

Date: September 18, 2020

To: Economic Rights of Unmarried (Nonmarital?) Cohabitants Drafting Committee

From: Barbara Atwood

Re: Comments on current draft

Congratulations on a pretty smooth first reading last week. I thought you received some excellent comments (including Paul Kurtz's suggestion about the title). Because I will not be able to attend the upcoming drafting committee meeting, I wanted to send along some thoughts.

Section 2(1): I strongly recommend that you broaden the general definition of "cohabitant." One of the goals of this project from the beginning was to make clear that cohabitation itself should not render contractual and equitable claims unenforceable. If you define cohabitant broadly (individuals who reside together) with the fact of cohabitation as the key, it gets you away from worrying about elements of intimacy, sex, couple-hood, etc. If you were to adopt this approach, the requirements of commitment and living together as a unit, etc., would be limited to the special Section 12 remedies.

Section 4: If cohabitation is defined broadly, then the limitations of Section 4 should apply only to Section 12. Enforceable contract and equitable claims surely could arise between two siblings living together, an uncle and niece, a mother and son, etc.

Section 5. Not sure what is meant by saying that a claim to enforce an economic right is governed by the law of this state, including choice of law rules. Is this meant to reference procedural law? The basic elements of contract or equitable claims? And why is Section 8(d) an exception? I honestly just don't understand what is meant.

Section 7(a)(1): I think you mean "not void as against public policy *based solely on the fact of cohabitation.*" Some cohabitation agreements obviously can offend public policy (e.g., I will pay you \$100 every night if you have sex with me).

Section 8: I commented during the reading that you might want to consider acknowledging that cohabitants can define some of these terms for themselves. Thus, in Section 8(a), you could start out with: "Except as otherwise provided in an enforceable cohabitation agreement, "termination of cohabitation" in this section means"

I would add the same language at the beginning of subsection (d) also – to recognize that cohabitants can agree that marriage ends any claims arising under the act.

Section 9: As others have noted, this section creates an unnecessarily complicated framework (different burdens for covered cohabitants vs others) and, in my view, is not a great policy choice. More importantly, departing from state law will undermine enactability. The draft creates a new set of rules governing oral and implied contracts, chooses preponderance of evidence for equitable claims, but leaves in place the state’s existing law as to written contracts. It would be much cleaner to just fall back on existing state law for all contract claims and for all ordinary equitable claims.

Section 10(b)(2): Just a minor point that I made during the reading – I think you should add the word “adversely” before “affects a child’s right to support.”

Section 11: I agree with the comments pointing out the confusion that might be caused by the language presently used. I suggest “... a cohabitant may assert and a court may enforce an equitable claim, including claims based in whole or in part on the performance of domestic services.”

Section 12(a): This section needs to state very clearly what a court must find in order to make an equitable division of property without regard to legal title. People living under the regime created by the act have the right to know when this special remedy kicks in, and it’s simply too fuzzy to have courts determine both “whether and how” to divide up assets by referencing a list of factors. In particular, should a particular duration of the relationship be a requirement, rather than just a factor? The act could require something along the lines of an interdependent relationship between the cohabitants living together as an economic, social, and domestic unit for [a substantial period of time] or for a defined period -- [five years]. You could structure it so that a party would have to make that preliminary showing before a court would get to the actual division of assets/liabilities according to a list of factors.

Under (b), a married cohabitant is limited to division of property acquired and liabilities incurred by efforts *before* the marriage. I don’t understand the policy that is being furthered by this limitation. If it’s intended to protect the spouse in the wings, it doesn’t do that and, indeed, does the opposite. Ex: A is married but enters into a ten-year cohabitation with B. During the cohabitation, A and B contribute money and labor to the acquisition of property that is titled in B. If A and B split up or if B dies, A would have no right under the act to make a

claim for a share of the jointly-acquired property. On the other hand, if A were to die, B would not be barred under this section from making a claim against property acquired by A during the cohabitation – thus exposing the spouse in the wings to litigation (notwithstanding the potential protection provided by Section 13(b)). Does this general result make sense?

Section 13(a): This section will be very unpopular among trial judges since it forces an evaluation under community property or marital property law solely to determine if the claim under the act exceeds what a spouse would be entitled to. At the very least, please limit it to Section 12 equitable claims. It makes no sense to me when applied to contract claims or ordinary unjust enrichment/restitution claims.

Ex: A expressly promises to give B certain pieces of real property titled in A's name if B will live with A and help with housekeeping. They live together for 10 years. When they separate, B makes her claim for the real estate based on contract.

Ex: During A and B's cohabitation, B contributes money and labor to improvements on A's property over a 10 year period. At the end of the cohabitation, B makes an equitable claim, arguing that A will be unjustly enriched if he walks away with the increased value of the property.

How would this section be applied to these scenarios? In some states, contracts for domestic services between spouses are unenforceable – since the services are viewed as inherent in the marriage relationship. Thus, B might be precluded on her contract claim under this section, but that seems inconsistent with the rest of the act. Alternatively, does this section mean cohabitants can't contract for more than they would receive under marital property law if they were married? That doesn't make sense to me. As to her equitable claim, again would a court limit it to whatever she might receive as marital property had they been married? That would require the judge to work through what might be a complicated analysis of marital property interests in appreciated value, etc., after assessing the unjust enrichment/restitution claim. Really?