At a Cross-Road: Anti-Same-Sex Marriage Policies and Principles of Equity: The Effect of Same-Sex Cohabitation on Alimony Payments to an Ex-Spouse

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This Note discusses the effect of post-marital homosexual relationships on the receipt of alimony payments from an ex-spouse. Traditionally, a court will terminate alimony payments to a recipient-spouse upon evidence of his or her re-marriage or cohabitation with another person. The purpose underlying such termination is to release the payor-spouse from an obligation to support an ex-spouse who has become financially interdependent with another. More specifically, allowing a recipient-spouse to obtain simultaneous double-support creates an inequitable situation for the payor-spouse. A new issue relevant to courts' concerns for preserving equity in alimony disputes is whether same-sex couples fall within the traditional legal notions of a cohabitating relationship. For states that have prohibited same-sex marriage, it has become problematic whether to grant private homosexual relationships a legal status analogous to marriage. The resolution to this problem directly affects whether the payor-spouse in an alimony-termination dispute may obtain an equitable outcome. This Note suggests that to preserve the equitable principles underlying alimony-termination, state legislatures and courts must recognize same-sex cohabitation as a marriage-like relationship.

Part I of this Note first will establish the background to alimony payments and the underlying principles of equity in terminating support payments when a dependent ex-spouse cohabits with another person. Next,
Part I will address the effect of homosexual relationships on traditional notions of cohabitation and alimony termination. Finally, Part I presents a categorical approach to understanding the various state interpretations of cohabitation. Part II of this Note highlights key state-court decisions, each representative of one of the three categories described from Part I. Lastly, Part III will critique the various state-court interpretations, while suggesting a workable model for Illinois to adopt that balances equity with social policy.

1. BACKGROUND

A. Termination of Alimony and Spousal Support upon Cohabitation as a Matter of Equity

Alimony constitutes an equitable payment system under which both spouses may share in the material assets accumulated during the marriage. Implementing a maintenance agreement serves as a balance of equities; the payor-spouse will continue to support the recipient-spouse unless or until a determined condition occurs. The recipient’s equitable interest is in maintaining a level of financial stability that was enjoyed during the marriage. By contrast, the payor’s equitable interest is in terminating maintenance when the recipient is supported by another.

Terminating alimony payments to a recipient-spouse who is cohabitating with another person purports to preserve equitable interests on behalf of the payor-spouse. It would be unfair to oblige a former-spouse to contribute to the financial stability of recipient-spouse’s cohabitant or paramour. When a payor-spouse seeks to terminate alimony because of cohabitation, the court first will refer to the parties’ property settlement agreement (PSA) to determine the terms of payment. If the parties intended for cohabitation to terminate alimony, then the court will weigh the facts of the case to determine whether a cohabitating relationship exists. In the absence of a PSA, courts will rely on the cohabitation clause of the state’s alimony-modification statute.

Whether interpreting statutory language or a PSA, the courts must balance the recipient-spouse’s interests against those of the payor. Maryland,

7. Id.
for example, uses a multi-factored test to accomplish this objective.\textsuperscript{10} The test considers "(1) establishment of a common residence; (2) long-term intimate or romantic involvement; (3) shared assets or common bank accounts; (4) joint contribution to household expenses; and (5) recognition of the relationship by the community."\textsuperscript{11} According to the Maryland Supreme Court, considering a variety of factors ensures that an ex-spouse engaging in a new \textit{de facto} marriage does not wrongfully inherit financial support from two sources.\textsuperscript{12}

By looking at the romantic aspects of the cohabitants' relationship, as well as economic circumstances, states may effectively balance the opposing equitable interests at stake in spousal maintenance arrangements.\textsuperscript{13} Disregarding one of the aspects of a cohabitating relationship may cause a recipient-spouse to wrongfully lose financial maintenance.\textsuperscript{14} For example, it would be unjust for a court to terminate support for a recipient-spouse living with a family member, even if they exhibited some financial interdependence. Consequently, deciding whether a cohabitating relationship exists depends on the particular circumstances of each case.\textsuperscript{15}

In contrast to Maryland's multi-factored test, New Jersey's approach involves comparing post-marital cohabitating relationships to remarriage.\textsuperscript{16} In \textit{Konzelman v. Konzelman}, a payor-spouse alleged that his ex-wife was cohabitating with another male, and requested that the court terminate alimony pursuant to the parties' PSA.\textsuperscript{17} The recipient-spouse argued that she was not cohabitating in the manner intended in the PSA because she was not financially dependent on her partner.\textsuperscript{18} Despite the presence of a PSA, the court looked to the state's alimony-modification statute to determine the intended effect of cohabitation.\textsuperscript{19} The plain language of New Jersey's statute provides for termination of alimony upon a recipient-spouse's remarriage; it does not mention cohabitation.\textsuperscript{20} Nevertheless, the

\begin{enumerate}[itemsep=0pt]
\item \textsuperscript{10} See Gordon v. Gordon, 675 A.2d 540, 547-48 (Md. 1996).
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id. at 548.
\item \textsuperscript{13} See 27B C.J.S. DIVORCE § 656 (2007).
\item \textsuperscript{14} See id.
\item \textsuperscript{15} See 24A AM. JUR. 2D DIVORCE AND SEPARATION § 749 (West 2008).
\item \textsuperscript{16} See Konzelman v. Konzelman, 729 A.2d 7, 12 (N.J. 1999) (using factors such as living together; intertwined finances; shared living expenses; and recognition of the couple's relationship in their social and family circle, to terminate alimony); Pellegrin v. Pellegrin, 525 S.E.2d 611, 616-618 (Va. App. 2000) (using common residence; intimate or romantic involvement; provision of financial support; and duration and continuity of relationship as alimony termination factors).
\item \textsuperscript{17} Konzelman, 729A.2d at 10.
\item \textsuperscript{18} Id. at 11.
\item \textsuperscript{19} Id. at 12-13.
\item \textsuperscript{20} Id. at 13.
\end{enumerate}
court interpreted "remarriage" to mean "form[ing] a new bond that eliminates the prior dependency as a matter of law." Thus, provided that the recipient-spouse's new relationship has all the indicia of marriage, a PSA calling for termination upon cohabitation is enforceable. Konzelman, therefore, stands for the proposition that a cohabiting relationship must not be merely romantic, casual, or social in nature; rather, to have the indicia of marriage, the cohabitants must be in a stable, permanent, and interdependent relationship.

Although Konzelman aimed to preserve equity by analogizing cohabitation to remarriage, it did not explicitly consider the recipient-spouse's financial interdependence with the third party. In this way, New Jersey's approach is less effective than Maryland's in preserving the equitable balance. On the other hand, courts must be careful not to overvalue the financial aspect of cohabitation. The appropriate inquiry is whether the cohabitating partners "look to each other for support, not whether the support is in fact adequate to meet the [recipient-spouse's] needs." Consequently, even if the recipient-spouse becomes less affluent by cohabitating with another person, a court may terminate alimony.

The Court of Appeals of Virginia's decision in Pellegrin v. Pellegrin illustrates another state's approach to defining cohabitation. There, the court relied on Konzelman and other states' decisions in concluding that cohabitation does not have an exclusive list of criteria. Some possible factors may include common residence; intimate or romantic involvement; the provision of financial support; and the duration and continuity of the relationship. Comparable to the Konzelman analysis, the Pellegrin court

23. Konzelman, 729 A.2d at 16. Like Maryland, the court noted some factors indicating cohabitation include living together, joint bank accounts, shared living expenses, division of household chores, and recognition of the relationship in the couple's social circle. Id. As is relevant to subsequent sections, the Supreme Court of New Jersey noted in dicta in Konzelman that, "[c]ohabitation is not defined or measured solely or even essentially by 'sex' or even by gender." Id. Neither the court nor New Jersey legislature has explicitly commented on whether cohabitation provisions include private homosexual relationships, though this dictum seems to suggest that it does.
24. Id. at 12.
25. See id. at 12–13. Importantly, the failure to consider financial circumstances may not be significant error given that the payor-spouse still carries the burden of proving that the cohabiting relationship has indicia of a marriage-like relationship. Perhaps the New Jersey Supreme Court presumed that marriage-like relationships involve financial interdependence.
27. See Weisbruch, 710 N.E.2d at 444.
29. Id.
30. Id.
did not value any one criterion more than another; rather, it gave deference to the trial court’s evaluation of the facts presented.\textsuperscript{31} Nevertheless, the court implied that financial contributions and support play a substantial role in cohabitation.\textsuperscript{32} Ultimately the court determined that mere evidence that the recipient-spouse received money from her paramour and that the couple regularly exchanged gifts, did not amount to the “degree of financial interdependence generally associated with marital relationships.”\textsuperscript{33}

Virginia’s approach to defining cohabitation represents the middle-ground between Maryland and New Jersey. The court looks for particular indicia of a marriage-like relationship, while also considering the specific circumstances of each case.\textsuperscript{34} Similar to marital-relationships, levels of intimacy and financial interdependence are unique to every cohabitating couple. Therefore courts have the burden of weighing the facts of each case to reach an outcome that will protect the interests of both parties. Because most states have implemented an equitable law regarding alimony modification and cohabitation, cases rarely deal with questions of law. Recently, however, trends in post-marital homosexual cohabitation have presented the courts and practitioners with a new legal question to address.

\subsection*{B. Effect of Homosexuals’ Controversial Legal Marital Status On Alimony Modification}

The importance of balancing the recipient and payor-spouse’s equitable interests sets the groundwork for understanding the effect of private homosexual relationships on definitions of cohabitation. Recently imposed federal and state Defense of Marriage Acts (“DOMAs”)\textsuperscript{35} have led to a surge of questions concerning the legal rights of homosexuals.\textsuperscript{36} Among the handful of states which have not yet adopted DOMA, same-sex mar-

\begin{itemize}
  \item \textsuperscript{31} Id. at 617.
  \item \textsuperscript{32} Id. at 618.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} The Defense of Marriage Act (DOMA) was initiated by President Clinton and was passed by Congress in 1996. The Act has two sections; one defining marriage as between a man and a woman, and the other reaffirms the states’ own power to define marriage within its boundaries, exempt from the Full Faith and Credit Clause under Article IV, Section 1 of the United States Constitution. In effect, DOMA allows states to constitutionally refuse to recognize same-sex marriages formalized by another state. After the federal DOMA was passed, states subsequently adopted their own DOMAs to their respective state constitutions. Currently, the following states have not adopted DOMAs either as state law or a legislative amendment: Connecticut; Maryland; Massachusetts; New Jersey; New Mexico; New York; Rhode Island; Vermont; and Wyoming. Massachusetts is the only state to date that has fully legalized same-sex marriage. For more insight, see http://www.domawatch.org. (last visited Dec. 9, 2009).
  \item \textsuperscript{36} See generally MULLER DAVIS & JODY MEYER YAZICI, 12 ILL. PRAC., FAM.L. 750 5/213.1 (2007 ed.).
\end{itemize}
riage issues are surfacing in some senate and assembly debates.37 For example, at the time of this writing, a bill before the New York State Senate proposed an amendment to the state’s domestic relations law that would declare marriage a fundamental human right.38 In effect this bill would legalize same-sex marriage in New York.39 The bill already passed in the assembly, and should it pass the senate vote as well, New York will become the second state behind Massachusetts to recognize same-sex marriage.40 This bill would impact New York’s domestic relations law tremendously, considering the law currently contains gender-specific language in its marriage-dissolution provisions.41 Although the majority of states have enacted a constitutional amendment, citizen-imposed initiative, or federal-based DOMA, the outcome of New York’s same-sex marriage bill will undoubtedly impact the remaining states’ views of same-sex marriage.

Aside from implicating equality or constitutional rights for homosexuals, state policies on same-sex marriage are also relevant to this Note’s discussion of cohabitation. As illustrated above, a number of states analogize post-marital cohabitation to remarriage for alimony-termination purposes. Whether homosexuals may enter a marriage-like relationship when they are denied the right to marry relates to equity interests in a post-marital cohabitation setting.42 On one side of the argument, it could be inconsistent policy for states to ban same-sex marriage yet recognize same-sex cohabitation. Some legislators may worry that acknowledging that homosexuals may live in a marriage-like manner will eventually lead to legalizing same-sex marriage. In effect, states supporting this argument have held that post-marital homosexual cohabitation will not affect alimony.

On the other hand, refusing to acknowledge same-sex cohabitation poses a concern for the payor-spouse’s interests in a spousal maintenance dispute. A July 22, 2007, article by Maura Dolan of the Los Angeles Times

38. 2007 Legis. Bill Hist. N.Y. A.B. 8590. The bill, in relevant part, states “[a] marriages that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex,” § 10-A(1). The bill passed the New York Assembly in June of 2007, and has been directed to the Judiciary Committee by the Senate for further review. See Michael M. Grynbaum, Gay Marriage, a Touchy Issue, Touches Legislators’ Emotions, N.Y. TIMES, June 21, 2007, at B5.
41. See, e.g., N.Y. DOM. REL. LAW § 248.
42. Robyn Cheryl Miller, Annotation, Effect of Same-Sex Relationship on Spousal Support, 73 A.L.R. 5th 599 (1999).
pinpointed this concern. The article covered an Orange County, California court decision that upheld alimony payments to a recipient-spouse, despite her cohabitation with her registered domestic partner. Pursuant to California state law, a court may terminate alimony payments when the recipient-spouse dies or remarries, unless otherwise stated in the separation agreement. Since California does not recognize same-sex marriage, the court held that same-sex partners cannot cohabitate in a manner analogous to marriage. Therefore, post-marital same-sex cohabitation was not grounds to terminate alimony in the state.

In a similar case before the Virginia Court of Appeals, same-sex cohabitation was sufficient to terminate a payor-spouse's alimony obligations. In that case, the parties' PSA provided that the recipient-spouse's cohabitation with "any person in a situation analogous to marriage" would be grounds for alimony termination. The case hinged on whether the parties intended "any person" to refer only to individuals of the opposite sex, or whether it was meant to refer to individuals of either sex. Relying on Virginia's state policy against same-sex marriage, the trial court determined that state law would neither recognize that homosexuals could cohabit, or "live together in the same house as married persons live together." Moreover, because the parties drafted the PSA pursuant to Virginia law, they must have intended for "any person" to refer only to individuals of the opposite sex. On appeal, however, the Virginia Court of Appeals reversed the trial court's holding, focusing instead on the language "analogous to marriage." The court concluded that the word "analogous" implies that the cohabitation need only resemble a marital relationship. As a result, although the recipient-spouse and her domestic partner were prohibited...
from marrying, their cohabitation did constitute a situation analogous to marriage.\textsuperscript{55} Therefore, the court terminated alimony payments to uphold equity for the payor-spouse.\textsuperscript{56}

The contrasting interpretations in the California and Virginia cases described above epitomize the relationship between private homosexual relationships and alimony termination.\textsuperscript{57} Precluding homosexuals the ability to attain legal marital status creates great inconsistency and confusion within the realm of domestic relations law. Suddenly, courts and practitioners alike have found themselves on new territory, challenged with interpreting not only terms of alimony modification orders, but also state policy on what constitutes a marriage. States like Massachusetts, New Hampshire, Vermont, and Connecticut, which recognize same-sex civil unions, may more easily terminate alimony upon same-sex cohabitation.\textsuperscript{58} However, for the majority of states that have outlawed civil unions, the decision to impose moral policy on the equitable principles of alimony creates a crossroads.

\textbf{C. Three Potential Models for Dealing with Same-Sex Cohabitation and Alimony}

Until recently, thirty-four states had not enacted any statute providing for the modification or termination of spousal support upon cohabitation of the recipient spouse.\textsuperscript{59} However, of those states which do have such provisions, the statutory language fits within one of three broad categories—(a) ambiguous language; (b) clear language excluding same-sex cohabitation; and (c) clear language including same-sex cohabitation.\textsuperscript{60}

The first category includes those states that have ambiguous statutory language, calling for modification of alimony payments when the recipient spouse cohabitates with “another person.”\textsuperscript{61} In Illinois, for example, a court may terminate a payor-spouse’s support obligations upon proving that the ex-spouse cohabitates with “another person on a resident, continuing con-
As used in Illinois' statute, "conjugal" refers to a relationship "of or belonging to marriage or the married state." Although sexual relations or intercourse may suggest a conjugal relationship exists, they are not a required factor. Rather, the better consideration is for the nature and duration of the relationship.

Illinois is representative of those states that clearly recognize cohabitation as a condition to terminate alimony, but whose statutory languages ambiguously reflect legislative intent. The plain meaning of these statutes alone suggests a broad interpretation of cohabitation, so as to include private homosexual relationships. However, analyzing the legislative history of the statutes and each state's current policy on same-sex marriage may indicate that the statutes are meant to exclude same-sex cohabitation. Quite bluntly, the Illinois legislature considers same-sex marriage as "abhorrent to Illinois public policy." This may in fact indicate that the Illinois legislators did not intend to include homosexuals in the scope of cohabitating or conjugal relationships. On the other hand, had the legislators intended to limit the statutory scope, it likely would have used clearer language. Overall, the valuable lesson for states like Illinois is to use careful drafting and specific language to define statutory boundaries.

The second category of states includes those whose statutory language explicitly excludes private homosexual relationships from the scope of their alimony-modification statutes. Of these states, the operative language is that alimony will be modified or terminated upon cohabitation with a member of the opposite sex. New York's gender-specific modification statute is an extreme representation of this category. Under this statute, a court may modify support "upon proof that the wife is habitually living..."
with another man and holding herself out as his wife.”

Although other states’ statutes implement gender-neutral language, they nevertheless disregard the payor’s interests by only applying it to heterosexual cohabitants.

Ironically, homosexuals cohabitating in states which prohibit same-sex marriage and implement narrow alimony-modification statutes, are from all aspects precluded from enduring one of the burdens of marital status. Gajovski v. Gajovski, a case before the Court of Appeals of Ohio, epitomizes this concept. In that case, an ex-husband filed a petition to terminate alimony payments to his ex-wife who was living and engaging in sexual relations with another woman. Pursuant to the parties’ PSA, alimony payments could be terminated if the ex-wife ever remarried or lived in a state of concubinage. The court had to decipher the meaning and scope of “concubinage” as used in the PSA. Relying primarily on a 1987 decision from the Court of Appeal of Louisiana, which analyzed “concubinage” from a biblical perspective, the court held that homosexual couples cannot enter a state of concubinage. Under the court’s perspective, “concubinage” describes a relationship in which “two people capable of contracting marriage are involved in an open, illicit sexual relationship approximating marriage.” Because same-sex couples may never attain marital status in Ohio, the court held that they may neither attain a status approximating marriage.

In his dissent, Justice William Baird criticized the majority’s reliance on a biblically-inspired interpretation of concubinage. Instead, a dictionary definition would have more appropriately characterized the parties’ intended use of the word. As cited by Justice Baird, Webster’s Third New International Dictionary, unabridged (1961), defines “concubine” as “a man living in a state of concubinage to another man or another woman.”

74. See Longmeyer, supra note 59, at 61; see also, e.g., Gajovski, 610 N.E.2d at 433.
75. Id.
76. Id. at 432.
77. Id.
78. Id.
80. Gajovski, 610 N.E.2d at 432 (citing Bacot, 502 So.2d at 1129) (emphasis omitted).
81. Id. at 433.
82. Id.
83. Id.
84. Id. (Baird, J., dissenting).
Therefore, it logically follows that the parties likely intended “in a state of concubinage” to signify an interdependent living arrangement involving sexual relations.\textsuperscript{85} Explicitly, the underlying purpose of terminating alimony upon concubinage is to prevent the payor-spouse from supporting the recipient spouse’s paramour.\textsuperscript{86} According to Justice Baird, the paramour’s inability to marry the recipient spouse seems beyond the scope of the decree and the parties’ intentions.\textsuperscript{87} Given his recognition of the equitable considerations underlying alimony payment issues, Justice Baird’s dissent closely resembles the last category of state modification statutes.

The final category of statutory language encompasses those states which have explicitly expanded their respective modification statutes to include same-sex cohabitation.\textsuperscript{88} North Carolina’s alimony termination statute adequately represents this category of states; it terminates payments when the supported spouse remarries or engages in cohabitation, regardless of the genders of the cohabitants.\textsuperscript{89} The statute further defines cohabitation as “the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship.”\textsuperscript{90} North Carolina perhaps best preserves the equitable principles underlying alimony modification, as it primarily focuses on the changed financial circumstances of the recipient spouse.\textsuperscript{91}

By comparison, some other states whose statutory language falls within the third category still do not emphasize changed circumstances of the recipient spouse. For example, Delaware recognizes same-sex cohabitation, but disregards “whether the relationship confers a financial benefit on the party receiving alimony.”\textsuperscript{92} Consequently, while an ex-spouse’s income or financial stability may not have changed, she may lose financial support from a prior relationship solely upon entering a cohabiting relationship with another individual.

Arguably, the states within this subset act just as unfairly as those which explicitly exclude same-sex cohabitation. In effect, the fact that these states have expanded their statutory language to include same-sex cohabitation is meaningless in terms of preserving equity, unless the prima-
ry focus remains on the changed circumstances of the recipient spouse. To uphold the true purpose of alimony and to protect the interests of the payor-spouse, states should follow a framework similar to that of North Carolina.93 In sum, equity requires states to recognize same-sex cohabitation; but even more importantly, it requires states to recognize that cohabitation alone is not dispositive, unless and until the payor-spouse can prove that the recipient-spouse is financially interdependent with the cohabitating partner.

II. CASES

This section illustrates two of the three approaches to alimony termination by closely looking at cases from representative states. The first set of cases represents those states which interpreted ambiguous language, either from a PSA or state statute, broadly to include same-sex cohabitation for purpose of terminating or modifying alimony payments. Arguably, these cases have best preserved a payor-spouse’s equitable interests. The second set of cases represents those states which have refused to recognize same-sex relationships as a means to terminate or modify alimony. As a result, these states failed to appreciate the equitable interests at stake. For the purposes of this Note, whether the court interpreted a state statute or privately-constructed PSA is not dispositive. Rather, the focus is whether the court applied a broad or narrow view of cohabitation, thereby either preserving or undervaluing the equitable principles integral to alimony modification.

A. “Private Homosexual Relationships” Interpreted to be within Statutory or PSA Language

i. Utah

In Garcia v. Garcia, a payor-spouse petitioned the court under Utah’s alimony modification statute to terminate support to his former wife who was allegedly cohabiting with another woman.94 The plain language of the statute provides that alimony shall terminate “upon establishment by the party paying alimony that the former spouse is cohabitating with another person.”95 The inherent ambiguity of “another person” left open the issue whether same-sex cohabitation qualified to terminate support. The trial

93. See generally N.C. GEN. STAT. § 50-16.9(b).
95. Id.; see also Garcia, 60 P.3d at 1175.
court narrowly interpreted the statute to apply only to heterosexual couples, based on Utah’s prohibition of same-sex marriage.\textsuperscript{96} However, the Court of Appeals of Utah reversed the trial court’s holding and found same-sex cohabitation did fall within the statute’s scope.\textsuperscript{97}

Not only did \textit{Garcia} broaden cohabitation to include homosexual relationships, but it also set forth a two-part test to determine whether a cohabitating relationship exists.\textsuperscript{98} The test looks for (a) common residency and (b) sexual contact evidencing conjugal association.\textsuperscript{99} Presumably, the purpose of requiring both factors is to avoid terminating alimony when the recipient-spouse merely lives with a roommate, family member, or friend. To determine whether the second factor included same-sex couples, the court looked to the plain meaning of Utah’s alimony modification statute and to previous cohabitation cases.\textsuperscript{100} First, because the legislature did not specify that cohabitation exists only between two people of the opposite sex, the court determined that the second part of the test could apply to same-sex couples.\textsuperscript{101} Next the court considered \textit{Haddow v. Haddow}, which held that conjugal associations, as used in the cohabitation context, only applied to heterosexual couples.\textsuperscript{102} Disagreeing with this interpretation, the court in \textit{Garcia} broadened the scope of conjugal association to encompass same-sex sexual contact.\textsuperscript{103}

\section*{ii. Virginia}

In a 2007 decision, \textit{Stroud v. Stroud}, the Court of Appeals of Virginia expanded its interpretation of cohabitation to include same-sex couples.\textsuperscript{104} In that case, a payor-spouse requested alimony termination upon discovering that his ex-wife was cohabitating with another woman.\textsuperscript{105} Under the terms of the parties’ PSA, spousal support shall terminate “upon the remarriage of [w]ife and/or her cohabitation with any person to whom she is not related by blood or marriage in a situation analogous to marriage.”\textsuperscript{106} The trial court, persuaded by Virginia’s prohibition of same-sex marriage, con-

\begin{itemize}
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Id.}; see also \textit{Haddow v. Haddow}, 707 P.2d 669, 672 (Utah 1985).
\item \textsuperscript{101} See \textit{Garcia}, 60 P.3d at 1176.
\item \textsuperscript{102} \textit{Haddow}, 707 P.2d at 672.
\item \textsuperscript{103} \textit{Garcia}, 60 P.3d at 1176.
\item \textsuperscript{104} \textit{Stroud}, 641 S.E.2d at 151.
\item \textsuperscript{105} \textit{Id.} at 145.
\item \textsuperscript{106} \textit{Id.} (emphasis omitted).
\end{itemize}
cluded that as a matter of law individuals of the same sex cannot cohabit.\textsuperscript{107} The court primarily relied on a 1994 Opinion written by the Attorney General of Virginia.\textsuperscript{108} There, the Attorney General interpreted a section of the criminal code referring to cohabitation of a defendant and a victim in a domestic relations dispute.\textsuperscript{109} The code classifies assault or battery of a “family or household member” as a Class 1 misdemeanor.\textsuperscript{110} A subsequent section of the code defines, in relevant part, a family or household member as “any individual who cohabits or who, within the previous twelve months, cohabited with the defendant.”\textsuperscript{111} The Attorney General relied on Virginia’s prohibition of same-sex marriage as well as the customary legal usage of “cohabits,” which refers to a couple living together as husband and wife.\textsuperscript{112} These factors led the Attorney General to believe that the relevant section of the code only applied to heterosexual cohabitation.\textsuperscript{113}

On appeal, the Court of Appeals of Virginia criticized the trial court’s reliance on the Attorney General’s Opinion, considering the fact that \textit{Stroud} required interpretation of a private contract rather than legislative intent.\textsuperscript{114} The parties’ PSA contained the phrase “analogous to marriage;” the court interpreted “analogous” broadly and held that same-sex couples could cohabitate in a manner analogous to marriage.\textsuperscript{115} Furthermore, the court in \textit{Stroud} considered five factors indicative of cohabitation.\textsuperscript{116} The factors included (1) common residence; (2) intimate or romantic involvement; (3) provision of financial support; (4) duration and continuity of the relationship; and (5) other indicia of permanency.\textsuperscript{117} Therefore, if an analysis of the five factors shows that an ex-spouse is cohabitating with another individual, the court may terminate alimony.\textsuperscript{118} Given the PSA language and the cohabitating nature of the recipient-spouse’s relationship with her domestic partner, the court justified terminating spousal maintenance.\textsuperscript{119}

\begin{itemize}
    \item \textsuperscript{107} \textit{Id.} at 150–51.
    \item \textsuperscript{108} \textit{Id.} (citing 60 Op. Att’y Gen. Va. 1 (1994)).
    \item \textsuperscript{109} 60 Op. Att’y Gen. Va. 1 (1994); see VA. CODE ANN. § 18.2-57.2(A) (West 2001).
    \item \textsuperscript{110} 60 Op. Att’y Gen. Va. 1 (1994); VA. CODE ANN. § 18.2-57.2(A).
    \item \textsuperscript{111} \textit{Id.} at § 18.2-57.2(D).
    \item \textsuperscript{112} 60 Op. Att’y Gen. Va. 3 (1994).
    \item \textsuperscript{113} \textit{Id.} at 4-5.
    \item \textsuperscript{114} \textit{Stroud}, 641 S.E.2d at 150–51.
    \item \textsuperscript{115} \textit{Id.} at 151 (holding that “analogous to marriage” only means similar in some way, but not identical in form or substance).
    \item \textsuperscript{116} \textit{Id.} at 148–150.
    \item \textsuperscript{117} \textit{Id.}
    \item \textsuperscript{118} \textit{See id.} at 151.
    \item \textsuperscript{119} \textit{Id.}
\end{itemize}
iii. Washington

In *Vasquez v. Hawthorne*, the Supreme Court of Washington held that neither the "legality" of the relationship between the parties, nor the sexual orientation of the parties should limit claims based on equitable principles.\(^{120}\) That case involved a dispute between the decedent’s estate and the decedent’s alleged homosexual partner.\(^{121}\) According to the trial court, the partner provided sufficient evidence that he and the decedent enjoyed such a meretricious relationship, and therefore deserved an equitable division of the decedent’s assets against the estate.\(^{122}\) The key issue in *Vasquez* was whether a homosexual partner could rely on the equitable doctrine of "meretricious relationship."\(^{123}\) Typically, the doctrine provides that property acquired during and resulting from a long-term, stable, cohabiting relationship may be considered the joint property of the parties involved.\(^{124}\) The trial court interpreted the doctrine and cohabitation broadly, holding that same-sex partners may engage in a meretricious relationship.\(^{125}\) On appeal, however, the Court of Appeals of Washington determined that same-sex partners cannot enter a meretricious relationship or achieve marital-like status because they cannot legally wed.\(^{126}\) In spite of this reasoning of the lower court, the Supreme Court of Washington vacated the judgment of the Court of Appeals and remanded the case for a new trial.\(^{127}\)

Although the main issue in *Vasquez* does not involve alimony modification, the procedural history is useful for determining whether same-sex relationships may be analogous to marriage.\(^{128}\) The state supreme court recognized that the partner’s claims were based on equitable principles; therefore the outcome should not have depended on the legality of his relationship with the decedent.\(^{129}\) Moreover, the court relied on previous cases, which had interpreted "marital-like" and "meretricious relationship" to be mere analogies to marriage. Because the court had never before found a marital-like relationship to be identical to marriage, doing so in *Vasquez*

120. *Vasquez v. Hawthorne*, 33 P.3d 735, 737–38 (Wash. 2001). It should be noted that the state of Washington does not have a statute specifically pertaining to alimony modification upon cohabitation of the recipient spouse. Rather, Washington’s most relevant statute calls for modification or termination of spousal maintenance upon a “substantial change in circumstances.” RCW 26.09.170(1).
121. *Vasquez*, 33 P.3d at 736.
122. Id.
123. Id.
124. Id. at 737–38.
125. Id. at 737.
126. Id. at 736.
127. Id. (ruling that the trial court erred by granting summary judgment when a question of material fact still existed, and therefore the Court of Appeals erred in its ruling on the merits).
128. See generally id. at 736.
129. Id. at 737–38.
would contradict principles of equity.\textsuperscript{130} Although \textit{Vasquez} was ultimately remanded for a new trial, the supreme court still recognized the injustice in excluding homosexuals from the ability to engage in a meretricious relationship.

In his concurrence, Justice Richard B. Sanders criticized the majority for underemphasizing that the ability to wed is a requisite for a meretricious relationship.\textsuperscript{131} Because Washington only recognizes marriage between partners of the opposite sex, only heterosexual couples may live in a state of cohabitation or engage in a meretricious relationship.\textsuperscript{132} Presumably, to Justice Sanders "marital-like" refers to a heterosexual couple who has the ability to marry, but which has chosen not wed. In \textit{Vasquez}, because the partner and the decedent were of the same sex, they could have never been in a meretricious or cohabiting relationship under the law.\textsuperscript{133} Consequently, the partner was never entitled to equitable relief and all property in question belonged to the decedent’s estate.\textsuperscript{134}

\textbf{B. Same-Sex Relationships Interpreted to be Outside Scope of Statutory or PSA Language}

i. Georgia

In \textit{Van Dyck v. Van Dyck}, the Supreme Court of Georgia reversed the trial court’s ruling that homosexual cohabitation was within the scope of Georgia’s modification statute.\textsuperscript{135} Pursuant to the statutory language, alimony may be terminated or modified when a former spouse is voluntarily cohabitating in a meretricious relationship.\textsuperscript{136} Throughout the statute, "cohabitation" means "dwelling together continuously and openly in a meretricious relationship with a person of the opposite sex."\textsuperscript{137} Given the statute’s clear language, the supreme court held that the trial court erred by expanding "meretricious relationship" to include private homosexual relationships.\textsuperscript{138} According to the court, had the legislature intended the statute to

\begin{itemize}
\item \textsuperscript{130} \textit{id.} at 738.
\item \textsuperscript{131} \textit{id.} at 740 (Sanders, J. concurring).
\item \textsuperscript{132} \textit{id.}
\item \textsuperscript{133} \textit{id.}
\item \textsuperscript{134} \textit{See id.} at 741.
\item \textsuperscript{135} 425 S.E.2d 853, 854 (Ga. 1993).
\item \textsuperscript{136} \textit{id.}; \textit{GA. CODE ANN.} § 19-6-19(b) (1993).
\item \textsuperscript{137} \textit{Van Dyck}, 425 S.E.2d at 854; \textit{GA. CODE ANN.} § 19-6-19(b).
\item \textsuperscript{138} \textit{Van Dyck}, 425 S.E.2d at 854.
\end{itemize}
disregard the sexual orientation of the cohabitants, it would have so indicated by the statutory language.\footnote{Id. at 854–55.}

Interestingly, Justice Leah J. Sears-Collins’ concurring opinion in Van Dyck implied that the majority opinion may have been based on preserving homosexual equality more than principles of equity.\footnote{Id. at 855.} In her opinion, Justice Sears-Collins emphasized the injustice that same-sex couples endure by being denied many legal rights awarded to married couples.\footnote{Id.} Specifically, she noted that while alimony ideally should be based on a recipient-spouse’s financial need, expanding the Georgia statute to include same-sex couples would impose on them a burden of marital-status without awarding them any of the benefits of marriage.\footnote{Id.} Because cohabitating heterosexual couples have the choice of taking advantage of the benefits of marriage, they justifiably must accept the burden of alimony modification upon cohabitation.\footnote{Id.} Conversely, because homosexual couples are legally forbidden to enjoy the benefits of marriage, they will never be similarly situated to unwed, cohabitating heterosexual couples.\footnote{Id.} As a result, it would be unfair to subject cohabitating homosexual couples to the burden of modified alimony payments, without first granting them the option of getting married.\footnote{Id.}

ii. New York

In Pattberg v. Pattberg, a payor-spouse challenged New York’s alimony modification statute on grounds that its gender-specific language discriminated against her because she was female.\footnote{Pattberg v. Pattberg, 497 N.Y.S.2d 251, 252 (N.Y. Sup. Ct., Special Term, Suffolk Cnty. 1985); N.Y. DOM. REL. Law § 248.} New York’s statute gives the court discretion to modify support payments upon showing that an ex-wife is (a) habitually living with another man and (b) holding herself out as the wife of said man.\footnote{Pattberg, 497 N.Y.S.2d at 252. Notably, these two elements have proven problematic and controversial for New York courts.} The first element contains three sub-parts, each of which is weighed based on the particular facts of the case. First,
“habitually” is determined by the duration of the new relationship.\textsuperscript{148} Second, “living with” involves something more than being traditional roommates or housemates.\textsuperscript{149} Lastly, the ex-spouse must be engaging in a sexual relationship with the man with whom she is habitually living.\textsuperscript{150}

Because this case implicated the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court of New York first reviewed whether the right to cohabit and assert a martial status was a fundamental right in the context of the state’s alimony modification statute.\textsuperscript{151} This required the court to ascertain the appropriate level of scrutiny for an alleged gender-based equal protection violation.\textsuperscript{152} “The success of a constitutional challenge to New York’s termination-of-alimony statute on Equal Protection grounds will depend of [sic] the level of scrutiny the reviewing court chooses to apply to the classification established by the statute.”\textsuperscript{153} Applying strict scrutiny review would require the court to find the statute serves a compelling state interest and is narrowly tailored to furthering that interest.\textsuperscript{154} The court rejected this argument, however, because the United States Supreme Court had not yet recognized a fundamental interest in cohabiting with another person of the opposite sex, much less whether sexual preference is a dispositive factor in cohabitation cases.\textsuperscript{155} Absent a fundamental interest, the court instead decided to apply the less strict rational basis review, requiring that the statute be only a “rational means to [serving] a legitimate [s]tate objective.”\textsuperscript{156} Upon considering the statute’s legislative history and other jurisdictions’ alimony modification statutes, the court concluded that the law passed rational basis review.\textsuperscript{157}

Despite the statute’s constitutionality, however, the court strongly opposed its language and practical effect on alimony modification.\textsuperscript{158} Specifically, the court criticized that requiring unmarried couples to hold themselves out in public as a married couple missed the true purpose of alimony modification.\textsuperscript{159} Rather, alimony modification should be based on

\begin{footnotes}
\textsuperscript{148} Id. Although no set time minimum has been established, “intermittent intimacy” or merely spending the nights or weekends with another man will not qualify.
\textsuperscript{149} Id. at 253.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 252; N.Y. DOM. REL. LAW § 248; see U.S. CONST. amend. XIV, § 1.
\textsuperscript{152} Pattberg, 497 N.Y.S.2d at 254.
\textsuperscript{153} Id. “Equal protection” demands that no State shall deprive any person of the equal protection of the laws; “all persons similarly situated should be treated alike.” Id.
\textsuperscript{154} See id. at 254.
\textsuperscript{155} Id. at 255–56.
\textsuperscript{156} Id. at 256.
\textsuperscript{157} Id. at 256–57.
\textsuperscript{158} Id. at 258–59.
\textsuperscript{159} Id.
\end{footnotes}
the economic need of the recipient-spouse; justice provides that once a recipient-spouse is being supported by another, a payor-spouse should have grounds to modify or terminate spousal support. Thus, whereas the New York statute may have been declared constitutional with regards to equal protection, it also “[left] the courts powerless to relieve the former husband of [his] obligations of subsidizing his former wife’s affairs no matter how unfair this may [have been] under the circumstances.” Consequently, the court in Pattberg strongly advised the legislature to amend the law into a workable statute.

Interestingly, however, even though homosexual cohabitation was not at issue in this case, the court explicitly stated in dicta that the statute “specifically refers to a heterosexual relationship” and that “allegations of an ex-wife’s homosexual relationship cannot provide a basis for [alimony termination].” As a result, although the court seemingly intended to render an equitable, gender-neutral decision, it undermined its own objectives by limiting the statute to heterosexual cohabitating couples.

III. ANALYSIS

As illustrated by the case-by-case analysis above, determining whether same-sex cohabitation should qualify to terminate or modify alimony payments to a recipient-spouse is a complex area of law. That statutory language, moral policy, and definitions of “cohabitation” vary from state to state only further complicates this issue. To simplify the matter, the issue should be broken down into two key concepts. First, state legislatures must act to account for private homosexual relationships in their respective alimony modification statutes; failing to do so undermines the importance of equity in awarding spousal support to an ex-spouse in the first place. Second, in addition to legislative action, state judiciaries must design a clear set of indicia to determine whether a cohabitating relationship exists between the recipient-spouse and a third party. To ensure fairness to the recipient-spouse, the indicia should include at least some consideration for the financial interdependence of the cohabitating couple. For states that currently have ambiguous statutory language or have excluded private homosexual relationships, action from the respective legislature and judiciary

160. Id. at 258.
162. Id.
163. Id. at 253.
164. See id.
is necessary to maintain an equitable balance between the payor and recipient spouse.

The following analysis section first will dissect the specific errors of states which do not recognize same-sex cohabitation, and some of the problems associated with definitions of cohabitation that focus solely on the intimacy of the cohabitating parties. Then, it will set forth a workable model for Illinois to adopt to guarantee a payor-spouse’s interests are protected in every alimony modification case.

A. The Unjust Inconsistency of States Which Do Not Recognize Same-Sex Cohabitation

States which fail to recognize same-sex cohabitation for purpose of modifying or terminating alimony payments, regardless of their policies on same-sex marriage, effectively diminish the equitable principles underlying spousal support. The Supreme Court of Georgia’s opinion in Van Dyck and the Supreme Court of New York’s opinion in Pattberg are prime examples of this phenomenon.\(^{165}\)

In Van Dyck, the majority refused to terminate alimony payments to a recipient-spouse in spite of the fact that she was cohabitating with another woman.\(^{166}\) The court based its reasoning on the plain language of the statute, and found that the trial court erred by inferring a broad and inexplicit legislative intent.\(^{167}\) As implied by Justice Sears-Collins’ concurring opinion, the Van Dyck court considered equality issues for homosexuals in its deliberation.\(^{168}\) Specifically, they reasoned that private homosexual relationships are equivalent to unformalized heterosexual relationships because the heterosexual couple will always have the option of marriage.\(^{169}\) However, this reasoning fails to preserve equitable justice for the payor-spouse because it overlooks the fact that private homosexual couples, like unwed heterosexuals, may still exude a sense of permanency in their relationship. When a couple financially invests in their relationship, it likely indicates they intend to commit to and depend on each other. Because both homosexual and heterosexual couples alike become financially interdependent, homosexuals’ inability to marry is immaterial. While it remains unfair that same-sex couples may suffer a burden of marriage without being able to

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165. See generally Van Dyck v. Van Dyck, 425 S.E.2d 853, 854 (Ga. 1993) (holding that the state modification statute does not extend to meretricious relationships between individuals of the same sex); Pattberg, 497 N.Y.S.2d at 258-59.
166. Van Dyck, 425 S.E.2d at 854.
167. Id. at 854-855.
168. Id. at 855.
169. Id.
reap any of the benefits, the financial consequences to payor-spouse by continuing alimony are much worse in terms of equity. Plainly, a payor-spouse should not be obligated to continue to support an ex-spouse if that spouse has become financially interdependent with a third party, regardless of that party’s gender.

As compared to Van Dyck, the Supreme Court of New York’s decision in Pattberg represents an even more disconcerting perspective on cohabitation.170 Despite the court’s intent in Pattberg to promote a neutral alimony modification system—one based on the economic needs of the recipient-spouse rather than moral policy—it ironically advocated for one substantially shy of its goal. The court directly advised the state legislature to eliminate the gender-specific statutory language, thereby relying more on economic and financial factors to determine alimony modification.171 Additionally, however, the court unequivocally excluded same-sex cohabitation from the statute’s purview.172 By refusing to extend New York’s modification statute to same-sex cohabitation, Pattberg rendered an inconsistent decision.173 Although the court’s primary objective may have been for the statute to cover male recipient-spouses, limiting the scope of the statute to heterosexual cohabitation undermined the court’s broader objective in preserving equity for the payor. In effect, unless the New York legislature responds to Pattberg by explicitly including private homosexual relationships in its modification statute, the payor-spouse’s equitable interests will not be completely preserved. Pattberg’s internal contradiction represents the cross-road between equity and anti-same-sex marriage policies; here they simply were not reconciled.

Another one of New York’s errors is its excessive reliance on the sexual intimacy of the cohabitating partners’ relationship.174 While intimacy is a significant indicator of cohabitation or a marriage-like relationship, it must be supported by additional indicia of financial interdependence. Because maintenance is predicated on recipient-spouse’s need for financial support, the financial implications of the new relationship are the most relevant to determining that spouse’s continued need for maintenance—“not the presence or absence of sex.”175 This issue arose in In re Marriage

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170. Pattberg, 497 N.Y.S.2d at 253, 258; see generally Van Dyck, 425 S.E.2d at 855.
172. Id. at 253.
173. Id.
174. Id. (stating that “[t]he ex-wife must also have a sexual relationship with the man with whom she is living.”)
of Sappington when a payor-spouse petitioned the court to terminate alimony payments to his ex-wife because she was allegedly cohabitating with another man on a resident, conjugal basis. The ex-wife contended that she was not in a conjugal relationship with the other man because he was impotent, and there was no evidence that the two had sexual intercourse. Ultimately the court terminated maintenance to the ex-wife, finding that people cohabitating on a conjugal basis do not necessarily have to engage in sexual relations and that her relationship with the third party had sufficient indicia of a conjugal relationship. Had the court concluded that a conjugal relationship requires proof of sexual relations, it would have rendered an inequitable decision that favored the recipient-spouse; the ex-wife would have wrongfully continued to receive alimony from the petitioner while simultaneously receiving financial support from another person.

On the other hand, eliminating all considerations for intimacy and sexual relations could wrongfully favor the payor’s equitable interests. For instance, assume a recipient-spouse moved in with a family member, sharing a common residence and some household expenses. If a court did not take intimacy into consideration at all, it may mistakenly terminate maintenance upon concluding that the recipient-spouse was cohabitating in a conjugal relationship with another person. In sum, to adequately protect both the recipient and payor-spouses in cohabitation cases, the court must scrutinize the conjugal relationship using factors related to both intimacy and permanency.

B. A Suggestion for Illinois To Create A Workable Statute that Actually Preserves Principles of Equity

Currently, Illinois’ alimony modification statute has ambiguous statutory language. The statute does not explicitly include private homosexual relationships, but rather provides for alimony termination when a payor-spouse proves that the recipient spouse is “engaged in a resident, continuing, conjugal relationship with a third party.” Despite the language’s ambiguity, the purpose is well-defined—to remedy the inequity created when the recipient spouse engages in an un-formalized de facto marriage, to continue to receive alimony from his or her ex-spouse. To
prove a conjugal relationship exists, the payor-spouse must show the other ex-spouse is involved in a “de facto husband and wife relationship with a third party.” Consideration of the following six factors may assist the court to determine the significance of the recipient spouse’s new relationship: “(1) the length of the relationship; (2) the amount of time the couple spends together; (3) the nature of the activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together.”

Illinois’ approach to alimony termination renders two main concerns: (1) the failure to explicitly acknowledge that private homosexual relationships fall within the scope of a de facto marriage; and (2) the failure to consider financial interdependence as a factor of a conjugal relationship. The first concern is an issue to be addressed by the Illinois legislature, whereas the second must be addressed by the courts. To create an alimony modification statute that effectively balances the equitable interests of the payor-spouse against the financial concerns for the recipient-spouse, both branches of government must act on these concerns.

i. Illinois Legislature Should Amend the Statutory Language to Include Private Homosexual Relationships

The first concern with Illinois’ current approach to alimony termination is its ambiguous statutory language. To resolve this concern, the legislature should explicitly include private homosexual relationships in the statute’s definition of de facto marriage. In terms of clarity, North Carolina’s alimony termination statute is the best example for Illinois to follow; it defines cohabitation as “two adults living continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship.” Although Illinois’ statute refers to a conjugal relationship rather than a cohabiting one, this distinction will not affect the desired goal.

Given that Illinois is a state which has adopted its own DOMA, some legislators may contest that recognizing homosexual conjugal relationships for alimony-termination purposes contradicts state policy. This argument is without merit for two key reasons. First, according to In re Marriage of Weisbruch, a 1999 case of first impression brought before the second dis-

182. Id. (emphasis in original).
183. Id.
184. See 750 ILL. COMP. STAT. ANN 5/510(c) (West 2009).
185. See id.
186. N.C. GEN. STAT. § 50-16.9(b).
strict Appellate Court of Illinois, same-sex relationships fall within the statute's reference to “conjugal” relationships.\textsuperscript{188} Second, other states which join Illinois in prohibiting same-sex marriage still acknowledge same-sex cohabitation or \textit{de facto} marriages for alimony termination purposes.\textsuperscript{189} Therefore, all political and moral views of same-sex marriage aside, it makes legal and equitable sense for Illinois to include private homosexual relationships in the statute’s scope.

\textit{Weisbruch} set a powerful tone for Illinois state policy on both same-sex relationships and alimony termination. In that case, a payor-spouse petitioned the court to terminate alimony payments to his ex-wife who allegedly was engaged in a conjugal relationship with another woman.\textsuperscript{190} The trial court held for the payor-spouse, reasoning that homosexual relationships fall within the definition of “conjugal” and that the recipient-spouse was engaged in such a relationship.\textsuperscript{191} On appeal, the recipient-spouse contested both findings.\textsuperscript{192} Interestingly, one of the arguments the recipient-spouse made to the court was that her relationship with the other woman could not be conjugal because of Illinois’ policy against same-sex marriage.\textsuperscript{193} By making this argument, the recipient-spouse, presumably a lesbian, was advocating for a policy decision contrary to her own lifestyle.\textsuperscript{194} The inherent contradiction in this argument epitomizes one of the consequences of outlawing same-sex marriage. By enforcing the disparity between heterosexual and homosexual couples’ right to marry, courts only complicate other areas of the law.

On the other hand, when cases like \textit{Weisbruch} arise the court has an opportunity to address the ramifications of anti-same-sex marriage legislation in the most equitable way possible. In that case, the court upheld the trial court’s conclusions that same-sex relationships may be considered conjugal within the statutory language; that holding reaffirmed that the true purpose of alimony termination is to prevent injustice to the payor-spouse when the recipient-spouse uses the money to support a third party or has

\begin{footnotesize}
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\item \textsuperscript{188} See \textit{In re Marriage of Weisbruch}, 710 N.E.2d 439, 445 (Ill. App. Ct. 1999).
\item \textsuperscript{189} Some examples include North Carolina, Utah, and Virginia. See, e.g., N.C. GEN. STAT. § 50-16.9(b); Garcia v. Garcia, 60 P.3d 1174, 1176 (Utah App. 2002); Stroud v. Stroud, 641 S.E.2d 142, 150 (Va. App. 2007).
\item \textsuperscript{190} \textit{Weisbruch}, 710 N.E.2d at 441.
\item \textsuperscript{191} \textit{Id.} at 442.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at 443; see also 750 ILL. COMP. STAT. ANN. 5/213.1 (West 2009); 750 ILL. COMP. STAT. ANN. 5/212(a)(5) (West 2009).
\item \textsuperscript{194} Of course, one may presume that the recipient-spouse in \textit{Weisbruch} and others in a similarly situated position would rather see same-sex marriage become legal; even if that resulted in more certain termination of maintenance payments. However, the way anti-same-sex marriage policy currently exists, homosexuals are compelled to argue against their own marital rights on the alimony issue.
\end{itemize}
\end{footnotesize}
become financially interdependent with another person.\textsuperscript{195} Moreover, courts should aim to further this purpose regardless of the gender of the third party, and in spite of the fact that Illinois prohibits same-sex marriages.\textsuperscript{196}

As significant as the \textit{Weisbruch} decision was for Illinois’ alimony-termination policy, the Illinois legislature should still formally amend the statutory language to explicitly include private homosexual relationships. At the time of writing this Note, \textit{Weisbruch} has not been overruled, but neither have similar cases been brought before the courts. Without legislative action, \textit{Weisbruch} stands to be changed, or even rejected. Changing the statutory language not only would clarify legislative intent for the scope of conjugal relationships, but it also would ensure that the equitable interests of the payor-spouse are protected regardless of the gender of the third party. A possible revision of the clause pertaining to cohabitation could provide for termination “if the party receiving maintenance cohabits with another person, \textit{of either the same or opposite sex}, on a resident, continuing conjugal basis.”\textsuperscript{197} Another option would be to strike the current statutory language altogether and instead adopt a version modeled after North Carolina’s definition of cohabitation.\textsuperscript{198} This approach may involve broadening the interpretation of conjugal relationship from “\textit{de facto} husband and wife relationship” to “private heterosexual relationship, even if not solemnized by marriage, or a private homosexual relationship.”\textsuperscript{199} Whichever approach the legislature may elect, the purpose must be to clarify the scope of cohabitation and conjugal relationship so that same-sex relationships are included. To the extent that this purpose is achieved, the legislature will have resolved the ambiguous language of the current statute.

Significantly, the two concerns for Illinois’ alimony termination statute cannot be resolved by either the judiciary or the legislature alone; to effectively preserve equitable principles on behalf of the payor-spouse, action from both branches is necessary. To reiterate, allowing same-sex couples to achieve equal marital status to heterosexual couples would alleviate the alimony modification conflict and, to be sure, many others. However, unless and until that legislation emerges, the legislature and court system must work together to further the true purposes of spousal mainten-

\textsuperscript{195} \textit{Weisbruch}, 710 N.E.2d at 443–44.

\textsuperscript{196} \textit{Id}.

\textsuperscript{197} \textit{See} ILL. COMP. STAT. ANN. 5/510(c) (West 2009). Italicized words were added as an example of possible language to amend the statute.

\textsuperscript{198} \textit{See} N.C. GEN. STAT. § 50-16.9(b) (defining cohabitation as “the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship.”).

\textsuperscript{199} \textit{See} 750 ILL. COMP. STAT. ANN. 5/510(c) (West 2009); N.C. GEN. STAT. § 50-16.9(b).
ance. Consideration for the financial interdependence of the cohabiting couple, as well as explicit language acknowledging same-sex cohabitation are two ways by which Illinois can meet this goal.

ii. Illinois Courts Should Consider the Financial Interdependence of the Conjugal Couple

The judiciary’s analysis of conjugal relationships slightly resembles Maryland’s multi-factoried approach in *Gordon.* Maryland courts consider (1) establishment of a common residence; (2) long-term intimate or romantic involvement; (3) shared assets or common bank accounts; (4) joint contribution to household expenses; and (5) recognition of the relationship by the community.” In contrast to Illinois’ approach, Maryland’s test for cohabitation focused, in part, on the financial interdependence of cohabitating couple; whereas Illinois’ factors focus solely on the intimacy of the couple’s relationship. Both states share in the spirit of preserving equitable principles on behalf of the payor-spouse; yet, Illinois’ approach does not explicitly consider whether the recipient-spouse’s financial circumstances have changed.

Not only does financial interdependence indicate stability in a relationship, but it additionally will prevent the courts from terminating alimony support prematurely. For instance, couples who have a close, intimate relationship; who travel together; or who regularly spend holidays together still may not be engaging in a *de facto* marriage. Unfortunately, Illinois’ current factors would indicate otherwise, potentially causing a recipient-spouse to lose necessary financial support for engaging in an intimate relationship with another person. The best suggestion for Illinois courts to rework the current model is to include factors that consider the financial interdependence of the cohabitating couple. For example, other states consider whether the couple shares bank accounts, assets, household expenses, or property. When a couple establishes financial interdependence, they have invested in the relationship and likely intend for the relationship to continue and prosper. Although these factors should not be dispositive of

201. See id.
205. See *Sunday,* 820 N.E.2d at 642; see also *In re Marriage of Sappington,* 478 N.E.2d 376, 381 (III. 1985).
a cohabitating or conjugal relationship, they are critical in preserving the recipient-spouse’s interests. For the courts to do their part to improve Illinois’ approach to alimony termination, they should amend the five-factor analysis by adding factors related to financial interdependence of the cohabitating couple.

CONCLUSION

To maintain an equitable balance in alimony-termination disputes, states should recognize that private homosexual relationships fall within the meaning of cohabitation. Accomplishing this objective requires courts to use a broad interpretation of cohabitation, such that the partners live in a manner analogous to marriage. By considering factors of intimacy and financial interdependence, courts will ensure that both the recipient and payor-spouse in an alimony dispute obtain an equitable outcome. Moreover, state legislatures and practitioners may further prevent an inequitable outcome in these disputes by using careful drafting and specific language to designate intent. Putting the foregoing measures in place precludes moral policies from interfering with matters of equity.