

To: Uniform Laws Commission Economic Rights of Unmarried Cohabitants Act Drafting Committee

From: Andrea Charlow, Professor, Drake University Law School, Observer

Re: November 2019 draft - Economic Rights of Unmarried Cohabitants Act

Date: December 5, 2019

First, thanks for all the work you put into this draft and for inviting observer comments. You requested a summary, so I have just outlined a general review, not a line by line list of potential issues. Items that might warrant further consideration are set out below.

There are a great variety of reasons people cohabit without marrying, and any attempt to codify relief needs to accommodate autonomy as well as correct the inequities that result under present law. Crafting a statute that eliminates inequities without interfering with freedom of contract will be difficult.

1. OTHER RIGHTS - Rights other than those to property and support are not covered by the act. Some of these are extremely important, especially in an intact relationship - the right to be considered a family for insurance, taxes, medical decisions, loss of consortium, etc.

2. CHILD CARE - Why does care of a mutual child raise an implication of rights beyond those related to the child? Child support, custody and visitation are covered by current law. Commitment to a child is not the same as commitment to an adult partner who co-parents. All parents have a responsibility to take care of their children. That is not the same as the circumstance in which one partner is a "stay-at-home parent" who gives up their independence in reliance on a partner. The latter situation would warrant some type of compensation after the relationship ends. There is no distinction in the draft on this point.

3. ELECTIVE SHARE - I am concerned about the provision for an elective share based on a PEP. What if the deceased chose not to marry the PEP to protect the rights of his or her children from a previous relationship? This is a sufficiently common reason not to marry, and provision of automatic rights might force someone to choose between their children and their lifestyle. Perhaps a less drastic solution might be to allow a party who cohabited in a home owned by the deceased to have a life estate or some other remedy to avoid being "thrown out on the street." An absolute elective share seems like a bad idea.

4. REMEDIES - The statute gives the court the power to order remedies in property and support but it does not give any guidance as to how to determine under what circumstances and how much that might be. The restatement quote sets out unjust enrichment and quantum meruit or restitution, all of which already exist in current law. Also, the substance of the restatement needs to be in the statute itself if the intent of the drafters is to use that as a guide.

5. TERMINATION - Termination of the relationship on knowledge or notice of the other cohabitant's will to end the relationship is open to interpretation. Business partners are more likely to give clear notice than cohabitants. Without formal notice of some type, there might be litigation about when the relationship and concomitant rights ended.

6. OPTING OUT - If the parties want to opt out of the PEP, do they have to put it in writing? I can easily see a war of who said what, with no witnesses to either. In addition, what if one tries to opt out of the consequences of the PEP without opting out of the relationship, and the other partner claims it's too late because the opt out is really notice of the end of the relationship? Notice of opting out given after the relationship is established could certainly bring about the end of the relationship.

7. ECONOMIC RIGHTS - Defining economic rights as "legally cognizable" is a bit tautological. Isn't this statute written to define those rights, although it is not very explicit in doing so? Why do you think no torts rights are included in this definition? They would be "legally cognizable."