To: ULC Economic Rights of Unmarried Cohabitants Act Committee
From: Albertina Antognini, Associate Professor, University of Arizona, James E. Rogers College of Law (Observer)
Re: Economic Rights of Unmarried Cohabitants Act Draft (November 2019)
Date: December 5, 2019

Thank you to the Committee for putting together this thoughtful and comprehensive proposal for how to address unmarried cohabitants' economic rights, which remains an unresolved yet pressing question. I have a few comments that I hope will be helpful as the Committee discusses the draft Act, based in large part on my research on the topic of property rights in nonmarital relationships.[1]

I share some of the concerns already voiced by the memos submitted by Professor Cain, and Cathy Sakimura and Professor Joslin, and write only to highlight two salient problems with the current nonmarital regime that do not appear to be addressed by this uniform law: (1) the nearly universal presumption that domestic services are rendered gratuitously, thus generally preventing the party seeking property at the end of a nonmarital relationship from accessing any of it; and (2) the difficulty in satisfying the requirements set out in status-based regimes that compare the nonmarital relationship to marriage, as in the case of Washington.

Below, I explain how these issues arise in specific sections of the draft Act.

Article 2

Section 203

I agree that it is essential to provide for the availability of implied-in-fact agreements, which is a standard contract law doctrine accessible to all individuals. My concern with this section is how the implied-in-fact agreements are defined – in particular, I think the considerations the Act identifies in deciding whether an implied-in-fact contract exists are too rigid, and they ignore the larger problem of courts treating domestic services as though they were rendered gratuitously, which prevents implied-in-fact contract claims from being successful.

First, a court should be able to determine for itself whether the agreement alleged was implied-in-fact, based on the specific claims raised before it, rather than on the Act's enumerated series of factors, which appear to rely on marriage as a metric for determining assent. Why should the factors define which relationships "count" for purposes of an implied-in-fact contract claim? Eliminating them would, in turn, allow cohabitants to structure their relationship in whatever way they deem fit, whether or not they hold themselves out to others as an economic, social, and domestic unit (subsection (b)(4)), or whether their relationship has the marker of "consistency" (subsection (b(2)). Not only am I worried that the listed factors might muddle an implied-in-fact analysis, but they are also repetitive of the factors that determine whether an equitable partnership has been established under Article 4. It is unclear why they should also guide a court's decision in finding an implied-in-fact contract.

[1] My comments here are based on the following articles I have written (or am currently writing): *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017), *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891 (2018), *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019), and *Nonmarital Contracts* (in progress), as well as the work of the authors I rely on in those pieces.

Second, an effective implied-in-fact contract analysis should address the main obstacle that currently prevents courts from distributing property based on either contractual or equitable claims – namely, the presumption that domestic services are rendered gratuitously in the course of an intimate relationship.[2] Directly addressing this presumption of gratuity is crucial if we are to provide individuals access to property at the end of a relationship. Considering expressly reversing that presumption in this Act would go some way towards ensuring that individuals pleading an implied-in-fact contract claim will receive a standard contract law analysis. Reversing that presumption would also enable courts to figure out the contours of an implied-in-fact agreement, separate from the marital-like factors identified in this section.

Article 3

Section 301

As with the above provision of the Act, I support the availability of unjust enrichment claims for cohabitants. I worry, however, that the Act as written does not add much to existing law, and that including an unjust enrichment provision will have little impact if we do not address the core question of if/when/how to value homemaking services. Unjust enrichment claims are currently available in all states, yet they are rarely successful. Even where courts accept their validity, homemaking services are hardly ever assessed at anywhere near half of the assets accumulated during the relationship.[3] These results stem from the presumption that services inhere in an intimate relationship. Importantly, the presumption applies only to homemaking services; services rendered in building or designing a home, for instance, are readily compensated[4]

If there is to be any change to what is already available across jurisdictions, the Act should explicitly address the presumption that homemaking services are rendered gratuitously. This naturally begs the very difficult question of what ought to be the correct measure of valuing such services – which is the type of conversation I believe the ULC should be having.

Article 4

Section 401

I wholeheartedly agree with the overall impetus to consider status-based approaches to cohabitants' property rights. I am, however, concerned with the current markers that are identified to guide the determination of whether an equitable partnership exists. I am also concerned with using this approach as a way to replace, rather than confront, the shortcomings of courts' applications of standard contract and equitable doctrines in the context of intimate relationships.

While Washington state has had a status-based regime for a number of years, the case law suggests a troubling trend. As I have previously written:

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[2] This was the focus of my most recent article, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019). Even if one disagrees with my claim that the roots of these doctrines lie in coverture, the cases routinely deny access to property in the context of a relationship that involved domestic services. *Id.* at 2173-79.

[3] Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. at 46.

[4] Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. at 2171-72 ("[C]ourts routinely compensate services rendered in making a home because, unlike homemaking services, they are not presumed to be a part of the relationship or gratuitous; nor does the possibility of compensating them end when the relationship does.").

> In the different-sex context, Washington courts impose a high bar for the nonmarital relationship to mimic marriage — in fact, the lack of an actual marriage often leads a court to find there was no equity relationship for purposes of distributing property. In *In re Pennington*, the Supreme Court of Washington considered two consolidated cases brought by female plaintiffs at the end of a heterosexual relationship. In the first case, the Court declined to find a committed relationship in the context of a twelve-year relationship, reasoning that the man's "refusal, coupled with [the woman's] insistence on marrying, belies the existence of the parties' mutual intent to live in a meretricious relationship." In the second case, the court's analysis of the five factors was influenced by the fact that the parties had been involved with other individuals at the beginning of the relationship. Unlike the court's conclusion in *Long and Fregeau*, the court in *Pennington* held that dating other people disproved that the relationship was sufficiently stable and marital-like.[5]

Courts in Kansas provide an example for thinking about how to structure property rights without relying on marriage-like markers. As I have previously written:

> In Kansas, courts undertake "a deeper analysis that goes beyond which party actually paid for the property." In particular, the Kansas Court of Appeals acknowledges that "a party can help contribute to accumulating property by taking care of the home and child." That is, rather than discount those contributions or value them at much less than half of the total amount of property accumulated throughout the relationship, the court explains that they lead to "an ownership interest in the property equal" to the individual who had title over the property. Even if, as the court reasons, "[i]t is difficult to assign a precise monetary value to those duties," it holds that "they were nonetheless contributions."[6]

Given that what is at stake in these cases is, ultimately, access to property, the relevant analysis should focus on the relationship between the cohabitants and property, and their contributions to the relationship. Some of the proposed factors under Section 401 – like the consideration of "the conduct of the cohabitants concerning their household activities" – do this effectively. Others, however, like those that address the "consistency of the relationship" or the holding out of the cohabitants, seem at best tangential to the question of property rights. Similarly, while evidence of the economic dependence of cohabitants is relevant, the draft Act currently considers evidence of "*intent* to be economically interdependent" – a requirement that could easily be defeated by one individual's desires to the contrary, regardless of the actual economic dependence evinced throughout the course of the relationship.

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[5] Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. at 1917.

[6] Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. at 2208-09 (quoting Becker v. Ashworth, No. 104,417, 2011 WL 2206635, at *4 (Kan. Ct. App. June 3, 2011) (per curiam) (unpublished table decision)).