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FOR ~~DISCUSSION ONLY~~ APPROVAL

# Uniform Cohabitants' Economic Remedies Act

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Uniform Law Commission

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June + 29, 2021

## Uniform Cohabitants' Economic Remedies Act

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# **Uniform Cohabitants' Economic Remedies Act**

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# Uniform Cohabitants' Economic Remedies Act

## Prefatory Note

The Uniform Cohabitants' Economic Remedies Act (UCERA) provides states with comprehensive and uniform guidance on questions concerning cohabitants' property interests and other obligations based on their relationship. UCERA is an enabling act that does not create any special status for cohabitants; it enables cohabitants to exercise the usual rights of individual citizens of a state to contract with others and to bring equitable claims against others in appropriate circumstances. The act affirms the capacity of each cohabitant to contract with the other and to claim a contract-based or equitable remedy against the other with respect to "contributions to the relationship" without regard to any intimate relationship that exists between them and without subjecting them to hurdles that would not be imposed on litigants of similar claims. The act ensures that the nature of the relationship of the parties is not a bar to capacity to contract. At the same time, the act recognizes the value of non-sexual services, activities, and efforts of a party to the relationship as a basis for contractual and equitable claims.

The act responds to the dramatic increase in the number of nonmarital cohabitants in the United States over the past half-century. The Census first began including "Unmarried Partner" as a possible relationship in 1990.<sup>1</sup> Today, more than 17 million people, representing seven percent of American adults, are cohabiting.<sup>2</sup> More adults have cohabited than have been married.<sup>3</sup> The number of older adults who cohabit is growing. In 1996, only two percent of partners in cohabiting households were ages 65 or older; by 2017, that number had tripled to six percent.<sup>4</sup> Just over 6 percent of partners in cohabiting households earn over \$90,000 per year, while more than half earn less than \$30,000.<sup>5</sup>

Cohabitants may share financial responsibilities during their cohabitation, or they may keep their finances separate. One cohabitant may move into a dwelling the other had acquired separately. They may acquire property together. Both may work, or one may work and the other might take care of the household. The rights at separation and death that derive from cohabitation have evolved over the past half-century.

One of the earliest cases in the United States to recognize potential economic rights between nonmarital cohabitants, notwithstanding the nature of their relationship, was the California Supreme Court opinion in *Marvin v. Marvin*.<sup>6</sup> Before *Marvin*, courts typically rejected claims for support between cohabitants. In *Marvin*, the California Supreme Court held that unmarried cohabitants could enter into enforceable contracts to share earnings or property or for support, notwithstanding the<sup>22</sup> nature of their cohabitation, so long as the parties' sexual relationship is not an inseparable part of the agreement. The court identified a broad range of

<sup>1</sup> Linda A. Jacobsen, *What is a Household?* (2020), <https://www.prb.org/what-is-a-household/>.

<sup>2</sup> Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners* (2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html>.

<sup>3</sup> Nikki Graf, *Key Findings on Marriage and Cohabitation in the U.S.* (2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/>.

<sup>4</sup> Gurrentz, *supra* n. 2.

<sup>5</sup> Gurrentz, *supra* n. 2.

<sup>6</sup> *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

possible remedies such as express or implied contract (including partnership and joint venture) and a cluster of other equitable doctrines such as quantum meruit, constructive trust, resulting trust, unjust enrichment, and equitable lien.

A number of states have followed *Marvin* in recognizing rights between nonmarital cohabitants, notwithstanding the nature of their relationship, yet states have developed ~~inconsistent differing~~ approaches to when such rights will be recognized.<sup>7</sup> Some states recognize the potential existence of both express or implied contracts and include equitable claims,<sup>8</sup> some states have imposed writing requirements on cohabitants' agreements,<sup>9</sup> and a few states refuse to accept domestic or household services as lawful consideration, reasoning that such services are inextricably intertwined with the sexual relationship and are typically provided without expectation of compensation when a couple shares a home. ~~The Illinois Supreme Court in 2016, for example, rejected calls for expanded recognition of claims between unmarried couples, although the state does recognize claims between nonmarital cohabitants when they are independent of the relationship.<sup>10</sup> The case generated controversy with its emphasis on the state's continuing interest in distinguishing between marital and nonmarital relationships, and its suggestion that the appropriate source for change was the state legislature, not the courts.<sup>11</sup>~~

~~The most ambitious effort to recognize broad obligations among cohabitants came from Twenty years ago, the American Law Institute's Institute summarized the state of American law regarding unmarried cohabitants as follows:~~

---

<sup>7</sup> Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. Rev. 912, 927 (2019) (“A plurality of states fully embrace *Marvin*’s approach permitting claims as between former cohabitants based on express contract, implied contract, and equitable theories”).

<sup>8</sup> E.g., *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987) (endorsing *Marvin* approach, recognizing that cohabitants may assert claims based on express or implied contract, quantum meruit, equitable remedies); *Estate of Henry v. Woods*, 77 N.E. 3d 1200 (Ind. Ct. App. 2017) (permitting relief based on an express contract, an implied contract, or unjust enrichment, and rejecting argument that cohabiting couple were in a familial relationship which imposed a presumption that services were performed gratuitously); *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000) (holding unjust enrichment claim by nonmarital cohabitant not barred by public policy, does not require agreement or promise); *Bonina v. Sheppard*, 78 N.E. 3d 128 (Mass. App. Ct. 2017) (holding that there is no presumption in Massachusetts that contributions in a cohabitation relationship are gratuitous; that the existence of a romantic relationship does not prevent a party from recovering from a former cohabitant under an unjust enrichment theory); *Sands v. Menard*, 904 N.W.2d 789 (Wis. 2017) (concluding that a claim for unjust enrichment may lie when “two people work together to acquire property ‘through the efforts of both,’” regardless of their cohabitation relationship, citing *Watts*, but that the relationship does not itself create the claim for relief, and that a party seeking relief must still establish the elements of unjust enrichment); *Shaw v. Smith*, 964 P.2d 428 (Wyo. 1998) (in recognizing claim for unjust enrichment by cohabitant, requiring proof that (1) valuable services were provided to the defendant, (2) which were used and enjoyed by the defendant, (3) under circumstances which reasonably notified the defendant that the plaintiff expected payment, and (4) without payment the defendant would be unjustly enriched).

<sup>9</sup> Minn. Stat. Ann. § 513.075 (“[i]f sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties; and (2) enforcement is sought after termination of the relationship.”); N.J.S.A. § 25:1-5(h) (promise of “support or other consideration” by party to nonmarital personal relationship must be in writing and with independent advice of counsel); Tex. Bus. & Com. Code Ann. § 26.01 (agreement made “on consideration of nonmarital conjugal cohabitation” must be in writing).

<sup>10</sup> *Blumenthal v. Brewer*, 69 N.E.3d 834, 856 (Ill. 2016).

<sup>11</sup> *Id.* at 858 (“Until the legislature sees fit to change our interpretation of the public policy in Illinois . . .”).

1  
2       In the United States, courts generally rely upon contract law when they conclude  
3 that cohabiting parties may acquire financial obligations to one another that survive their  
4 relationship. The great majority of jurisdictions recognize express contracts, and only a  
5 handful of them require that the contract be written rather than oral. Jurisdictions split on  
6 whether to recognize implied contracts. Those that do recognize implied contracts differ  
7 in their inclination to infer contractual undertakings from any given set of facts. Some  
8 courts reach much further than others. In doing so, they appear to vindicate an equitable  
9 rather than a contractual principle.<sup>12</sup>

10  
11       Where UCERA is an enabling act, the ALI proposed a more ambitious, perhaps radical,  
12 approach to widespread cohabitancy in the *Principles of Family Dissolution* (ALI *Principles*) in  
13 2002).<sup>13</sup> The ALI *Principles* effectively extend the marital remedies of equitable distribution of  
14 property and alimony to cohabitants. However, the ALI's approach has not been fully adopted  
15 by any state. ~~In~~Closest has come the State of Washington, in which a long-term marriage-like  
16 cohabitation with a sharing of finances and other indicia of an interdependent relationship can  
17 give rise to a presumptive application of community property principles, both at dissolution and  
18 at death, but not to ongoing support obligations.<sup>14</sup> ~~Other~~However, some other countries have  
19 enacted legislation similar to the system set out in the ALI *Principles*.<sup>15</sup> As an alternative, some  
20 jurisdictions have adopted systems that allow a nonmarital couple to opt into various obligations  
21 towards one another.<sup>16</sup> , such as through domestic partnership, civil union, or designated  
22 beneficiary statutes.<sup>17</sup>

23  
24       Even in states that do recognize remedies for nonmarital cohabitants, courts may still be  
25 reluctant to award relief. In declining to recognize a cohabitant's claim, courts have often

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<sup>12</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analyses and Recommendation* § 6.03 cmt (2002).

<sup>13</sup> ~~American Law Institute, *Principles of the Law of Family Dissolution: Analyses and Recommendation* (2002).~~ *Id.* Chapter 6.

<sup>14</sup> See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (applying equitable presumption of community property principles to parties who lived in marriage-like “meretricious relationship”); *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (applying *Connell* and affirming that certain assets acquired during the relationship were to be classified as community-like property subject to a 50/50 equitable division between the parties).

<sup>15</sup> E.g., Adult Interdependent Relationships Act, S.A. 2002, c A-4.5 (Can.), [http://www.qp.alberta.ca/1266.cfm?page=A04P5.cfm&leg\\_type=Acts&isbncln=9780779780334](http://www.qp.alberta.ca/1266.cfm?page=A04P5.cfm&leg_type=Acts&isbncln=9780779780334) [<https://perma.cc/N7FX-8PT3>]; Family Statutes Amendment Act, S.A. 2018, c 18 (Can.), [https://www.assembly.ab.ca/ISYS/LADDAR\\_files/docs/bills/bill/legislature\\_29/session\\_4/20180308\\_bill-028.pdf](https://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_4/20180308_bill-028.pdf) [<https://perma.cc/X4KU-FYN5>] (making numerous references to the Interdependent Relationships Act and substantially affecting the rights of those who qualify as Adult Interdependent Partners)

<sup>16</sup> E.g., C.R.S.A. § 15-22-104 (2021); Mary-Charlotte Y. Carroll, Note, *When Marriage Is Too Much: Reviving the Registered Partnership in A Diverse Society*, 130 Yale L.J. 478, 508–513 (2020)(discussing Belgian and French opt-in structures).

<sup>17</sup> E.g., C.R.S.A. § 15-22-104 (2021); NCLR, *Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States* (2020), <https://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf>. Other countries have adopted opt-in systems. See, e.g., Mary Charlotte Y. Carroll, Note, *When Marriage Is Too Much: Reviving the Registered Partnership in A Diverse Society*, 130 Yale L.J. 478, 508–513 (2020)(discussing Belgian and French opt-in systems).

1 referenced the meretricious nature of the couple’s relationship or a desire to preserve marriage.<sup>18</sup>  
2 There is thus no predictable result when cohabitants dissolve their relationship or when one  
3 cohabitant dies.

4  
5 Although there is certainly a movement in the states towards recognition of the rights of  
6 nonmarital cohabitants, state variation means these approaches are far from cohesive. This  
7 degree of variance from state-to-state leads to a lack of uniformity concerning cohabitants’  
8 claims. ~~The act~~As the Joint Editorial Board for Uniform Family Law and the Joint  
9 Editorial Board for Uniform Trust and Estate Acts noted in proposing a study committee on the  
10 feasibility of an act on the rights of nonmarital cohabitants, “[c]urrently there is no predictable  
11 result when cohabitants break up or when one cohabitant dies. Courts handle cases on a one-at-a-  
12 time basis, without a comprehensive statutory approach.”<sup>19</sup> As an example, the Illinois Supreme  
13 Court in 2016 rejected calls for expanded recognition of claims between unmarried couples,  
14 although the state does recognize claims between nonmarital cohabitants when they are  
15 independent of the relationship.<sup>20</sup> The case generated controversy with its emphasis on the state’s  
16 continuing interest in distinguishing between marital and nonmarital relationships, and its  
17 suggestion that the appropriate source for change was the state legislature, not the courts.<sup>21</sup>  
18

19 UCERA seeks to harmonize these varying approaches by enunciating the basis for  
20 nonmarital cohabitants to pursue remedies against one another. In doing so, the Act actually  
21 serves two purposes: providing certainty and predictability in the law while protecting the  
22 expectations of nonmarital cohabitants. Given that the approaches of many states to nonmarital  
23 cohabitants have not yet been codified, the act provides standard language for enactment.  
24

25 For purposes of the act, a “cohabitant” is defined as one member of a couple if the two  
26 individuals live together “as a couple” and are not married to each other. The term does not set a  
27 time limit as to how long the individuals must cohabit in order to meet the definition. A  
28 cohabitant might be married to someone else. Each cohabitant must be an adult (or an  
29 emancipated minor).  
30

31 Living as a couple does not require that the relationship have a sexual element.  
32 Roommates and siblings have traditionally not faced barriers to asserting claims because of their  
33 relationships, and, accordingly, the act is intended to remove barriers for those who have faced  
34 such barriers. It focuses on allowing cohabitants to bring contractual and equitable claims  
35 against one another, regardless of the intimate nature of their relationship. The act ensures that  
36 the nature of the parties’ relationship is not a bar to their ability to bring claims against one  
37 another, and it recognizes that contractual and equitable claims can be based on the provision of  
38 non-sexual services, activities, and efforts by a party to the relationship. Courts do not always  
39 recognize such domestic services as an adequate basis for recovery, reasoning instead that they

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<sup>18</sup> E.g., *Smith v. Carr*, 2012 WL 3962904 \*4 (C.D. Cal. Sept. 12, 2012) (“Without more, plaintiff’s express contract claim must fail for lack of consideration, as plaintiff’s alleged consideration is inextricably intertwined with any meretricious consideration”); Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67 (2021).

<sup>19</sup> This memo is available on the ULC Committee webpage.

<sup>20</sup> *Blumenthal v. Brewer*, 69 N.E.3d 834, 856 (Ill. 2016).

<sup>21</sup> *Id.* at 858 (“Until the legislature sees fit to change our interpretation of the public policy in Illinois . . .”).



1 are part of the cohabiting relationship and are thus rendered gratuitously.<sup>22</sup>

2  
3 The act protects the legal rights of third parties to the cohabitation. The interests of  
4 secured creditors of, or good faith purchasers from, a cohabitant, cannot be adversely **impacted**  
5 **effected** by a remedy granted under the act. A cohabitant married to a third party may be subject  
6 to any claim by the other cohabitant, but optional provisions are included in Section 8 for those  
7 states choosing to address protection of the spouse's rights and interests in the property of the  
8 married cohabitant. A claim under this act does not affect a child support obligation.

9  
10 The remedies provided in this act are not the only remedies available to cohabitants.  
11 Cohabitants may have claims against one another based on other state law that are not covered  
12 by the act, including, for example, tort claims and partnership claims. The act, in most instances,  
13 supplements and does not replace existing state law. An enacting state's procedural law will  
14 generally govern the claims between cohabitants.

15  
16 The act does not include a definition of court, nor does the act prescribe the court in  
17 which claims between cohabitants may be heard. States may decide that claims between  
18 cohabitants should be heard in general civil or family court. Other state law in an enacting state  
19 will govern whether these claims between living cohabitants are treated as general equitable and  
20 contract claims between individuals who just happen to be cohabitants or as claims that are  
21 similar to those heard by family courts. Claims involving deceased cohabitants should be heard  
22 in the court that handles settlement of decedents' estates and handled as a general claim against  
23 the decedent's estate. There is no need to obtain a judgment in civil or family court first, unless  
24 otherwise required under state law.

25  
26 The act does not address tort suits based on consortium, wrongful death, or infliction of  
27 emotional distress claims but defers to other state laws on such claims.  
28

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<sup>22</sup> *E.g.*, *Smith v. Carr*, No. CV 12-3251-CAS JCGX, 2012 WL 3962904, at \*4 (C.D. Cal. Sept. 10, 2012) (“plaintiff has not alleged she performed services in exchange for defendant's express promises apart from the interactions typical of every romantic relationship”); *Rabinowitz v. Suvillaga*, No. 17 CVS 244, 2019 WL 386853, at \*8 (N.C. Super. Jan. 28, 2019) (“Defendant affirmatively alleges that the parties “expressly formed a contract that obligated the parties to act as if they were married.” [] Thus, the contract, as alleged, goes to the very essence of the parties' personal relationship . . . . Accordingly, the Court finds no basis under existing North Carolina law that allows Defendant to assert a breach of contract counterclaim based on the facts as alleged”); *see Antognini, supra*, at 78 (“Courts hold that individuals cannot contract for exchanges that inhere in the relationship itself, such as services rendered, and generally decline to uphold contracts where the relationship could have been marital”). Some courts will recognize such exchanges. *See Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. Ct. 1983) (finding an oral contract to share assets accumulated during the relationship based on the consideration of domestic services).



1                                   **Uniform Cohabitants' Economic Remedies Act**

2                   **Section 1. Title**

3                   This [act] may be cited as the Uniform Cohabitants' Economic Remedies Act.

4                   **Section 2. Definitions**

5                   In this [act]:

6                               (1) "Cohabitant" means each of two individuals not married to each other who  
7 live together as a couple after each has reached the age of majority or been emancipated. The  
8 term does not include individuals who are too closely related to marry each other legally.

9                               (2) "Cohabitants' agreement" means an agreement between individuals  
10 concerning contributions to the relationship if the individuals are to become, are, or were  
11 cohabitants. The term includes a waiver of rights under the [act].

12                              (3) "Contributions to the relationship" means contributions of a cohabitant that  
13 benefit the other cohabitant, both cohabitants, or the cohabitants' relationship, whether in the  
14 form of efforts, activities, services, or property. The term:

15                                       (A) includes:

16   (i) cooking, cleaning, shopping, household maintenance,  
17 conducting errands, or other domestic services for the benefit of the other cohabitant or the  
18 cohabitants' relationship; and

19   (ii) otherwise caring for the other cohabitant, a child in common,  
20 or another family member of the other cohabitant.

21                                       (B) does not include sexual relations.

22                              (4) "Property" means anything that may be the subject of ownership, whether real  
23 or personal, tangible or intangible, legal or equitable, or any interest therein. The term includes

responsibility for a debt.

(5) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(7) “Termination of cohabitation” means the earliest of:

(A) the death of a cohabitant;

(B) the date the cohabitants stop living together as a couple; or

(C) the date of the cohabitants’ marriage to each other.

### Comment

The definition of “cohabitant” specifies to whom the act applies. The parties cannot be in a common law or other lawful marriage to each other and still be considered cohabitants. A cohabitant may be an emancipated minor under the age of 18 years if otherwise eligible to marry under state law. The definition specifies and thus limits application of the act to cohabitating couples rather than to relationships of more than two people. The definition also requires that the cohabitants live with one another, so it does not cover couples who are clearly “living apart together.” Cynthia Grant Bowman, *How Should the Law Treat Couples Who Live Apart Together?*, 29 Child & Fam. L.Q. 335, 335-36 (2018). Finally, the cohabitants must live together as a couple. Living together as a couple does not require that the relationship have a sexual element. ~~Roommates~~ On the other hand, roommates and siblings have traditionally not faced barriers to asserting claims because of their relationships, ~~and accordingly, the. This act is intended to remove~~ removes barriers for ~~these~~ cohabitants who *have* previously faced such barriers. If each cohabitant is unmarried, they should be otherwise eligible to marry one another under the law of the state in which they cohabit and the rights sought to be enforced attach.

Because the act provides rights only to cohabitants as defined herein, it does not cover minors. Consequently, if a minor begins living with a nonmarital partner, the act only provides rights that start once the minor reaches the age of majority. The minor may well have rights outside of the act, and, if so, those are preserved.

1 Although cohabitants cannot be married to each other, either of them might be married to  
2 a third party. Existing cases (typically) do not differentiate between a cohabitant who is married  
3 and one who is not in terms of potential remedies. *E.g., In re Est. of Roccamonte*, 808 A.2d 838,  
4 841 (N.J. 2002) (estate of deceased married cohabitant liable to nonmarital cohabitant for  
5 support); Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitation: The US Approach*, \_\_  
6 Houston J. Intl. L. \_\_ (forthcoming 2021)(listing married cohabitant cases). In a somewhat  
7 analogous situation, the Uniform Marriage and Divorce Act recognizes the concept of a “putative  
8 spouse” who may have rights against a married partner. See UMDA § 209. The inclusion of  
9 married cohabitants is not designed or intended to undercut the rights of the married cohabitant’s  
10 spouse but to ensure equity is done between the cohabitants.

11  
12 A state that provides parties in civil unions or domestic partnerships with rights  
13 comparable to those of a married couple may want to ensure that the term “cohabitants” does not  
14 include those in a civil union or domestic partnership with one another; that is, parties in such  
15 relationships would be excluded from qualifying as a cohabitant. See, e.g., Nev. Rev. Stat.  
16 §122A.200(a)(“Domestic partners have the same rights, protections and benefits, and are subject  
17 to the same responsibilities, obligations and duties under law, whether derived from statutes,  
18 administrative regulations, court rules, government policies, common law or any other provisions  
19 or sources of law, as are granted to and imposed upon spouses.”).  
20

21 Example 1: A and B are siblings. After their spouses died, A and B moved in together.  
22 They have a joint bank account for household expenses, they eat their meals together, and they  
23 take care of one another. A and B are not cohabitants within the meaning of the act: because  
24 they are too closely related to marry each other.  
25

26 Example 2: A and B are unmarried and live together. They share expenses of the  
27 household. Absent additional proof that A and B are living together as a couple, they are not  
28 cohabitants within the meaning of the act.  
29

30 Example 3: A, B, and C live together. A and B are a couple, B and C are a couple, A  
31 and C are a couple. Nonetheless, the act does not consider A, B, and C together as cohabitants.  
32 Thus, A may enter into a contract with, or make an equitable claim against, C, but A, B, and C  
33 cannot enter into an agreement under this act. The act defines a cohabitant as “each of two  
34 individuals.” If A, B, and C enter into a three-party agreement, they may have claims under  
35 other state law.  
36

37 Example 4: A and B are cohabiting in State X. A moves to State Y for six months for  
38 work but plans to return to State X to live with B after the work ends. While A and B might not  
39 have qualified as cohabitants if their relationship had started while they were domiciled in  
40 different states, a period of separation does not necessarily end the cohabitation. See Fleming v.  
41 Spencer, 110 Wash. App. 1017 \*2 (2002)(“except for career-related absences [of up to one year],  
42 they continuously cohabited”). That is, once individuals are living together as a couple,  
43 subsequent actions might not disqualify them from being considered cohabitants, even if those  
44 actions would have initially prevented the individuals from qualifying as cohabitants.  
45

46 Example 5: A and B were married thirty years ago. A moved to a different city twenty

1 years ago and began cohabiting with C. A and C built a business together but titled it in A's  
2 name. If A and C separate, C could assert a claim against A under this act, but B would retain  
3 rights as A's spouse. Section 8 addresses the rights of a spouse in this situation.

4  
5 The definition of “contributions to the relationship” is central to the act and is designed to  
6 be expansive. For example, in addition to property and domestic services, it also includes  
7 activities related to business development, business entertaining, and similar activities for the  
8 benefit of the other partner or the relationship generally. E.g., *Hills v. Superior Court (Munoz)*,  
9 No. B174068, 2004 WL 1657689, at \*6 (Cal. Ct. App. July 26, 2004) (reasoning that female  
10 plaintiff's assertions, including that “she gave up her career and devoted herself to performing  
11 household and other domestic services for him so as to aid his business career,” gave rise to  
12 triable issues). Contributions to the relationship can provide the basis for both a contractual and  
13 an equitable claim under the act.

14  
15 Cohabitation often involves sexual conduct. The definition distinguishes contributions to  
16 the relationship from sexual services, which are distinct in nature. This definition and Section 4  
17 make clear that the existence of a sexual relationship during the cohabitation does not preclude a  
18 successful claim under this act; domestic services are not the same as sexual services. For further  
19 discussion of the need to distinguish the two, see Albertina Antognini, *Nonmarital Contracts*, 73  
20 Stan. L. Rev. 67 (2021).

21  
22 The definition of cohabitants' agreements ensures that such agreements can include a  
23 waiver of rights, including the right to bring an equitable claim under Section 7. The standards  
24 for proving such a waiver are the same as for proving any other terms of a cohabitants'  
25 agreement. As provided in Section 6, a cohabitants' agreement may be oral, written, or in a  
26 record, express or implied-in-fact.

27  
28 The definition of “record” is used within the act with respect to cohabitants' agreements.  
29 Cohabitants' agreements relate to the exchange of property and services, activities and efforts  
30 that are a part of the relationship of living together as a couple. Cohabitants' agreements need  
31 not be in writing, because the nature of cohabiting relationships is informal. The existence of an  
32 express agreement may be found in videos, emails, and any other type of information that can be  
33 retrieved in a tangible form. A record is not, however, required to establish such agreements:  
34 cohabitants' agreements may be oral or implied-in-fact.

35  
36 In defining “termination of cohabitation,” subsection 7(c) refers to the cohabitants'  
37 marriage: this includes common law marriage in those states that recognize common law  
38 marriage. In those states that provide parties in civil unions or domestic partnerships with rights  
39 comparable to those of a married couple, the state may want to include the entry into that status  
40 as a termination of the relationship.

### 41 42 **Section 3. Scope**

43 This [act] applies only to a contractual or equitable claim between cohabitants concerning  
44 an interest, promise, or obligation arising from contributions to the relationship. The rights and

remedies of cohabitants under this [act] are not exclusive.

## Comment

In conjunction with Section 4, Section 3 states the overall intent of the act: to remove bars to claims which arise within the framework of a cohabiting relationship, even if the relationship is an intimate, nonmarital one. In general, cohabitants should be treated as other litigants and not be precluded from bringing claims solely because their relationship has an intimate nature. It provides for affirmative recognition of cohabitants' rights to maintain relationship-based claims. It is intended to overturn decisions prohibiting claims because a cohabiting relationship was meretricious and to overturn decisions that, even if they recognized cohabitants' claims, created hurdles to successful prosecution of those claims. *See, e.g., Antognini, supra.*

Enforcement of a claim under this act may take a variety of forms and is designed to be expansive.

Example 1: ~~The parties shared a household. One cohabitant A and B qualified as cohabitants. After termination of the relationship, A~~ still has property in the household; a court might enjoin ~~one party A~~ from access to the residence while adjudicating the property claims.

Example 2: One party has videos taken during the relationship that a court might order be deleted.

This section makes clear that a cohabitant may have cognizable rights vis-a-vis the other cohabitant by virtue of other state law (e.g., the state's partnership law); those rights are not lost unless clearly inconsistent with this act. The rights and remedies provided by the act are not intended to be the exclusive rights and remedies afforded to cohabitants.

This act clearly does not have any effect on state law concerning marriage. Marriage is a formal legal status that is distinct from cohabitation.

## Section 4. Right of Cohabitant to Bring Action

(a) An individual who is or was a cohabitant may commence an action on a contractual or equitable claim that arises out of contributions to the relationship. The action is not:

(1) barred because of a sexual relationship between cohabitants;

(2) subject to additional substantive or procedural requirements because the parties are or were cohabitants or because of a sexual relationship between the cohabitants; or

(3) extinguished by the marriage of cohabitants to each other.

1 (b) An action may be commenced on behalf of a deceased cohabitant's estate.

2 (c) An action may be commenced against a deceased cohabitant's estate and adjudicated  
3 under this [act] and other law of this state applicable to claims against decedents' estates.

#### 4 **Comment**

5 This section, as well as Section 3, set out the core goals of the act in allowing cohabitants  
6 to assert claims against one another in the same manner as other litigants. These provisions  
7 abrogate court decisions that have held that cohabitation agreements are void as against public  
8 policy. *See, e.g., Blumenthal v. Brewer*, 69 N.E.3d 834, 854 (Ill. 2016), in which the court  
9 rejected constructive trust and restitution claims by a long-term cohabitant, noting that although  
10 the parties may have contracted independently of their cohabiting relationship, recognition of  
11 claims based on their cohabiting relationship would be inconsistent with the legislature's  
12 abolition of common law marriage. In *Gunderson v. Golden*, 360 P.3d 353 (Idaho Ct. App.  
13 2015), the court rejected a claim for division of property after a 25-year cohabitation stating  
14 "[t]he elimination of common-law marriage, supported by an explicit public policy justification,  
15 commands our courts to refrain from enforcing contracts in contravention of clearly declared  
16 public policy and from legally recognizing cohabitational relationships in general." As Section  
17 6(b) recognizes, contributions to the relationship can provide a basis for a contractual claim  
18 under this act, while Section 7(a) recognizes that such contributions can provide a basis for an  
19 equitable claim.

20 Subsection (a) emphasizes that cohabitation and the possibility, likelihood, or actuality of  
21 sexual relations between the cohabitants are irrelevant to the validity of their claims. Further, it is  
22 designed to ensure that cohabitants may pursue claims against one another in the same manner as  
23 other litigants without the imposition of additional hurdles. Cohabitants' claims are, for  
24 example, subject to the same statutes of limitation and burdens of proof as apply to other  
25 contractual or equitable claims between individuals under the law of enacting state.

26 Note that the Statute of Frauds ~~invalidates agreements~~ applies only to invalidate a  
27 promise that, by its terms, cannot be performed within one year, ~~but "the.~~ "[T]he enforceability  
28 of a contract under the one-year provision does not turn on the actual course of subsequent  
29 events, nor on the expectations of the parties as to the probabilities." Restatement (Second) of  
30 Contracts § 130 cmt. (1981). And some jurisdictions allow part performance to serve as reliable  
31 enough evidence of the agreement to take it outside the statute. Robert E. Scott and Jody S.  
32 Kraus, *Contract Law and Theory* 521 (5th ed. 2013); Jody S. Kraus & Robert E. Scott, *Contract*  
33 *Design and the Structure of Contractual Intent*, 84 N.Y.U. L. Rev. 1023, 1044 (2009). Moreover,  
34 when a promisor makes a promise "which the promisor should reasonably expect to induce  
35 action or forbearance on the part of the promisee or a third person and which does induce the  
36 action or forbearance," then the promise "is enforceable notwithstanding the Statute of Frauds if  
37 injustice can be avoided only by enforcement of the promise." Restatement (Second) of  
38 Contracts § 139 (1981). This act assumes the applicability of those exceptions to the statute of  
39 frauds— under other state law.

1       Example: A and B are cohabitants. A works primarily at a business, and B works  
2 sometimes in the business but also in the home. A promises to take care of B by providing B a  
3 share of the business in return for B taking care of the home. If A and B cohabit for a full year  
4 after the promise is made, that is sufficient indicia that the promise was made to remove the  
5 agreement from the statute. Moreover, because the promise could be completed within a year,  
6 the statute need not apply.

7       Finally, subsection (a) also clarifies that a claim under this act can still be brought, even if  
8 the cohabitants marry each other. Notwithstanding the cohabitants' subsequent marriage to one  
9 another, a claim for breach of a contract accrues upon breach while an equitable claim predicated  
10 on contributions to the relationship accrues upon termination of cohabitation (i.e., by that  
11 marriage) under Section 7(b). When they marry, cohabitants may want to ensure clarity with  
12 respect to their rights in a premarital agreement. See the Uniform Premarital and Marital  
13 Agreements Act (2012).

14       Because UCERA does not specify the appropriate court for actions between cohabitants,  
15 a state might require that such actions be brought in a court of general jurisdiction. If a  
16 cohabitants' claim is, however, brought at divorce, then a state might want to permit a family  
17 court to hear such claims.

18       Subsections (b) and (c) confirm that claims may be brought against, or on behalf of, the  
19 estate of a deceased cohabitant. The enacting state's procedures governing claims by or against a  
20 decedent's estate will similarly govern any such claim involving cohabitants, although Section 8  
21 provides alternatives for states wanting to add some protection for the spouse of a cohabitant.

## 22       **Section 5. Governing Law**

23       (a) Except as otherwise provided in this [act], a claim under this [act] is governed by  
24 other law of this state, including choice-of-law rules.

25       (b) The validity, enforceability, interpretation, and construction of a cohabitants'  
26 agreement are determined by:  
27

28               (1) the law of the state designated in the agreement if such designation is valid  
29 under other law of this state; or

30               (2) in the absence of an effective designation under paragraph (1), the law of this  
31 state, including choice-of-law rules.

## 32       **Comment**

33       This act coordinates with, and does not change, existing state law, except to the extent  
34 necessary to recognize that each cohabitant may have legally cognizable interests against the



1 other. State procedural law governing statutes of limitations, choice of law rules, transfers of  
2 property, probate proceedings, etc. control, unless otherwise specified in the act. One such  
3 specification is the clarity provided regarding when claims under this act accrue.  
4

5 For example, Sections 6(c) and 7(b) provide clarity regarding when contractual and  
6 equitable claims each accrue. Moreover, because state law governs cohabitants' claims under the  
7 act, unless otherwise provided in this act, the act may change state law that otherwise prevents  
8 recognition of contractual or equitable claims between cohabitants where domestic services (in  
9 the form of contributions to the relationship) constitute consideration. It may also be that  
10 recognition of the value of contributions to the relationship for purposes of enforcing equitable  
11 claims may be a change from existing state law.  
12

13 The intent is for other state law to supplement the act unless clearly inconsistent with the  
14 act. Thus, for example, if the cohabitants have a business agreement with one another, that  
15 agreement would be subject to state law that governs such agreements rather than subject to the  
16 provisions of this act.  
17

18 Subsection (b) provides that, as with most other agreements, a cohabitation agreement  
19 can specify a governing law, provided that law has a relationship to either the parties or their  
20 agreement, and it is not contrary to the enforcing state's public policy. Because cohabitants may  
21 move between states, the act contemplates that the rights of those cohabitants to bring claims  
22 against one another will be preserved if consistent with conflict of law principles.  
23

24 Example 1: A and B are cohabitants and live in State X, which has enacted UCERA.  
25 After three years in State X, they move to State Y, which has not enacted UCERA. State Y will  
26 apply its own choice of law rules to determine the rights between the parties under State X law.  
27

28 Example 2: A and B are cohabitants and live in State Y, which has not enacted UCERA.  
29 They vacation in State X, which has enacted UCERA. No rights arise under UCERA from the  
30 vacation in State X.  
31

32 Example 3: A and B are cohabitants and live in State Y for three years. State Y has not  
33 enacted UCERA. They move together to State X, which has enacted UCERA. Their relationship  
34 then terminates after one day in State X. After the move, A may bring an action in State X  
35 against B for claims under UCERA based on their cohabitation in State Y. In adjudicating the  
36 claims, a State X court would need to determine whether the public policy of State X should  
37 override the public policy of State Y.  
38

39 Example 4: A and B are cohabitants and live in State Y for three years. State Y has not  
40 enacted UCERA. Their relationship terminates. B remains in State Y, and A moves to State X,  
41 which has enacted UCERA. A might be able to bring common law claims, subject to the  
42 jurisdiction of State X, but cannot bring a claim under UCERA in State X. ~~This is the result~~  
43 ~~because UCERA does not create new rights but removes barriers to the enforcement of existing~~  
44 ~~rights. because no rights under UCERA have accrued in State X.~~  
45

## 46 Section 6. Cohabitants' Agreements

1 (a) A cohabitants' agreement may be oral, written, or in a record, express or implied-in-  
2 fact.

3 (b) Contributions to the relationship are sufficient consideration for a cohabitants'  
4 agreement.

5 (c) A claim for breach of a cohabitants' agreement accrues on breach and may be  
6 commenced, subject to [cite to the applicable statute of limitations], during cohabitation or after  
7 termination of cohabitation.

8 (d) A term in a cohabitants' agreement that affects adversely a child's right to support is  
9 unenforceable.

10 (e) A term in a cohabitants' agreement that limits the ability of the cohabitant, or requires  
11 a cohabitant, to pursue a civil, criminal, or administrative remedy is voidable to the extent the  
12 remedy is available because the cohabitant is a victim of a [crime of violence].

13 **Legislative Note:** Subsection (c) should cite to the state's statute of limitations on contractual  
14 claims.

15  
16 Subsection (e) should be modified in a state that does not have a clear definition of "crime of  
17 violence".  
18

### 19 Comment

20 Section 6 concerns contractual claims between cohabitants, while Section 7 deals with  
21 equitable remedies, including quasi-contract. A cohabitant may bring claims under both Sections  
22 6 and 7. A state will handle such claims in the same way as it handles other lawsuits with both  
23 contractual and equitable claims.  
24

25 Subsection (b) provides that contributions to the relationship may constitute consideration  
26 for such an agreement. In the past, some courts have been reluctant to find that domestic  
27 services are adequate. See Antognini, *supra*. This clarifies the law for cohabitants. See, e.g.,  
28 Smith v. Carr, No. CV 12-3251-CAS JCGX, 2012 WL 3962904, at \*4 (C.D. Cal. Sept. 10,  
29 2012); Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853, at \*8 (N.C. Super. Jan. 28,  
30 2019); Antognini, *supra*, at 108-09; but see Knauer v. Knauer, 470 A.2d 553 (Pa. Super. Ct.  
31 1983).  
32

33 There is no presumption in favor of finding a contract.

1 Subsection (c) makes clear that a claim for breach may be brought while the couple is  
2 still living together and even though the relationship has not been terminated. It also reiterates  
3 the rule of Section 5(a) to specify that the applicable statute of limitations is set by other state  
4 law.

5  
6 When cohabitation is terminated by death, there may be questions about the  
7 enforceability of an agreement concerning a provision to be made – or not to be made – in a will.  
8 Sections 3 and 5 provide that claims between cohabitants should be treated comparably ~~to~~ with  
9 claims between noncohabitants. Issues concerning the enforceability of an agreement to make a  
10 provision at death is governed by other state law. An express contract may be covered by  
11 Uniform Probate Code Section 2-514 (iii), which permits, for example, “a writing signed by the  
12 decedent evidencing the contract” to be enforceable.

13  
14 Subsection (d) reiterates the general rule that child support obligations have priority over  
15 other claims to the income of the payor. This act will not affect child support determinations or  
16 child support obligations.

17  
18 Subsection (e) protects the rights of victims of crime. It ensures that their remedial rights  
19 relating to the crime are not lost through cohabitation and cannot be the subject of an agreement.  
20 For example, a term in an agreement which provided that a cohabitant could not pursue a civil  
21 protection order would be voidable. Similarly, a provision in a cohabitation agreement which  
22 purported to give a cohabitant a right or interest in payments the other cohabitant received from  
23 or through the perpetrator, in an administrative or civil proceeding, would be voidable. A  
24 provision in an agreement that would require a crime victim to pursue a civil, criminal, or  
25 administrative remedy is also presumed to be coercive and therefore voidable.

## 26 27 **Section 7. Equitable Relief**

28 (a) ~~In~~ Unless inconsistent with a valid provision of a cohabitants’ agreement, and in  
29 addition to any remedies otherwise available ~~under other law of this state~~, a cohabitant may  
30 commence an equitable action against the other cohabitant based on contributions to the  
31 relationship.

32 (b) An equitable claim based on contributions to the relationship accrues on termination  
33 of cohabitation and is subject to equitable defenses.

34 (c) In addition to other provisions of law governing an equitable claim, the court  
35 adjudicating a claim under this section shall consider:

36 (1) the nature and value of contributions to the relationship by each cohabitant,

1 including the value to each cohabitant and the market value of the contributions;  
2 (2) the duration and continuity of the cohabitation;  
3 (3) the extent to which a cohabitant reasonably relied on conduct of the other  
4 cohabitant;  
5 (4) the extent to which a cohabitant demonstrated an intent to share, or not to  
6 share, property with the other cohabitant; and  
7 (5) other factors the court considers relevant.

### 8 **Comment**

9 This section, and, in particular, subsection (a), makes clear that unjust enrichment and  
10 other equitable claims available to cohabitants need not be tied to a specific asset, and that such  
11 claims may be based on non-monetary contributions to the relationship. See, e.g. Cf., *Blumenthal*  
12 *v. Brewer, supra*. The section recognizes that other claims, both contract claims and other  
13 equitable claims, are available to cohabitants, outside the scope of this act.  
14

15 Note that the cohabitants could enter into a valid agreement that would preclude equitable  
16 claims such as, for example, an agreement that neither cohabitant could bring claims against the  
17 other under the act or in which one cohabitant waived any right to bring such claims.  
18

19 Subsection (b) represents an exception to the general policy of the act to defer to other  
20 state law. An equitable claim under this act accrues upon termination of cohabitation: death,  
21 marriage of the cohabitants, or when the cohabitants stop living together as a couple. It is  
22 important, especially in cases in which the cohabitants lived in multiple states, to have a date  
23 certain from which the time to bring a claim, as prescribed in other state law, will begin to run.  
24 It is at the point of termination that rights, if any, under this act will vest in a cohabitant; other  
25 state law will determine whether an action to enforce those claims is timely.  
26

27 The act contemplates that courts will consider a range of appropriate forms of relief, such  
28 as disgorgement or constructive trust; injunctive relief, and particularly preliminary injunctive  
29 relief, which may be critical to preventing dissipation of assets. Because this act does not create  
30 a status comparable to marriage, relief of the sort ordinarily prescribed for the dissolution of  
31 marriage is inapplicable.  
32

33 Subsection (c) provides a list of factors to be considered in adjudicating an equitable  
34 claim; the list of factors provides guidance and is not designed to restrict a court's consideration  
35 of other factors.  
36

37 The initial factor seeks to ensure that "contributions to the relationship" are appropriately  
38 valued. These contributions are the essence of the sharing and exchange between the parties.

1 Therefore, in equity, this section provides for consideration and evaluation of those contributions  
2 not simply by reference to market value. See Candace Saari Kovacic-Fleischer, *Cohabitation*  
3 *and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 Wash. & Lee L. Rev. 1407,  
4 1426 (2011)(noting that not all services provided during a cohabiting relationship “are market  
5 transactions, however, and therefore they are not easily valued”). The value of a homemaker  
6 cohabitant’s services to the household is more than the hourly rate of a housekeeper or cook.  
7 The value of such contributions is not limited by market value. This factor ensures that  
8 contributions in the form of services will not be deemed gratuitous, but will be measured by their  
9 actual value to the other cohabitant and to the couple. See *Featherston v. Steinhoff*, 575 N.W.2d  
10 6, 10 (Mich. Ct. App. 1997)(presumption of gratuitous services); Restatement (Third) of  
11 Restitution and Unjust Enrichment § 28 cmt. d (Am. Law Inst. 2011) (noting that equitable  
12 claims “based purely on domestic services are less likely to succeed, because services of this  
13 character tend to be classified among the reciprocal contributions normally exchanged between  
14 cohabitants whether married or not.”). Courts are directed to consider the subjective value of the  
15 benefit, as well as the market value. The cohabitant performing the services likely receives  
16 benefits from the other cohabitant, which should be valued as well.

17  
18 Example: A and B are cohabitants. A takes care of the home and the parties’ four  
19 children while B starts a successful business and spends little time on any domestic services. At  
20 the end of the relationship, A *may have* a claim that the value of A’s contributions to the  
21 relationship should be half of the value of the successful business. Cf., *Watts v Watts*, 405  
22 N.W.2d 305 (Wis. 1987).

23  
24 Subsection (c)(2) concerns the duration and continuity of the relationship. Because any  
25 cohabiting relationship is covered by the act, the duration of the relationship is important in  
26 determining the parties’ reasonable expectations and the nature of any relief. Thus, for example,  
27 a three-year relationship may result in comparatively minimal unjust enrichment, while a twenty-  
28 five-year relationship provides significant opportunity for the occurrence of unjust enrichment.

29  
30 Subsection (c)(3) is directed to the reasonable reliance of the cohabitants. Each may have  
31 exhibited conduct indicating an intent to maintain separate lives, or there may have been reliance  
32 on the other’s conduct. See, e.g., *Marra v. Nazzaro*, 94 N.Y.S.3d 539 (N.Y. City Ct.  
33 2018)(enforcing, based on promissory estoppel, defendant’s promise to plaintiff to allow her to  
34 live rent-free on his property for a period of months).

35  
36 Subsection (c)(4) requires the court to consider evidence relating to the parties’ conduct  
37 or statements showing each cohabitant’s intent to share property with the other, both during the  
38 relationship or when the relationship ends, or one cohabitant dies. Thus, statements such as  
39 “what’s mine, is yours” would be relevant, as would the fact that title to the joint residence  
40 remained in the name of one cohabitant. This factor is not intended to be used to grant rights  
41 based on the parties’ mere qualification as “cohabitants” as defined in the act. This factor  
42 recognizes that one party's reasonable understanding that property would be shared, even if not  
43 the other party's understanding, would be relevant in considering equitable relief.

44  
45 Example 1: A and B are cohabitants. Throughout the relationship, they maintain  
46 separate bank accounts. A owned a family vacation home that the cohabitants visited several

1 times per year. A court could reasonably conclude there was no intent to share assets.

2  
3 Example 2: A and B are cohabitants and share resources with one another. Before the  
4 cohabitation, A was married to C, and they had three children. C died several years ago. B was  
5 married to D, and they had two children. B and D are divorced. A and B decide to cohabit,  
6 rather than to marry one another, because they want to preserve assets for their children from  
7 their earlier relationships. Even in the absence of an express waiver of equitable rights, no  
8 equitable claim accrues where the evidence showed intent not to share upon termination of the  
9 relationship.

10  
11 Example 3: A and B are cohabitants. A tells B that A will take care of B for the rest of  
12 B's life. A's statement indicates an intent to share resources upon termination of the  
13 relationship.

14  
15 The list of factors included is not exhaustive. Subsection (c)(5) provides a catch-all factor  
16 to allow the court to examine fully all relevant equities.

## 17 18 **Section 8. Effect of Court Order or Judgment on Third Party**

19 (a) [Except as provided in subsection(c), a][A] court order or judgment granting relief  
20 under this [act] against a cohabitant or a cohabitant's estate is an order or judgment in favor of a  
21 general creditor.

22 (b) A court order or judgment granting relief under this [act] does not impair the rights of  
23 ~~an earlier~~ a good-faith purchaser from, or secured creditor of, a cohabitant.

24 [(c) A court order or judgment concerning [a claim under this [act]] [an equitable claim  
25 under Section 7] does not supersede a right or interest of a cohabitant's spouse or surviving  
26 spouse to the cohabitant's property[, unless:

- 27 (1) the spouse had notice of the proceeding and an opportunity to be heard;  
28 (2) the court determines, based on the totality of the circumstances, that justice  
29 requires that all or part of the cohabitant's claim should be satisfied; and  
30 (3) the order or judgment preserves as much of the spouse's right or interest as  
31 appropriate ~~or legally required~~.]

32 **Legislative Note:** This section provides five options for treating claims of a spouse and a

1 cohabitant to a married cohabitant's property:

2  
3 (1) A state that seeks to treat a cohabitant's claim as a general creditor's claim in all cases  
4 should adopt only subsections 8(a) and (b) and not adopt subsection 8(c).

5  
6 (2) A state that seeks to insulate a spouse from both contractual and equitable claims of a  
7 cohabitant should adopt subsection 8(c) so that the subsection will read as follows:

8  
9 (c) A court order or judgment concerning a claim under this [act] does not supersede a  
10 right or interest of a cohabitant's spouse or surviving spouse to the cohabitant's  
11 property.

12  
13 (3) A state that seeks to insulate a spouse from both contractual and equitable claims of a  
14 cohabitant but allow a court under certain circumstances to find that justice requires at least  
15 some satisfaction of the ~~cohabitants'~~ cohabitant's claims ~~even~~ against a married cohabitant will  
16 adopt Section 8(c) so that the subsection will read as follows:

17  
18 (c) A court order or judgment concerning a claim under this [act~~H~~] does not supersede a  
19 right or interest of a cohabitant's spouse or surviving spouse to the cohabitant's  
20 property, unless:

21  
22 (1) the spouse had notice of the proceeding and an opportunity to be heard;

23  
24 (2) the court determines, based on the totality of the circumstances, that justice requires  
25 that all or part of the cohabitant's claim should be satisfied; and

26  
27 (3) the order or judgment preserves as much of the spouse's right or interest as  
28 appropriate and legally required.

29  
30 (4) A state that seeks to treat a cohabitant's contractual claim in the same manner as a general  
31 creditor's claim and insulate a spouse only from an equitable claim under Section 7 should  
32 adopt subsection 8(c) so that the subsection will read as follows:

33  
34 (c) A court order or judgment concerning an equitable claim under Section 7 does not  
35 supersede a right or interest of a cohabitant's spouse or surviving spouse to the  
36 cohabitant's property.

37  
38 (5) A state that seeks to treat a cohabitant's contractual claim in the same manner as a general  
39 creditor's claim and allow a court under certain circumstances to find that the interest of justice  
40 requires at least some satisfaction of the cohabitant's equitable claim even against a married  
41 cohabitant will adopt subsection 8(c) so that the subsection will read as follows:

42  
43 (c) A court order or judgment concerning an equitable claim under Section 7 does not  
44 supersede a right or interest of a cohabitant's spouse or surviving spouse to the  
45 cohabitant's property, unless:



*(1) the spouse had notice of the proceeding and an opportunity to be heard;*

(2) the court determines, based on the totality of the circumstances, that justice requires that all or part of the cohabitant's claim should be satisfied; and

(3) the order or judgment preserves as much of the spouse's right or interest as appropriate and legally required.

### Comment

The act treats a judgment in favor of a cohabitant as a general creditor claim, regardless of whether that judgment is against a living cohabitant or a deceased cohabitant's estate. Thus, for example, if a state chooses not to adopt subsection (c), a successful cohabitant's claims against a deceased cohabitant's estate will have priority over a surviving spouse of the decedent. This is how the claims of other creditors, such as plumbers or others who provided services to the decedent before death, are treated.

The act further ensures that secured creditors and good faith purchasers who generally have no notice, constructive or otherwise, of the cohabiting partners' relationship are protected. Priority is granted to their claims over those of a cohabitant. Thus, in general, in a dispute between a secured creditor of cohabitant A and cohabitant B over cohabitant A's property, the secured creditor wins.

Bracketed subsection (c) allows a state to choose whether and how to prioritize a cohabitant's spouse's claims over judgments entered in favor of the other cohabitant, providing several different options for the states. Regardless of whether a state adopts any of the options in subsection (c), a cohabitant has no legally cognizable claims against a married cohabitant's private or military pension or other assets subject to state or federal law, such as ERISA. ERISA's preemption clause "supersede[s] any and all State laws insofar as they ... relate to any [ERISA-covered] employee benefit plan ...." ERISA § 514(a), 29 U.S.C. § 1144(a). Accordingly, in a case based on a state's enactment of UCERA in which a cohabitant seeks to reach ERISA-covered retirement assets, ERISA would preempt the cohabitant's cause of action. Not all retirement benefits are covered by ERISA.

In selecting among the subsection (c) options, a state might choose to prioritize: 1) the claims of a spouse over both the contractual and equitable claims of a cohabitant; 2) the contractual claims of a spouse over only the equitable claims of a cohabitant. One reason for choosing to permit a cohabitant's contractual claim to be treated like that of a general creditor is because a cohabitant who enters into a contract, even if before the effective date of the act, has notice of those obligations, has voluntarily undertaken them, and accordingly, should be held responsible for those actions, even if that means that a spouse's claim might be diminished.

Example 1: A is married to B. B is cohabiting with C. B executes a will that leaves all of B's property to X, B's brother. B dies. C asserts both equitable and contractual claims under this act to be satisfied from B's estate. A asserts an elective share claim against B's estate. In a state that adopts Section 8(c) with the first set of brackets, only once A's elective share has been satisfied can C's equitable and contractual claims be asserted against any remaining property in

1 the estate. In a state that adopts Section 8(c) with the second set of brackets, thereby prioritizing  
2 a spouse's claims only over equitable claims, C's contractual claims would be treated like other  
3 creditor claims, potentially reducing the size of the estate against which A can assert an elective  
4 share, while C's equitable claims could only be asserted after A's elective share has been  
5 satisfied.

6  
7 Example 2: A is married to B. B is cohabiting with C. B dies intestate in State X, with  
8 no children or parents who survive. Under the law of State X, the surviving spouse receives the  
9 entire intestate estate. In a state that adopts Section 8(c) with the first set of brackets, there is no  
10 property available to satisfy any equitable or contractual claims that C might assert against the  
11 estate. In a state that adopts Section 8(c) with the second set of brackets, thereby prioritizing a  
12 spouse's claims only over equitable claims, C's contractual claims would be treated like other  
13 creditor claims, potentially reducing the size of the intestate estate, while there is no property  
14 available to satisfy any equitable claim that C might assert against the estate.

15  
16 Both options include another set of bracketed provisions that would allow a cohabitant's  
17 claims to be treated like those of a general creditor under circumstances in which the spouse had  
18 notice and an opportunity to be heard in the proceeding between the cohabitants, and a court  
19 determined that justice requires satisfaction of the cohabitant's claims. But even if the court  
20 finds that justice requires a remedy for the cohabitant, the court is directed to tailor the remedy to  
21 provide as much protection as is appropriate to the spouse's interests. This option recognizes the  
22 competing interests of the cohabitant and the spouse but would tip the scale ever so slightly in  
23 favor of the spouse if all other things are equal. For example, a court might consider the length of  
24 time that the spouse and cohabitant each lived with the individual in common along with the  
25 property acquired during each of those periods. See UMDA Section 209.

26  
27 If applicable state law provides that parties in civil unions or domestic partnerships have  
28 rights comparable to those of a married couple, then the term "spouse" will include those who  
29 have entered into domestic partnerships or civil unions.

## 30 31 **Section 9. Principles of Law and Equity**

32 The principles of law and equity supplement this [act] except to the extent inconsistent  
33 with this [act].

## 34 **Section 10. Uniformity of Application and Construction**

35 In applying and construing this uniform act, a court shall consider the promotion of  
36 uniformity of the law among jurisdictions that enact it.

## 37 **Section 11. Relation to Electronic Signatures in Global and National Commerce Act**

38 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National

Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

**Legislative Note:** *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

## Section 12. Transitional Provisions

(a) This [act] applies to a cohabitants’ agreement made before, on, or after [the effective date of this [act]].

(b) This [act] applies to an equitable claim under this [act] that accrues before, on, or after [the effective date of this [act]].

**Legislative Note:** *A state that previously has not recognized a claim between cohabitants based on contract or in equity arising from contributions to their relationship may want to apply this act only to a claim that accrues on or after the effective date.*

## Comment

~~UCERA is an enabling statute, and Section 12 addresses the effective date of the act. It applies to cohabitants’ agreements that were made before the act’s effective date, as well as those made after that date. The act is, in large measure, based upon current law and practice and leads to results that are consistent with the results that could be reached in cases involving non-cohabitant litigants. The act does not set out procedural or substantive prerequisites to the validity of such agreements (unlike, for example, the Uniform Premarital and Marital Agreements Act), and so should not affect agreements that have been entered into before the effective date of the act;);~~ the act enables the enforcement of such agreements.

Similarly, Section 12 provides that the act applies to equitable claims that accrued before the act’s enactment, as well as those that accrue afterwards. The fact that the cohabitation terminated before the effective date of the act is irrelevant to the validity of the claim. Nonetheless, the claim, which accrues upon breach for an agreement or upon termination of the cohabitation, death of one, or marriage of one to the other for equitable claims, may be barred by expiration of the time limitation within which similar claims could be brought in accordance with state law, as provided in Section 5.

With respect to the constitutionality of the retroactivity of UCERA, this act enables

claims that already exist. For states for which UCERA does not serve to enable existing claims, the legislative note provides a suggestion on how to proceed. Of course, even in states which have not previously recognized either contractual or equitable claims, retroactive application would be legally justified. Courts have upheld the retroactivity of statutes based on a state's police power and other significant state interests. E.g., *In re Marriage of Bouquet*, 546 P.2d 1371, 1372 (Cal.1976)(community and separate marital property context); *Ryan v. Ryan*, 277 So. 2d 266, 273 (Fla. 1973)(constitutionality of retroactive application of no-fault divorce law); *Rothman v. Rothman*, 320 A.2d 496, 499–500 (N.J. 1974); see *Calleros v. Rural Metro of San Diego, Inc.*, 272 Cal. Rptr. 3d 767, 773 (2020), review denied (Mar. 24, 2021)(wage and hours case, setting out factors for constitutionality of retroactive application that interferes with vested rights); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960)(the public interest is a major factor in upholding retroactivity); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1063 (1997)(noting the Court's deference to "retroactive legislation"); Kirby Black, Note: *Have Courts Become Too Deferential?: The Constitutionality of Retroactive Economic Regulation*, 58 U. Louisville L. Rev. 537, 537 (2020)(suggesting analysis for retroactive legislation). As the *Rothman* court noted in upholding the validity of retroactive application of an equitable distribution statute, "¶:

[a] state may, in the exercise of the police power, enact a statute to promote the public health, safety, morals or general welfare. Such a statute, because of retroactive application or otherwise, may diminish in value or totally destroy an individual's right, whether in property as such or arising out of contract, provided that the public interest to be promoted sufficiently outweighs in importance the private right which is impaired." *Id.*

*Rothman, supra*, at 499. UCERA provides remedies based on state interests in protecting reasonable expectations of the parties and preventing unjust enrichment.

~~This act is, in large measure, based upon the current practices and is consistent with results that could be reached by proper interpretation of the rules of present law in most states. Thus, the act can be applied, without significant dislocations, to transactions and events that occurred prior to enactment.~~

### [Section 13. Repeals; Conforming Amendments]

(a) . . .

(b) . . .]

**Legislative Note:** A state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to accrual of an equitable claim. See Section 7(b). A state should also consider whether modifications to this act or other law are desirable to reflect the state's public policy regarding domestic partnerships or civil unions.

### Section 14. Effective Date

This [act] takes effect . . . .