Memorandum
To Economic Rights of Unmarried Cohabitants
Committee Members, Advisors, and Observers

September 20, 2020

Dear Friends,

Many thanks for your participation in the pre-first read and the first read. We received many helpful comments and suggestions, including many from you. As you know, we have scheduled two, and perhaps three, Zoom meetings between now and our official Fall drafting meeting which is scheduled for Nov 6th and 7th. We thought it might help to set out what we plan to discuss at the various meetings, with the understanding that circumstances, discussion, or committee preference might cause us to make changes.

<u>September 25th Meeting</u>

- Pre-Review of Minor Changes

Ever mindful of the political season and the benefits of building momentum, we hope we can deal with some things quickly on September 25, or perhaps before. Included with this memo is a red-lined version of the Act noting what we believe are minor (stylistic and uncontroversial) comments and suggestions. Of course, minor is in the mind of the beholder. In our ideal world, if you find one or more of these changes to be problematic, or have others to suggest, you would send the three of us an email and maybe we can sort it out, but there may be things the entire committee will need to discuss. If we don't have time to do so on the 25th, will do it later on. Remember that nothing is ever final until everything is final so you are not losing your opportunity to improve a word or phrase. We are hopeful (perhaps we are delusional too) that if you find some of these changes controversial, we can discuss those in no more than 15 – 20 minutes.

- Primary Discussion

We know section 12 is very important but we think we first need to decide who should be covered by the provisions of the Act, <u>other than</u> section 12. [We will discuss section 12 separately, so, unless that section is explicitly mentioned, we are addressing comments to other parts of the act.]

Although surely an overstatement, it is directionally right to say that no one is very happy with our current definition of cohabitant as it applies to contractual and equitable claims relating to economic rights. (To be clear, we say again, to whom section 12 applies is another kettle of apples, a different barrel of fish.)

We believe we know what we want to do. We want the Act to give states that have heretofore worried about enforcing contractual and equitable claims between individuals who have a personal, intimate and/or romantic relationship of some sort but who are not married, the opportunity to allow such individuals to make claims against one another, just like everyone

else. If I can contract with, or make a claim for unjust enrichment against, my good friend who lives across the hall under state law then that should not change just because my good friend and I decide to live together, or "become an item," or engage in sexual relations. Below we discuss three possible approaches to this issue.

One approach – we will call it **Approach 1** (keep track of the numbers because they will matter) – is to say something like:

(a) Except as otherwise provided under Section 12, the elements of an express contract, implied in fact contract, or equitable claim as between nonmarital partners is governed by the law of this state other than this [act].

(b) Except as otherwise provided under Section 12, a claim between two individuals shall not be precluded or be subjected to an additional procedural or substantive hurdle on account of the individuals being current or previous nonmarital partners.

We are grateful to our observers, and particularly to Courtney Joslin, for help in thinking about this approach. You will see a number of submissions on the ULC website that discuss the issues and advocate for some variation of this approach. We urge you to read and study those carefully. One key question with such an approach is whether the term "nonmarital partners" is clear enough. My law partners and I are nonmarital partners. We are not attempting to sweep them (us) into this Act. Although, would it do any harm if we did? We believe that the committee does not want to cover more than two individuals – that is easily remedied using the language above by saying "two individuals who are nonmarital partners" – nor family groups like sisters. Would a court think sisters are nonmarital partners?

A different question this formula might pose under (a) is the content of the law of this state other than this act. What if a state says "the law of this state other than this act" is that individuals cannot contract about sex, and if sex is an element of a contract we will not enforce it? Is such a determination likely? What if a court concludes that the law of this state is that nonmarital partners cannot contract; presumably that situation of the law chasing itself around a tree could be prevented by adding language specifically stating that a contract or claim that would otherwise be allowable under state law will not be disallowed merely because the individuals are nonmarital partners.

You will note that the language of parts (a) and (b) above are slightly different and we could decide which one works best. But the first key question is whether we think a bare bones approach to who we sweep into the act works.

Approach 2 starts with our existing definition of cohabitant, which has three components. Two unmarried individuals must (a) live together as a couple, (b) be in an intimate, committed relationship, and (c) function as an economic, social, and domestic unit. Our impression is that most readers think that definition is too long, too amorphous, too many things to prove, too narrow. We could adopt just one or two of (a), (b), or (c) and apply the act (except for section 12) on that basis.

Within the possible permutations of Approach 2, the one that we like best is to say that cohabitant means each of two individuals who are not married to each other and live together

as a couple. We think it is unlikely that a court would conclude that sisters live together as a couple. Note in this regard that "reside together" may have a different, broader shade of meaning. For parallelism to the discussion of Approach 1, imagine saying something like:

> *Except as otherwise provided under Section 12, the elements of an express contract, implied in fact contract, or equitable claim as between two individuals who are not married to each other and live together as a couple is governed by the law of this state other than this [act].*

Many variations on Approach 2 exist. We could say "two individuals who are not married to each other who are in an intimate, committed relationship" or "two individuals who are not married to each other who form an economic, social, and domestic unit."

Commissioner Atwood has suggested that all we need is "two individuals who are not married to one another who reside together." She notes that of course that would sweep in a mother and son, siblings, etc. who live together but does that matter: those individuals could contract, or have equitable claims against one another, so our act would not be doing anything beyond affirming what is true now.

Approach 3 starts with the point that most states, perhaps all, have a definition, whether statutory or in the common law, of cohabit, often with respect to the termination of an alimony obligation. Our act could direct a state to use its existing definition, whatever it is. Of course, a state might not like its definition of cohabit, or might not think that its usual definition is helpful for this act, so we could present a definition if the state wanted to replace its current definition. You might think of Approach 3 as offering up an Approach 1A – a state may use its own definition or something like nonmarital partner – or 2A – a state may use its own definition or something like live together as a couple.

We are hopeful that we can arrive at a working consensus on an approach (whether one of these or another) so that we can spend time during this year applying and refining the language of the act with a clear reference to the universe of individuals whom we are discussing.

We remain delusional and thus hope to deal with the issues in Part II in, say, an hour (doesn't HAVE to take that long but it takes however long it takes).

- The Remainder of the First Meeting – Tee Up Section "12"

First, you will note when looking at the attached red line, that we have deleted a section so former Section 12 is now Section 11. Since all of us have gotten used to referencing the equitable division provision as Section 12, we will continue to do so…. At least through our meeting on the 25th.

In our remaining hoped for 15 – 20 minutes of this first meeting we hope to tee up section 12. There are lots and lots of questions about section 12 but the first is whether we think it will fly in enough legislatures to make the effort worth it. You may say, I can't answer that until I know how it is finally drafted, and that is fair enough, but there are some people we've heard from who say that section 12 is a non-starter no matter how it is drafted. To collapse all nuance, the nub of that position is that marriage isn't hard and if individuals don't want to marry it is

because they don't want anything forced on them (as distinct from contractual claims or even claims for unjust enrichment).

A slightly different argument is that section 12 would create a nightmare for cohabitants, no matter how defined (and note we haven't yet discussed in this memo to whom we would apply section 12) because it will be plead every time a couple, by whatever designation, breaks up. That presents not only problems of expectations but also issues of judicial resources.

If we are going to have section 12, we believe most everyone generally acknowledges that it should apply to a narrower class than the earlier portions of the act. Thus, whatever Approach we adopt for the our "basic" contract and equitable claims under the first part of the Act, for section 12 we are likely to do something different. Our current working hypothesis is that we would adopt our current definition of cohabitant, with all three elements. If all three of those are included a claimant would have to prove they are unmarried, have lived together, as a couple, in an intimate relationship, in a committed relationship, and they and the other individual functioned as an economic unit, a social unit, and a domestic unit – eight in total.

Suggestions have been made that a term of years should be added as a threshold. No claim is permitted under section 12 until the formerly happy couple has met whatever definition for 3 years or 5 years or however long. Others dislike that suggestion because they think it gives the appearance of a black line but in reality just adds one more element to litigate.

Another suggestion is that section 12 is supposed to be for extraordinary situations, not in "every" case of a couple dissolving the relationship. If so, consider how that extraordinariness might be indicated, if indeed it is possible and desirable to do so. Could we add enough direction with a simple requirement that in deciding whether extraordinariness exists, the court weigh specific factors such as the duration and continuity of the relationship (current 12(d)(1)), evidence of the parties intent to share assets and liabilities (current 12(d)(5)), and other factors the court considers relevant (current 12 (d)(9))?

Finally, note the interrelationship of sections 11 and 12. Posit a couple who have entered into nothing the law would recognize as a contract. Yet there is a clear claim for unjust enrichment – for instance, one party has paid the mortgage on the house the couple lives in for a dozen years, generating substantial equity, but the other party owns the house, and all other claims between the two parties offset. Section 11 is designed to provide redress in that instance. Presumably, however, section 11 also deals with unjust enrichment claims founded upon the provision of domestic services. So section 12 contemplates a circumstance where after adjusting for the unjust enrichment claims, there is still a lack of justice and equity between the parties. How, if at all, should section 12 address the possibility of cumulative claims?

As noted, we hope to tee up these issues, not resolve them, because they are numerous and complex, on September 25.

<u>October 9th Meeting</u>

We propose that at our Friday, October 9 meeting we hold a comprehensive discussion section 12. Of course, if we decide to jettison section 12, we can move on to other topics.

Otherwise, our guess is that we will absorb a full hour and 45-minute meeting with section 12 because we have spent the least amount of time on it heretofore.

The Dreaded Third Meeting on October 24

Assuming our guesses about time are right thus far, we have other important issues remaining and we have proposed October 24th for that. Among those are the degree to which the parties governed by our act can contract around section 12 and the extent to which we want to vary existing state law regarding contracts that have nothing to do with section 12. Think of this as yet another go at the burden of proof issues, at least in part; and we suspect that burden of proof issues will come up repeatedly throughout our discussions, as we have heard those concerns from several committee members and other Commissioners at the readings.

We also have fun and interesting questions of the relationship of claims under our act and spousal claims. Those claims go both ways; for instance, Turney is married to Kendra but for 20 years, he is in a relationship to which this act applies with someone else. One issue is the extent to which claims against Turney or his estate can negatively affect Kendra's rights as a spouse but another is to what extent can Kendra's rights affect the rights of Turney's cohabitant. For ease of illustration, suppose Turney lives with his cohabitant for 20 years but really doesn't want to benefit her, so he enters into a valid marital agreement with Kendra that gives her all sorts of property at his death, and that agreement has the effect of reducing what the cohabitant can receive.

If We Get Lucky!

If we get lucky and get our work done with these three meetings then we will be able to have a strong draft of the Act incorporating our decisions ready for review in November which will let us start the all-important work of determining whether our decisions work together, whether our language says what we mean, and what key issues we have failed to consider at all. We welcome comments on process as well as substance of course.

Meanwhile, We Mustn't Get Ahead of Ourselves

We have drifted into issues for another day. Please return to our redline of potential uncontroversial changes and to the questions posed under Approaches 1 – 3. Many thanks for what we know will be great thinking.

By the way, you are welcome of course to email the whole committee or to ask the ULC office to post things to the website anytime you want – after all, this is America and everyone gets to choose. As committee members, we have found it helpful if comments and submissions by committee members are organized by the chairs and reporter, and if you agree, you are welcome to send things to us and we'll make sure whatever gets discussed, circulated, etc.

Thank you!

Mary Devine, Turney Berry, Naomi Cahn