court did not fail to notice that the couple had lived together before the marriage—rather, the trial court expressly acknowledged the premarital cohabitation but chose not to include it within the marriage.[173] When the North Dakota Supreme Court reversed and remanded the case[174] after commenting that the trial court erred in failing to "consider" the cohabitation period,[175] it was unclear whether the high court was merely suggesting that the trial court should have given reasons why the period was not tacked on—mere acknowledgment does not constitute consideration—or was suggesting that the cohabitation period had to be tacked on, notwithstanding the high court's express refusal "to hold Tonia and Adam Lizakowski had a long-term marriage as a matter of law."[176]

Perhaps *Lizakowski* stands for the proposition that cohabitation must be considered, but trial courts still have discretion to determine what counts as a long marriage if that factor is

---

[168] *Id.*

[169] *Id.* at 613.

[170] *Id.* at 614.

[171] *Id.* at 613–14.

[172] *See id.* at 614 ("We therefore reverse and remand.").

[173] *Id.* at 613 ("The district court found the parties' marriage was short-term, explaining, '[t]he parties have been together for 16 years, but have only been married for nine years.'").

[174] *Id.* at 614.

[175] *See id.*

[176] *Id.* at 613–14.

included.[177] Or, perhaps the trial court must consider premarital cohabitation, but it need not include that period in the length of the marriage, so long as the court clearly considered that factor.[178]

The North Dakota policy became even less clear when the court again addressed cohabitation about two years later. In *Paulson v. Paulson*, the court considered a couple who "were married for six years, and cohabited for a decade prior to marriage."[179] In upholding the trial court finding of a short-term marriage,[180] the court noted that the appellant "provided no evidence to the court of the parties' financial practices during the period of cohabitation, which *may* have supported a finding [that] cohabitation should be considered in calculating the length of the marriage."[181] Regrettably, the North Dakota Supreme Court did not make clear whether the right kind of evidence would have

---

[177] In *Lizakowski*, the relationship would have been of 14 years duration with all of the cohabitation included. *See supra* note 166 and accompanying text. A separate issue is whether some rather than all of the cohabitation period could be considered. *Cf*. D'Hue v. D'Hue, 2002-Ohio-5857, ¶ 90 (Ohio Ct. App.) ("In the present case, we conclude that the court did not abuse its discretion in equitably choosing the de facto date of the marriage as April of 1992. It was at this time, as recognized by the court, that the parties started functioning as husband and wife, both socially and economically."). Focusing on a de facto date would mean that there might be a time *during* the cohabitation period at which the clock must start to run.

[178] In *Innis-Smith v. Smith*, the North Dakota Supreme Court suggested that a trial court was acting with its discretion, see 905 N.W.2d 914, 922 (N.D. 2018) when including the couple's long-term premarital relationship (a 10-year engagement), *see id.* at 917, when treating the 5-year marriage, *see id.*, as if it had been a long-term marriage. *See id.* at 918 (discussing why the relationship need not have been treated as a short-term marriage). But suggesting that this decision was within the court's discretion might mean that a different court might consider and reject that the cohabitation should be considered when determining the length of the marriage. *Cf.* MacKenzie v. MacKenzie, 180 A.3d 855 (Vt. 2017) (upholding trial court refusal to include cohabitation period within length of marriage).

[179] Paulson v. Paulson, 955 N.W.2d 92, 101 (N.D. 2021). This case involved Kristopher and Shannon Marie Paulson, whereas the other *Paulson* case in 2010 involved Mark and Cheryl Paulson. *See* Paulson v. Paulson, 783 N.W.2d 262 (N.D. 2010).

[180] *Paulson*, 955 N.W.2d at 101 ("The determination that the Paulsons had a short-term marriage is not clearly erroneous.").

[181] *Id.* (emphasis added).

likely persuaded the trial court that the period of cohabitation should have been included—which would have been compatible with the trial court's having discretion whether to include the cohabitation years—or, instead, that the right kind of evidence would have provided the basis for reversing the trial court's refusal to consider the years of cohabitation—as the *Lizakowski* court suggested merely two years earlier.[182] To make matters even more confusing, the *Paulson* court made clear that a "court may, but is not required to, consider a period of cohabitation when calculating the length of a marriage,"[183] undercutting the very limited direction provided by *Lizakowski*.

In North Dakota, trial courts have great discretion to determine the beginning and ending of marriages, at least where there is a period of premarital cohabitation or a substantial period of time between the divorce filing and the issuance of the final decree. Such an approach almost guarantees inconsistency across cases. Extra indeterminacy is added when the North Dakota Supreme Court reverses a lower court determination without explaining how the trial court had abused its discretion in its length of marriage calculation. It may be that the North Dakota Supreme Court reached a better result in *Lizakowski* than the trial court did, but trial courts might rightly feel that they have been given no guidance with respect to when premarital cohabitation should be included, and, in many cases, individuals might rightly feel that the length of their marriages and the rights and obligations attendant on that length would be anyone's guess.

CONCLUSION

Most states afford trial courts great discretion with respect to whether or how much spousal support to award. By listing numerous factors to consider, including whatever is relevant or appropriate, states have allowed courts in some cases to achieve equitable results, but in other cases the results are much harder to justify. Because, in part, of the inconsistent judgments that such a

---

[182] *See Lizakowski*, 930 N.W.2d 609 (2019).

[183] *Paulson*, 955 N.W.2d at 101 (citing Schultz v. Schultz, 920 N.W.2d 483, 487 (2018)).

forgiving approach permits, some states have tried to increase consistency by tying the duration of support to the duration of the marriage.

Many couples live together prior to marrying and linking support to the duration of the marriage brings into focus the reality that many couples' relationships last far longer than suggested by the length of the official marriage. Recognizing that considering only the years of official marriage raises a fairness issue, states often permit courts to take premarital cohabitation into account, either because legislation specifically authorizes doing so or because that consideration is relevant or appropriate.[184] But lower courts have been given so much discretion and so little direction about whether and how to consider premarital cohabitation that its use, while sometimes promoting equity in individual cases, has nonetheless undermined consistency, predictability, and equity across cases. Some state supreme courts seem to have gone out of their way to refrain from offering helpful guidance to lower courts, which only contributes to perceptions of arbitrariness and inconsistency. State courts must do better—for the sake of individual parties and for the system as a whole.

---

[184] *See, e.g.*, Sprouse v. Sprouse, 678 S.E.2d 328, 330 (Ga. 2009) (citing Harrelson v. Harrelson, 932 P.2d 247, 255 (Alaska 1997)) ("We hold that, under the catchall provision of OCGA § 19–6–5(a)(8), the trial 'court is free to consider the parties' entire relationship, including periods of premarital cohabitation,' in determining alimony."); In re Marriage of Lind, 139 P.3d 1032, 1040 (Or. Ct. App. 2006) ("[W]e note that the statute's final subsection gives the court broad discretion to consider other factors that 'the court deems just and equitable.' We see no reason why that discretion necessarily excludes considering the length of the parties' premarital cohabitation.").