

To: ULC Economic Rights of Unmarried Cohabitants Act Committee

From: Patricia A. Cain, Professor of Law, Santa Clara University, Aliber Family Chair in Law, Emerita, University of Iowa, Observer

RE: Economic Rights of Unmarried Cohabitants Act, November 2019 Draft

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This is an important project, creating the opportunity to resolve some archaic issues under state law and perhaps to make state law more uniform. I have been working on many of these issues for most of my academic life and can attest to the fact that the possible resolutions are complicated. I thank you in advance for your commitment to work on this project.

Cathy Sakimura and Professor Courtney Joslin have shared with me their comments on this draft. For the record, I am in full support of the points they make. Rather than repeat what they have already said I will stress a few of their points by adding some of my thoughts to what they have to say and then by identifying a couple of specific places where I think additional work needs to be done.

- 1. The importance of recognition based on status.** To me, this is the most important aspect of your project. The United States, other than the State of Washington, is far behind other developed countries on this matter. For example, in 2006, Scotland adopted the Family Law Act which provided limited rights to cohabitants (e.g. household goods purchased during the relationship are presumed to be jointly owned). This is not a great step forward, but it is something in that it recognizes property rights based on status rather than on the basis of who paid for what.

Adopting status-based property rights would also avoid the many different state law rules on cohabitation contracts. Illinois still refuses to recognize them (as well as maybe Georgia and Louisiana, although the Georgia case is old and may no longer be good law – and it wasn't a Supreme Court decision). Some states only recognize express contracts, as opposed to implied ones (e.g. New York). And some states only recognize them if they are in writing (e.g., Texas and Minnesota).

Also, I don't think Article 4 should be bracketed. Anyone who meets the criteria should have some rights. You might bracket the degree of rights – e.g., equal ownership of tangible property acquired during relationship vs equal ownership of all property. And yes, I would bracket the right to support rights because that seems more highly contested.

- 2. How to prove existence of a Presumptive Equitable Partnership.**

- If you have to show economic, social, and domestic interdependence and if one of the factors in determining that is duration of the relationship, why do you need a minimum period for the relationship? In any event I would not make it as much as 5 years. One year is long enough to become interdependent.

- The second factor (totality of circumstances) says “the consistency of the relationship.” In my experience no relationships are consistent. Do you mean continuity – i.e., that they don’t break up and then get back together?
- The provision appears to apply to cohabitants, and I assume this means according to the definition of cohabitants in Section 102 which mentions “living together.” What does this mean? Some couples share space in more than one location because of job or other needs. So does cohabitation mean living together in the same space or living together in some shared space for a period that is a majority of the time in each year (or something like that?) See, e.g., *Morgan v. Briney*, 200 Wash.App. 380 (2017).
- I agree with the Sakimura/Joslin concern about proof of such a relationship. (See Section 402.) If the relationship is presumptive, why does someone trying to claim it have to prove the existence by clear and convincing evidence? I don’t think that standard applies to prove a “committed intimate relationship” under Washington state law or to prove a *Marvin* claim under the laws of other states. So why here? If this status is really presumptive, which I think it should be, you need to decide what is sufficient to raise the presumption. Maybe three years of living together plus some indication (x of y factors) of interdependence? Then if there is a presumption I would shift the burden of proof to the one claiming it doesn’t exist.
- Also, if there really is a presumption and it can’t be rebutted except by claiming an agreement not to have claims against each other (Section 401(c)) then shouldn’t that disavowal have to be in writing? In other words, I think the presumption should really be a presumption in the right fact situation.
- I agree with Section 403 in principle although we might need a definition of “termination.”

3. Remedies

- **Section 404 Remedies.** I have a larger comment here. I think it would useful to describe the rights that the parties in a PEP (Presumed Equitable Partnership) have in property acquired by the partners. As I understand the Washington rule on CIRs, the partners in the CIR basically have something I would characterize as akin to quasi community property. That is, no immediate rights to the non-title holder during the relationship but a 50/50 right to the property at time of dissolution or at death. If a partner owns 50% then the court of course can award 50% to each partner.
- **Federal Income Tax.** Much of my academic focus on rights of unmarried partners has focused on the federal tax consequences to such partners when property is in fact shared at dissolution. I have worked with some great folks in Chief Counsel’s Office (IRS) about these issues. They have been pretty good on clarifying rules as to RDPs and Civil Union Partners, who are not considered spouses under federal tax law. They do totally recognize state law property rights in such partners and so tax consequences follow. That means equal divisions of community property at dissolution (California RDPs) should not trigger adverse tax consequences. The IRS has been reluctant to issue any advice or guidance as to similar transactions between cohabitants who are not married or registered. In my opinion, based on old case law, the more vested the rights of the partners are

at the time of any division the more likely it is that the division will not be taxed. See the old case of *U.S. v. Davis* (1962) before enactment of IRC Section 1041 which taxed Mr. Davis on his transfer of appreciated stock in exchange for his wife's inchoate marital rights. The Davis rule did not apply to spouses who were merely dividing property that they both had rights to. As a result, I think the best state law rule would be to say that PEPs have a right to 50% of any property acquired during the relationship.

- **Section 404(c) Remedies upon Death.** This needs to be clarified. As I read the current language a survivor may get either an intestate share (not sure what this means) if no will, or an elective share (you should clarify that this is in a case where there is a will); or award relief appropriate in a community property state. I would say this as follows:
 - (1) In a case where there is no will, the survivor should get an intestate share equal to a spousal intestate share (if this is what you mean), and
 - (2) In cases where there is a will:
 - a. the survivor should get an amount equal to the elective share of a spouse (but how do you deal with Georgia that has no elective share?), or
 - b. in a community property state, the survivor should get half of the property acquired during the relationship
- **Questions about above approach.** As before, I prefer a system which actually gives property rights to the non-titled PEP. In common law states, there are no title rights to the non-titled spouse. She gets equitable distribution (maybe 50% and maybe vested enough at divorce to be called ownership), but at death she owns nothing and has to make a claim against the estate. I think community property is a better regime for such spouses because community property recognizes her ownership rights and gives her her property. Now I don't think this project is the time to reform separate property regimes to resemble community property regimes, but we should recognize the differences here. If a spouse/partner disinherits a spouse/partner in a community property regime, then the survivor is entitled to 50% of the "marital/community" property. My understanding of Washington law is that even if a CIR partner dies intestate, the surviving partner only gets her/his 50%. See *Olver v Fowler*, 126 P.3d 69 (2006)(note: this was a case in which all property titled in male's name was subject to a tort claim for wrongful death and the import of the state court's ruling on the interest owned by the CIR was that she owned it at death and so it was not subject to the tort claim).

In any event my question is whether the surviving PEP should be entitled to a full spousal share (which is often 100% of all property owned at death) or just 50% of property acquired during the relationship. I would prefer a rule that did not distinguish between community property and non community property states. So if an intestate share is to be made available to surviving PEPs in separate property states when there is no will then the same should be available to a surviving PEP in community property states. But if there is a will then the difference is between an elective share and community property share (assuming we want to keep state law in tact as much as possible).

4. Earlier Provisions

- **Section 104(b).** If marriage terminates the agreement does that mean at divorce, marital property is only property acquired after marriage? Surely the rights acquired under the contract are tacked on to any subsequently acquired marital rights. Maybe I misunderstand this. I don't claim to be a family law expert.
- **Section 202.** Why must express agreements be in writing? I don't think that is the law in most states.
- **Section 203.** These are the same factors I mentioned earlier with respect to PEPs. Again, maybe some clarification about what consistency means.
- **Section 205.** I understand the desire to require stronger proof for implied in fact agreements but I don't think current state law recognizing implied in fact agreements requires this higher standard, so I query the need for it.
- **Page 9, lines 20-25.** This comment would apply to express contracts as well if they are not in writing. But it really depends on the terms of the contract. If the agreement can be construed as something other than a promise to provide something at death, it may escape the writing requirement. See *Byrne v Laura*, 52 Cal.App.4th 1054 (1997), rev denied.