

THE IMPLICATIONS OF COHABITATION REGARDING THE CHILD BORN OUT OF WEDLOCK

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Abstract: Due to the modernization of individuals' thinking within a society, their perceptions of life and the way of living in a broad sense change rapidly and uncontrollably. In modern society, we observe that even the concept of family is beginning to take increasingly diverse forms. In a first understanding we have the idea of traditional family, a concept that is represented by the idea that a man and a woman have to marry with the purpose of having and raising a child—this concept being distinct from that of the modern family. Today, many young people conceive of a family even in the absence of an official marriage, a situation where the two partners choose to live together in cohabitation. This paper focuses on analyzing cohabitation as a concept that is becoming more and more common, much more so than in previous years. Cohabitation affects not only the legal regime of the couple's assets but also the way in which the child is raised and educated, an aspect deeply explored in this article. Lastly, reference is made to the succession rights of cohabiting partners. The research is based on methods such as the analysis of numerous factual situations in relation to the surrounding environment, targeting a diverse group of individuals from distinct family and social backgrounds. It was observed that young people with a more traditional mindset tend to come from rural areas or small towns, where the family represents the social nucleus. Subsequently, a careful analysis of the legal texts was carried out, revealing a significant legislative gap, which led to the emergence of proposed legal reforms. The analysis of legal texts was conducted in a comparative manner, considering both civil codes from Romania and the Republic of Moldova, as well as the Civil Codes of countries such as France and Spain.

1.Introduction

The union between two individuals for the purpose of founding a family is often realized through marriage, which can be officiated in either a religious or spiritual context depending on the culture, or in a civil context, by a registrar. This step is essential and absolutely necessary for the union between the two spouses to have legal effects. Although, from a legal standpoint, the family is most commonly established through marriage, many people opt for the alternative of cohabitation, which may seem simpler, but in reality, presents many disadvantages. This form of union is not protected by Romanian civil law.

According to the **Explanatory Dictionary of the Romanian Language**, cohabitation is defined as "the coexistence of a man and a woman without fulfilling the legal requirements of marriage." (<https://dexonline.ro/>, 30.04.2025, 20:00 PM) The notion of cohabitation originates from the Latin language, where, in Roman law, it referred to "sleeping in the same bed with someone" or "staying in bed with someone," with the Romans using the expression *cum cubare*. This gave rise to the term *concubinatus*, which referred to a union between a man and a woman that resembled marriage, much like in contemporary law. Unlike adultery or incest, which were severely punished by law, cohabitation in Roman law was not subject to legal sanctions. There were no reciprocal obligations between cohabitants; they did not have the obligation of respect or fidelity, unlike in Byzantine law, where such obligations were incumbent upon both parties. Furthermore, a child born from a cohabiting couple did not have recognized filiation from the father.

Regarding the child born outside of marriage, the situation improved during the Byzantine period when the father was legally obligated to provide necessary support for the child.

Considering that this form of coexistence is a simple fact, accepted by law but not regulated, the current Civil Code or special laws have not provided a definition for cohabitation. A definition of cohabitation is only found in legal doctrine. It is defined as "a coexistence with relative stability

between a man and a woman who do not have a marriage bond." Additionally, in doctrine, cohabitation is defined following the analysis of a Constitutional Court decision and a legislative proposal for its regulation, as "a factual union between two persons of different sexes, who live together in a stable and permanent manner, creating the appearance of a marriage."

2. Cohabitation in the Concept of Foreign Legal Systems

When comparing with legal systems from other countries, we observe that in states like France and Spain, for example, civil law regulates cohabitation as a distinct legal institution.

In France, cohabitation is regulated by Articles 515 to 518 of the French Civil Code as a form of partnership between cohabitants. These partners remain the owners of their respective property, and no form of joint ownership arises from cohabitation. Moreover, they do not have the right to jointly adopt a child. However, cohabitants may establish conditions for their cohabitation through a contract called a "cohabitation agreement," which can be drawn up either by a public notary in an authentic form or under private signature.

The issue of children born from cohabitation arises. A child born in this context is considered a child born outside of marriage, and both parents have the obligation of care and maintenance. They can enter into an agreement to regulate the exercise of parental authority.

Similarly, in Spain, cohabitation is regulated by law. It is recognized on the condition that the couple has lived together for a certain period, which varies depending on the region. For example, in Catalonia, this period must be at least 2 continuous years.

This approach significantly aids the members of a modern and non-conformist society, whose principles increasingly deviate from those of the traditional family. In Western countries, there is a strong inclination towards such relationships, where the partners seek to establish a family but do not wish to formalize the marriage. In Europe, this has become an alternative regulation for such couples, in particular for the same-sex couples who ultimately seek to formalize their relationships through civil partnerships.

In the Republic of Moldova, the Family Code does not regulate cohabitation as a legal institution. A child born from cohabitation, like in Romania, is considered a child born outside of marriage, but in terms of rights, the child is treated similarly to one born within marriage. This is reinforced by Article 58 of the Moldovan Family Code, which states: "Parents have equal rights and obligations towards their children, regardless of whether the children are born in or outside of marriage, or whether they live together with the parents or separately."

Filiation towards the mother is established through medical documents issued for this purpose, while the filiation towards the unmarried father is established through the father's recognition of the child. (Noul Cod Civil al României, art. 408. alin.) The presumption of paternity operates similarly to Romania, but according to the Family Code, it can be challenged by a joint declaration from the parents submitted to the civil status authority. (Noul Cod Civil al României, art. 408 alin. 2,3)

3. Cohabitation in Romania:

In Romania, cohabitation is not regulated by law, unlike in some other European states. Cohabitants are simply individuals who live together and maintain a relationship resembling that of married couples.

Firstly, regarding their property, cohabitants do not own joint property unless it was acquired through one of the legal methods of acquiring joint ownership, other than the form of ownership that arises from marriage. Cohabitants do not benefit from a matrimonial regime concerning property, as is specific to marriage. At the end of the cohabitation relationship, former cohabitants do not have the right to initiate partition proceedings for the property acquired during the cohabitation, except if joint ownership has arisen through a contract. However, the partition here is not conditioned by the dissolution of the cohabitation relationship, unlike the partition after a divorce. (Lucia Irinescu - Dreptul familiei, editura Hamangiu 2024, București, p 48-50)

Secondly, with respect to the situation of the child, the law does provide for certain legal effects. For instance, the presumption of paternity is recognized and applicable for the cohabiting father, as regulated by Article 426 of the Civil Code: "Paternity is presumed if it is proven that the alleged father cohabited with the child's mother during the legal period of conception." From this, we deduce that for the presumption of paternity to operate, the period of conception must coincide with the cohabitation period. According to Article 412, paragraph 1 of the Civil Code, the legal period of conception is the interval between 300 and 180 days before the birth. (Noul Cod Civil al României art. 412 alin.1, 2)

There are no issues regarding the filiation with respect to the mother. However, the child born from cohabitation is considered a child born outside marriage, and parental authority is exercised as such. Cohabitation is proven by any means of evidence and is seen in doctrine as a *de facto* status. (Lucia Irinescu -Dreptul familiei, editura Hamangiu 2024, pg47-50) A child born outside of marriage whose filiation has been established is treated by law as if born within marriage. They have the same rights regarding domicile, name, citizenship, parental authority, maintenance, and inheritance from both parents and their relatives. Parental authority is generally exercised jointly by both parents when they live together.

Moreover, cohabitants cannot jointly adopt a child, but they may do so separately. They can also opt for assisted human reproduction with a third-party donor, even though they are not married, as the special law and the Civil Code do not require marriage as a necessary condition. (Noul Cod Civil al României articolul 441, alin 3)

What happens if the cohabitation relationship ends, and the parents no longer live together, but a minor child was born during the cohabitation? In this situation, the parents exercise parental authority in the same way as divorced parents. As a general rule in divorce cases, it will be exercised jointly by both parents. In cases of disagreement between parents on how to exercise parental authority, they may turn to the guardianship court. There are exceptions to the rule of joint exercise, when parental authority is exercised by one parent or another person. (Lucia Irinescu - Dreptul familiei, editura Hamangiu 2024, București, p 482)

Exercising Parental Authority by One Parent:

This occurs when there are justified reasons, according to Article 398, paragraph 1 of the Civil Code. Justified reasons include:

- Alcoholism
- Mental illness
- Repeated and serious violation of parental authority by the other parent
- Drug addiction
- Conviction for committing crimes such as violence, sexual offenses, human trafficking, or drug trafficking
- Parental alienation (when the child manifests unjustified or disproportionate repulsion, resistance, or hostility towards one of the parents)

According to Article 397 of the Civil Code, the parent will exercise all rights and obligations that would have belonged to both parents while respecting the Principle of the Best Interests of the Child. Parental authority may also be exercised separately by one parent when the cohabitation has ended, for objective reasons. (Nou Cod Civil al României articolul 397 482. alin 2)

Article 507 of the Civil Code mentions that parental authority is exercised by one parent when the other is objectively unable to exercise their rights and obligations. The law specifies the following situations:

- One of the parents (cohabitants) has died
- One of the parents (cohabitants) has been declared deceased by a court decision

- One of the parents (cohabitants) is under special guardianship (but can still oversee the child's upbringing and education)
- One of the parents (cohabitants) is missing, has abandoned the family, or is serving a custodial sentence
- One of the parents (cohabitants) has been deprived of parental rights

If the child is not recognized by the father of the former cohabitant, filiation is established only with respect to the mother, and parental authority will be exercised accordingly.

Furthermore, parental authority for a child resulting from cohabitation can be exercised by other persons or institutions instead of the parents when the guardianship court places the child for valid reasons in an institution, with a relative, or another person close to the minor. This situation arises when both parents have shown serious neglect towards the child, suffer from illness, or are objectively unable to exercise parental authority. (Noul Cod Civil al României art. 507, 508)

Inheritance Rights:

A child born from cohabitation (outside of marriage) will have the same inheritance rights as a child born within marriage. The child has inheritance rights to both the mother's and the father's estate if filiation has been established with both parents. If it is believed that if the child is not recognized by the father, the child has the right to file an action to establish filiation towards the father and thereby gain inheritance rights to the father's estate.

A negative effect of the cohabitation situation on the child is that, in the case of a child born from the parents that are not married, the filiation towards the father is established more easily and quickly without requiring a special procedure, therefore the child often being recognized immediately. There are no doubts regarding the child's filiation to the father, and the presumption of paternity operates automatically, being overturned only in exceptional cases (for instance, if the father was abroad during the legal period of conception or was serving a custodial sentence). On the other hand, in the case of a child born from cohabitation, the presumption of paternity can be easily overturned, and the issue of establishing paternity arises more often in such cases, leading to disputes being resolved through the courts.

I believe that the cohabitation relationship is not conducive to the harmonious psychological development of the child, as the parents bear different surnames, and the child has only one parent's surname, most often the father's, if the father recognizes them. This leads to confusion for the minor child and raises questions such as, "Why does my mother have a different surname from mine?" "Why does my classmate have the same surname as both of his parents, but I don't?" Such questions can disrupt the harmony necessary for a child's development, which might seem insignificant to cohabitants but are of great importance to the child.

Although parental authority is exercised jointly, the union between the two individuals brought by marriage does not exist, even if both respect the legal rights and obligations toward their child. Such a union provides certainty in family relationships, which must be solidified and harmonious in order to educate a child in a healthy environment. I believe that this might slightly affect, though not significantly, the Principle of the Best Interests of the Child, this principle being the fundament of this institution. For example, in Moldova, the Family Code provides that when spouses opt for partitioning their property during marriage or after divorce, property transferred to the names of minor children belongs to the child and is not part of the divisible estate. This is not possible for cohabitants, which creates a significant disadvantage for the child's estate, leaving a child born outside marriage deprived of an essential right.

The Romanian legislator should introduce concrete regulation to assist couples who, for various reasons, cannot or do not wish to marry. Such regulation should target the following aspects:

- The possibility of entering into a notarial agreement where the cohabitants define their rights and obligations to each other and their minor children.

- The regulation of a legal regime for property acquired during cohabitation, specifying a matrimonial-like regime.
- The possibility of ending this legal regime through judicial or contractual partition.
- The dissolution of cohabitation.
- The establishment of filiation for the child.
- The way in which parental authority is exercised.
- The manner and limits in which cohabitants must contribute to the child's upbringing and education, both during cohabitation and after its termination.
- The legal effects of the dissolution of cohabitation for both the life of the minor child and the joint property acquired during the cohabitation.
- In the event of the death of one cohabitant, the surviving one should have a legal share of the property acquired during the cohabitation.

4. Conclusion:

In conclusion, while cohabitation may seem like an option for many couples, it comes with numerous inconveniences since it is not regulated by law in Romania, as mentioned above. The simplicity of cohabitation is merely apparent, as complications can arise when the two cohabitants decide to separate, particularly concerning the minor child. I believe that regulating cohabitation within a well-defined legal framework would greatly assist in resolving issues regarding property and the upbringing and care of children. Adopting a model similar to that of France or Spain would be highly beneficial. The law should at least give cohabitants the possibility of entering into agreements in authentic notarial form, in which they can define the acquisition of property, the subsequent division of it, and especially the way parental authority is exercised, subject to the guardianship court's approval.

References

1. C. Hamangiu, M.Nicolau – DREPT ROMAN (ed. Îngrijită de A.G. Oprea), editura Hamangiu, București 2022, p 211-2014
2. M.N Costin ,Dicționar de drept civil de la A la Z ,ed a2a ,Ed Hamangiu, București 2004,p 15
3. Lucia Irinescu - Dreptul familiei ,editura Hamangiu 2024 ,București, p .47
4. Lucia Irinescu - Dreptul familiei ,editura Hamangiu 2024 ,București, p 48-50
5. Lucia Irinescu - Dreptul familiei ,editura Hamangiu 2024 ,București, p482
6. Juridice.ro- Despre concubinaj. Repere cu privire la exigența conviețuirii.- Andrei Săvescu, 9 iunie 2023.
7. Civil code of Romania
8. Family code of Republic of Moldova
9. Civil code of France
- 10.Civil code of Spain