

Memorandum
Follow-Up from the ERUC Drafting Session of September 25

October 2, 2020

Thanks to each of you for the great meeting last week. We think we made excellent progress and are grateful for your help as always. Many thanks, too, for the comments before and after.

As a follow up to the discussion of the first portion of the Act - **NOT** to Section 11 – we have two different approaches for your consideration. This is not legislative language. We know it will need to be tweaked, but we have kept the language parallel in each of the two options below to focus our decision-making.

Option 1 recognizes contractual and equitable claims between any two individuals who are not married to each other and includes explicit recognition that such claims are permissible, even if the individuals live together.

The language might read something like this:

- a. Unless prohibited by state law other than this [act] two individuals not married to each other may contract with, and bring equitable claims against, each other, including such individuals who cohabit with one another, live together in an intimate, romantic relationship, or have similar living arrangements.
- b. Except as authorized or modified by this [act], the law of this state shall govern the creation, terms, and enforcement of contracts and equitable claims as described in this [act].
- c. Domestic services, other than sexual services, may provide consideration for an agreement or contract between unmarried individuals. Equitable claims between unmarried individuals may be predicated on the provision of such domestic services and may include claims based on promissory estoppel or unjust enrichment.

Pros: No proof is required for any aspect of a relationship except that that the individuals are not married to one another. Whatever else state law requires to make out a contractual or equitable claim (e.g. that the individuals are adults, have capacity, etc.) will apply here as well.

The descriptions after “including” are merely illustrations of individuals who are covered, not limitations. We believe these particular illustrations would serve as a “shot across the bow” for courts that might be reluctant otherwise to apply normal contract and equitable principles to cohabitants and maybe others. Obviously, in this formulation, we could add other things – dog owners, for instance – without doing any violence to the Act itself, although a reference to dog owners might be puzzling. You may think of other descriptors that should be included, as might state legislatures during the enactment process.

Cons: Because it applies the Act broadly, we might inadvertently affect individuals we don't mean to affect. In hopes of avoiding that problem, we have included the introductory clause limiting the effect of this Act to situations where other law would create a different rule.

Option 2 retains the same language as Option 1, but with different meaning. Here we take our described individuals as in Option 1 but instead of those being examples, we only apply the Act to them.

The language might read something like this:

- a. Unless otherwise prohibited by state law for reasons not related to their living arrangements, two individuals not married to each other who cohabit with one another, live together in an intimate, romantic relationship, or have similar living arrangements, may contract with, and bring equitable claims against, each other.
- b. Except as authorized or modified by this [act], the law of this state shall govern the creation, terms, and enforcement of contracts and equitable claims as described in this [act].
- c. Domestic services, other than sexual services, may provide consideration for an agreement or contract between unmarried individuals. Equitable claims between unmarried individuals may be predicated on the provision of such domestic services and may include claims based on promissory estoppel or unjust enrichment.

Pros: We only cover the individuals we intend to cover. (Note, again, that if "cohabit with one another, live together in an intimate, romantic relationship, or have similar living arrangements" is not exactly what we want to say, we can tweak it.) All unintended applications of the Act have been eliminated.

Cons: In order for the Act to apply an individual must persuade a court that the sort of relationship described exists. An individual who wants to avoid the Act need only show the absence of intimacy or romance or challenge whether they have cohabited or lived together. Perhaps that does not matter because our Act does not create exclusive rights so even if an individual wiggles out of the Act general state law would still enforce contractual or equitable claims against the individual.

In general, the proponents of Option 2 believe that it solves the known problem for the people with the known problem, and avoids unintended consequences. The proponents of Option 1 say not so fast because Option 2 creates four classes of individuals in the state, rather than the usual three. Without the Act you have individuals who cannot contract, individuals who can contract, and married individuals (whose contract rights are special). With the Act we arguably would be creating a new class of individuals: those who can enforce claims under our Act.

An important consideration when deciding between Option 1 and Option 2 is the degree to which, if at all, our Act will affect the contracts or equitable claims of individuals (by, for instance,

choice of law determinations or burden of proof allocations). A somewhat related consideration is the extent to which we are concerned that a court may limit the contractual or equitable rights of an individual not described in our Act under the mistaken assumption that the legislature must not have meant to give that individual rights or it would have included the individual within the Act (an unintended consequence of a different kind). Once we decide on the option we want, we will deal with these other considerations.

As noted, we do not intend to discuss these matters at our next Zoom meeting on October 9th. We intend to discuss Section 11 at that meeting.

Sometime in October, perhaps even at our October 24 meeting, or maybe early November, we will circle back to this issue in hopes of reaching a consensus on the best direction. No rush, but as you have thoughts and comments please let us have them. Written comments or calls are welcome, and fully jelled, partially jelled, even kind of soupy not quite jelled thoughts are all welcome.

We will keep all comments confidential unless you ask us to have them posted to the website for the entire committee. We look forward to discussing your ideas at our third Zoom meeting later in October or our “official” drafting meetings in November, a point we mention simply to say that if you feel impassioned no worries – you will have time to make your plea.

Thank you!

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