

**To:** ULC Economic Rights of Unmarried Cohabitants Act Committee  
**From:** Cathy Sakimura, National Center for Lesbian Rights & Professor Courtney Joslin, UC Davis, Observers  
**RE:** Economic Rights of Unmarried Cohabitants Act Draft, November 2019  
**Date:** December 3, 2019

## **I. Importance of a status-based option in Article 4**

We strongly believe that some form of status-based option for unmarried cohabitants is crucial for a number of reasons. First, it is the right policy decision; a status-based approach recognizes and respects the families the parties chose to create and fosters rather than discourages mutually supportive relationships. Second, it is best way to create clarity for cohabitants about their rights. Washington has had a status-based approach for cohabitants for over a hundred years.

### **A. Public policy concerns**

Allowing only contract-based and equitable claims advantages the more wealthy and powerful party in the relationship. Under a contract-based approach, the default is that the person with the greatest wealth and power can avoid obligations to the other partner unless the more vulnerable partner can prove that a specific agreement or equitable remedy applies. By contrast, a status-based remedy means that the person in the relationship with the least power will be recognized for their contribution to the relationship unless the parties mutually agree otherwise.

Often, opposition to a status-based approach relies on the claim that all unmarried couples have made a deliberate mutual choice to be legal strangers with no obligations to each other unless they affirmatively take steps to marry, even if they have completely merged their finances and worked together to build their families and lives for many years. Empirical research, however, paints a more complicated picture of these families and why they are unmarried. Only 14% of unmarried adults report that they never want to get married.<sup>1</sup> Many unmarried couples have not made a mutual decision not to marry. Instead, for many of these couples, they simply go on living their lives. For example, sociologists Sharon Sassler and Amanda Miller report that “quite of few [of their unmarried cohabitant respondents] had not even broached the topic of a future together before they began cohabiting—nor since. Several noted that they preferred to ‘live in the now.’”<sup>2</sup>

Moreover, to the extent that one or both parties do make a deliberate decision not to marry, the reasons they give are much more varied. For example, a substantial majority of unmarried adults report that they want to delay marriage until they are financially stable.<sup>3</sup>

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<sup>1</sup> Kim Parker & Renee Stepler, *As U.S. marriage rate hovers at 50%, education gap in marital status widens*, PEW RESEARCH CENTER (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/>. Even among this group, not all make this decision simply or even primarily because they want to have no obligations to each other. *See, e.g.*, Sharon SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS 153 (2017) (noting that some of the unmarried cohabitant respondents who rejected marriage “noted that getting married wouldn’t add anything to their relationships”).

<sup>2</sup> SASSLER & MILLER, *supra* note 1.

<sup>3</sup> Parker & Stepler, *supra* note 1 (reporting that of the unmarried adults who want to marry at some point, over 2/3 of them report that “not being financially stable” is either a major reason (41%) or a minor reason (28%) for not marrying yet).

## **B. Provides greater clarity and reduces litigation**

A carefully designed status-based option simplifies litigation by replacing piecemeal litigation about each asset and each possible contractual or equitable claim. So long as the remedies allow for division of assets once the status is proven, a status-based option allows the litigation to focus on a single question about status. If the status is proven, then the court would divide the assets as a whole, rather than assess each claim or asset individually. Not only does this simplify the litigation, it also clarifies the parties' expectations. In this way, it may encourage settlement and deter litigation.

Currently, nearly every state allows some form of contractual or equitable litigation between cohabitants. But in many states, the exact nature or application of those remedies are unclear, leading to even more complex litigation. These states also potentially require piecemeal, or at least complex, litigation about each claim and even each asset, rather than moving to distribution of assets after determining that a certain status is met.

Creating a status-based remedy also does not re-create common law marriage and is useful even in states with common law marriage. Hundreds of rights are extended to married couples based on their status as married spouses. Article 4 only extends one or possibly two right(s) to unmarried cohabitants—property distribution and the possibility of spousal support.

A status-based option also provides additional protections in common law marriage states because many cohabitants who would not satisfy the common law marriage criteria (especially the requirement of a mutual, present agreement to be married), nonetheless have intertwined their finances and developed shared obligations to one another. A status-based remedy also provides important protections couples who cohabited for a long time prior to marrying, which is a particular issue for same-sex couples. The modern trend is to allow consideration of pre-marital cohabitation for couples who married after a period of cohabitation,<sup>4</sup> and Article 4 would follow this trend as well as make it available to cohabitants who never married.

Finally, a status-based remedy would also bring the U.S. in line with the trends around the world. Outside the U.S., status-based remedies for nonmarital couples are common.<sup>5</sup>

## **II. Remedies for the status-based option**

The current wording of the remedies in Article 4 seems to require litigation of each asset individually, and imports the contractual and/or equitable requirements into status-based litigation by requiring proof of contributions to each asset. This creates more complexity and reduces or even eliminates the benefit of having a status-based option. If the current structure is kept, at a minimum, Section 404(b)(3) (which is currently bracketed) should be included and should not be bracketed. Without this option, only monetary contributions may be recouped, which is even less than a cohabitant could achieve through a contractual or equitable remedy under existing law in most states.

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<sup>4</sup> See, e.g., Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912 (2019) (describing this trend and discussing recent cases).

<sup>5</sup> Other countries that extend rights and protections to unmarried couples under a status-based approach include: Canada, Australia, Sweden, Norway, Ireland, Scotland, Yugoslavia, Serbia, Croatia. See, e.g., Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75 (2016).

We recommend that the remedies for the status-based option refer to equitable distribution or community property law in the state, perhaps with the beginning of cohabitation as the beginning date for distribution purposes. Washington, for example, uses a status-based approach and applies property division rules to cohabitants that are similar to marital property division. Additionally, the provision of support likely should reference other state support laws, as it would be hard to administer without additional rules.

### III. Other issues:

- **Unwritten agreements should be included.** We think that it is crucial for this Act to allow for enforcement of unwritten express agreements. All other people are permitted to assert such claims. It would be particularly inequitable to deny unmarried cohabitants access to the claims that all other parties can assert.

Similarly, the requirement that written agreements be signed is too high of a bar and is not necessary to achieve fairness. Not only is this requirement unfair, it would increase the amount and complexity of the litigation to require these express contract claims to be litigated as implied-in-fact agreements.

Additionally, we do not think that the formalities required for premarital agreements should not be required for cohabitation agreements. Cohabitation agreements create rights that do not exist, while premarital agreements limit or alter existing rights.

- **Cohabitants should be subject to the same standard of proof as legal strangers.** We feel that the standard of proof for implied-in-fact contracts should not be heightened because cohabitants should not be subject to a higher evidentiary standard than is applicable to any other person asserting an implied-in-fact contract. As far as we know, states do not generally have any heightened proof for implied-in-fact contracts. Instead, as explained in the comment to Section 4 of the Restatement (Second) of Contracts: “Contracts are often spoken of as express or implied. The distinction involves, however, *no difference in legal effect*, but lies merely in the mode of manifesting assent.”<sup>6</sup>
- **Cohabitants who cannot marry should be included.** At a minimum, even those not eligible to marry should be allowed to litigate contractual and equitable remedies on at least equal footing as legal strangers. If there is a spouse who is not one of the cohabitants, that could be considered just as third party concerns would be considered in any other litigation on contractual or equitable claims.
- **All equitable remedies should be available to cohabitants.** The draft appears to provide unjust enrichment as the only equitable remedy. It is unfair to deny cohabitants the full range of equitable remedies that are available to all other individuals. We urge that the Act

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<sup>6</sup> Comment a (emphasis added). *See also, e.g.,* Walter Boss, Inc. v. Roncalli Freight Co., Inc., 62 Misc. 3d 1203(A) (N.Y. Sup. Ct. 2018) (“In short, the Defendants have proven by *the fair preponderance of the evidence* that the Plaintiffs ‘conducted [themselves] in such a manner that [their] assent may fairly be inferred’ The existence of an implied in fact contract has been established.” (emphasis added)).

expressly state that all available equitable remedies are also available to unmarried cohabitants.

- **Opting out of the status-based option should require a signed writing.** We are concerned that the draft makes it more difficult to opt in to a status-based option than to opt out of it. Currently, Section 402 requires clear and convincing evidence to demonstrate that the status exists but only a preponderance to opt out of it. Making it easier to opt out puts the more vulnerable party at an unnecessary disadvantage. Because the wealthier and more powerful cohabitant is the one who benefits from opting out, it is more reasonable to require a writing to prove mutual intent to opt out of the status.