

From: James Bopp Jr
Sent: Tuesday, September 15, 2020 2:08 PM
To: Lindsay Beaver
Cc: James Bopp; Carl Lisman; Tim Schnabel
Subject: Re: Economic Right of Unmarried Cohabitants

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I have been thinking about the Draft and have a few concerns and suggestions.

(1) Need for a presumption

As I mentioned during the formal session on your Draft, the Washington Supreme Court, in recognizing an equitable division of property arising during the cohabitation, held that there were three elements: (1) the finding of a meretricious relationship, (2) a presumption, in such a situation, that community property accumulated during the cohabitation should be distributed between the cohabitants, and (3) a just and equitable distribution of the property based on several factors.

Furthermore, with marriage, there is also a default in the law that would govern the distribution of property upon death or divorce, which can be changed by will or by a prenuptial agreement.

Your Draft has no presumptions or defaults which establishes the legal expectations for people living together, before or after the triggering event, ie, "cohabitation" as you define it, has occurred. Thus, the parties are still left adrift in an uncertain legal environment by your Draft.

This effects every aspect of the Draft. If they enter into an express agreement, what does it need to cover. If it is silent on distribution of accumulated property during cohabitation, does this mean that they have agree *not* to divide accumulated property or does it mean that the property will be divided because they failed to agree not to divide it.

Of course, the same applied to the Section 12, what is the default that is overcome by the equities?

(2) Need for termination of the cohabitation agreement.

Howard posited in the informal session that the purpose of the act is protect one party's reliance on the others promise "to take care of you for the rest of your life." With marriage, we also have that promise but it is terminable by divorce, except for spousal maintenance if the law allows for that. But there is no termination point for a term like that in a cohabitation agreement. So under the Draft, can the party who relies upon this promise sue on the agreement for support until the end of their life? What about other promises: "I will pay for your college if you move in with me." "If you move in with me and quite your job, I will raise your kids as my own." What is the end point for these promises, and your ability to collect under them, after the cohabitation ends?

(3) Need for a priority

Another thing also appears to be a problem: are these exclusive claims/remedies, does one preclude another, is there a priority among them, or can you pursue all of them at the same time?

As I understand it, with a prenuptial agreement, it varies the terms of a divorce regarding that matter, so you cannot also pursue any divorce remedy regarding it.

However, the Draft does nothing of the sort. If there is an express agreement, it appears you can still pursue equitable division under Section 12, if you don't like the terms of the agreement. See Section 8(e) which provides for this.

Even if there is an express agreement on the allocation of responsibilities, services and payment of expenses, can you still pursue unjust enrichment? A recent study calculated the value of services of a stay-at-home mom, including child care, at \$178,000 per year. And I consider this an underestimate.

If seems logical that an express or implied agreement on something should preclude any contrary equitable remedy.

(4) Factors

The Draft counts some factors twice. One can use the same domestic services to justify a claim for unjust enrichment and for equitable distribution of property under Section 12.

And the Draft does not count some things at all, like transfers of property and gifts between the cohabitants and the use and enjoyment of the assets of one cohabitant by the other.

(5) Clarify use of "intent of the parties"

Intent of the parties is an element through out the Draft. It would be looked to (1) find an implied contract, (2) to determine if there was unjust enrichment, or just a gift, and (3) to determine an equitable division of property. Surely, the intent of the parties would be determinative of the existence of an implied contract, but under Section 12, it is not determinative. It is just one factor that can be overcome by the other factors. So combined with Problem (3) "need for priority," an explicit understanding "not to share property accumulated during cohabitation" would be a term of an express or implied contract, but equitable division of property under Section 12 could still be ordered. This seems unjust and contrary to the reasonable expectations of the parties.

Finally, I think the fundamental problem is that the Draft is trying to cover the waterfront. The Draft not only addresses express agreements, which I think is warranted, but every legal theory any inventive lawyer has come up with to justify some legal right to the other cohabitant's property that any court has considered. This is a massive undertaking with many profound questions and potential contradictions that have not even begun to be addressed and sorted out by the courts or state law.

I know this committee has been very conscientious but, without some well worn paths before you, to mix a metaphor, the Draft has bitten off more than you can chew, in my opinion.

I think the committee could and should perform a useful service by confining itself to express agreements, and, at most, well defined implied contracts or contracts-in-fact.

Thank you for considering my questions, concerns and suggestions. Jim

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