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To: Drafting Committee, Economic Rights of Unmarried Cohabitants

From: Harvey Perlman

Re: Going forward

In order to clarify in my own mind what exactly we are trying to accomplish in this act I have constructed the following hypotheticals:

1. Sam and John are unrelated but decide to become college room mates in an apartment. Because they had the same schedule and their apartment was several miles from the campus they decided to purchase a car. They each chipped in half the price but it was titled in Sam's name for insurance purposes. They signed a written agreement that when they ceased to be room mates they would sell the car and split the proceeds. Is this agreement binding?
2. Same facts as hypothetical 1 except Sam and John are cousins.
3. Sam is a single parent with a 4 year old son. He is a high school teacher at a local school. He meets Sarah, a single woman, who is getting her Ph.D in Education at night at the local College and lives in the same apartment complex. As they talk Sam indicates he has a hard time finding childcare and Sarah admits that she is uncertain if she will be able to afford to remain in her program. Suddenly it hits them. They agree that Sam will contribute most of the living expenses if Sarah agrees to provide child care for his son during the day. They agree to jointly buy a car, Sarah contributing the trade-in value of her old car and Sam providing the rest. They agree in writing that when their arrangement ends they will sell the car and split the proceeds. Is this agreement binding?
4. Same facts as hypothetical 3 except Sam and Sarah agree to share a two bedroom apartment.
5. Sam is a 78 year old widower who meets Sarah, a 76 year old widow. They both live in the same apartment house. They enjoy each other's company but neither has an interest in intimate relations. They spend most of their time together at Sarah's and they share new purchases such as a new 83 inch TV, a new washer and dryer, and several valuable art works. All of the purchases are kept at Sarah's apartment. Sam generally sleeps in his own apartment and maintains his clothing and other personal effects there. Four years into their relationship they have a falling out. Sarah refuses to give Sam any of the joint purchases or to pay him for his share. Sam sues Sarah. In the absence of an agreement, does he have a cause of action?

I am certainly no expert in these matters but it seems to me that any of these contracts are enforceable and that in the absence of agreements there would be an equitable claim for unjust enrichment. If I am right, then I wonder what we are attempting to do in our proposed act. I recognize there are a few states that might think cohabitation is “living in sin” and thus will refuse to enforce an agreement even though they would enforce it in the absence of intimate relations between the parties. And I am aware there is some question about how to take domestic services into account in evaluating whether there is unjust enrichment. If these points are true, we would need one section that authorizes cohabitants to contract and one sentence to validate domestic services as a contribution that must be taken into account in unjust enrichment cases.

But of course we could be more helpful to judges. What we have avoided thus far is to construct a clear definition of what property is part of the cohabitation relationship. I don’t think we can ask the courts to make a fair distribution of property if we don’t give some guidance on what is to be divided. And, we have avoided some default formula for distribution, such as the status-based default provisions on dissolution of marriage. However, without some default provision, I fear any proposal will be opposed by judges who will see themselves as acquiring a number of cases without fair guidance as to what they are to do with them.

This caused me to do some modest research, which began (and ended) with the Restatement (Third) of Restitution and the ALI Principles of Family Dissolution. Both projects completed recently speak directly to these issues. I am surprised that, as far as I can tell, neither are cited in our Comments and have had no impact on our work.

Section 28 of the Restatement of Restitution provides:

§28. Unmarried Cohabitants

- (1) If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset in which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contribution has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.
- (2) The rule of subsection (1) may be displaced, modified, or supplemented by local domestic relations law.

The Reporter’s Notes contained numerous citations. Granted some of them seem to be shy about crediting sexual services to the plaintiff’s account. We could fix that.

Section 28 seems to be a specific example of more general restitution claims. For example, §27 provides that if one person makes expenditures to maintain or acquire property and reasonably expects to retain an interest in the property, restitution will be available if those expectations are frustrated. Whether domestic services are “expenditures” is of course ambiguous. We could fix that. And §29 deals with the division of a “common fund”.

The ALI Principles of Family Dissolution contains an entire chapter (Chapter 6) on domestic partnerships. For sure this work is a set of recommended principles rather than a restatement of existing law. The ALI recommends a status-based distribution of “domestic-partnership property” similar to the distribution on dissolution of marriage. Even if as a committee we were not inclined to go as far as a status-based distribution formula, the language in Chapter 6 as to how to define a domestic partnership (a limited cohabitation relationship), how to determine what property is within the partnership, and the formulation of factors for a just property distribution seem far superior to our language. And, they avoid talking about sex!

I have reproduced two sections as an appendix. Section 6.02 describes the purpose for fair distribution of economic returns to a domestic partnership. These provisions could be used to direct how courts might determine a fair distribution of cohabitation assets and liabilities. Section 6.03 helps define a domestic partnership and distinguishes those from other mutual living arrangements. If we were inclined to carve out certain cohabitating relationships, this section might provide valuable language.

In the end, I believe substantial revisions to our current draft are necessary, but I am open to being persuaded that “I just don’t understand”.

Appendix (American Law Institute Provisions)

§ 6.02 Objectives of the Rules Governing Termination of the Relationship of Domestic Partners.

- (1) The primary objective of Chapter 6 is fair distribution of the economic gains and losses incident to termination of the relationship of domestic partners by
 - a. allocating property according to principles that respect both individual ownership rights and equitable claims that each partner has on the property in consequence of the relationship, and that are consistent and predictable in application; and
 - b. allocating financial losses that arise at the termination of the relationship according to equitable principles that are consistent and predictable in application. Equitable principles of loss recognition and allocation should take into account
 - i. loss of earning capacity arising from a partner's disproportionate share of caretaking responsibilities for children or other persons to whom the partners have a moral obligation;
 - ii. losses that arise from the changes in life opportunities and expectations caused by the adjustments individuals ordinarily make over the course of a long relationship;
 - iii. disparities in the financial impact of a short relationship on the partners' postseparation lives, as compared to their lives before the relationship; and
 - iv. the primacy of the income earner's claim to benefit from the fruits of his or her own labor, as compared to the claims of a domestic partner.
- (2) The secondary objective of Chapter 6 is protection of society from social-welfare burdens that should be borne, in whole or in part, by individuals.

§ 6.03 Determination That Persons are Domestic Partners

- (1) For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.
- (2) Persons are domestic partners when they have maintained a common household, as defined in Paragraph (4), with their common child, as defined in Paragraph (5), for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*, set in a rule of statewide application.
- (3) Persons not related by blood or adoption are presumed to be domestic partners when they have maintained a common household, as defined in Paragraph (4), for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a rule of statewide application. The presumption is rebuttable by evidence that the parties did not share life together as a couple, as defined by Paragraph (7).
- (4) Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household.
- (5) Persons have a *common child* when each is either the child's legal parent or parent by estoppel, as defined by [§ 2.03](#).
- (6) When the requirements of Paragraph (2) or (3) are not satisfied, a person asserting a claim under this Chapter bears the burden of proving that for a significant period of time the parties shared a primary residence and a life together as a couple, as defined in Paragraph (7). Whether a period of time is significant is determined in light of all the Paragraph (7) circumstances of the parties' relationship and, particularly, the extent to which those circumstances wrought change in the life of one or both parties.
- (7) Whether persons share a life together as a couple is determined by reference to all the circumstances, including:
 - a. the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
 - b. the extent to which the parties intermingled their finances;
 - c. the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
 - d. the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
 - e. the extent to which the relationship wrought change in the life of either or both parties;
 - f. the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan;
 - g. the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
 - h. the emotional or physical intimacy of the parties' relationship;
 - i. the parties' community reputation as a couple;
 - j. the parties' participation in a commitment ceremony or registration as a domestic partnership;
 - k. the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
 - l. the parties' procreation of, adoption of, or joint assumption of parental functions toward a child;
 - m. the parties' maintenance of a common household, as defined by Paragraph (4).