

Memorandum

To: Drafting Committee on Economic Rights of Unmarried Cohabitants
From: Mary Devine and Craig Stowers, Co-Chairs; Naomi Cahn, Reporter
Date: January 24, 2020
Re: Draft to be considered at Feb. 7-8 Meeting

We are looking forward to our San Francisco meeting and hope you are as well. We have made good progress since our last meeting; nonetheless, we still have much to do to be ready for a floor reading in Madison in July.

The meeting

We recognize there will not be time to dive as deeply into all of the issues as we would like. As your co-chairs and reporter, we will do our utmost to ensure the discussion is productive. Please come to the meeting having read and thought about the entire draft, including the comments.

In addition to this memo and the meeting draft act, you are receiving with this email a memo and proposal from Andrea Boyack, ABA RPTE Section Advisor, and Courtney Joslin and Cathy Sakimura, Observers. We appreciate having received this material but have not had an opportunity to consider it. We intend to work from the meeting draft at the meeting and expect that anyone who so desires will refer to the alternative language at the appropriate time.

We will read the entire meeting draft act, line-by-line. Everyone will be given a chance to be heard on any issue necessary to facilitate our deliberations. Issues of lesser significance should be held in abeyance. Time permitting, we promise to circle back to take them up later Saturday. Please try to avoid repetitive comments.

By Saturday afternoon, we expect the Committee to reach consensus to enable preparation of the first-reading draft. This is our final in-person meeting before Madison. We will need to get a draft ready promptly after this meeting to allow time for the Style committee to review. Note that the meeting draft was not reviewed by Style, but our Style liaison, Mark Cutrona, was able to do some editing.

Thank you in advance for your consideration and assistance in making the very best use of our limited time together.

Summary of Significant Changes

- Modified the definition of “cohabitant”
- Highlighted the significance of fairly valuing the provision of domestic services. See, for example, Sections 102(5)(A) and 302(1)

- Attempted to reconcile the means to assert a claim, either in family/domestic relations court or a probate court
- Added an enhanced remedy (formerly known as “supercharged unjust enrichment”) to Article 3, which will be available in “extraordinary circumstances.” The remedy allows for a division of property. See Section 304(d)
- Revised the status-based approach of Article 4 to allow for the division of property based on a showing of long-term cohabitation or shared responsibility for a child. Factors to consider are included in Section 404.

We recognize that the enhanced remedies for equitable claims available under Section 304(d) and the remedies available under Article 4 may be somewhat duplicative. Note that Article 3 requires a showing of long-term cohabitation and *dependence* for an exceptional circumstances remedy (Section 304(d)(2)), while Article 4 requires only a showing of long-term cohabitation or a child. The Committee should plan to discuss whether one or the other approach best addresses the concerns regarding long-term relationships or if both are needed. If both, we should discuss how best to distinguish the two.

Below we have outlined some of the other major issues requiring resolution at the meeting. This list is merely a guidepost and, as always, we look forward to full discussion of the draft and your views.

Issues for Consideration

1. The definition of “cohabitant” in Section 102(1) raises a series of policy issues:
 - a. Should it include LATs (living apart together couples)?
 - b. Should it include “putative” cohabitants, those who were “innocent” cohabitants with a married cohabitant?
 - c. The act has specific language concerning minors in Section 107, in addition to the language in Section 102(1)(B)(iii). Is this approach appropriate?
2. Section 102(3) defines “court.” Is greater uniformity needed, or should the appropriate court be left open for the states to decide?
3. Section 103(d) is designed to apply when a putative cohabitant asserts claims against a cohabitant who was married to another. Apart from the innocent putative cohabitant’s potential claims, the act is not designed to affect the rights of a spouse of a cohabitant. On the other hand, Section 108, for example, provides that cohabitants’ claims in probate will be treated as are other creditor claims. Is Section 103 (d) needed?
4. Section 104(b) addresses the impact of the cohabitants’ subsequent marriage to one another. Is this approach appropriate?

5. Section 108 refers to the requirements of the probate code and their application to a claim under this act. Should this be limited to procedural aspects of the probate code only or are the substantive provisions important as well?
6. Section 206 concerns voidability of a cohabitants' agreement.
 - a. Are there other circumstances that should be included?
 - b. Should such agreements be void or voidable?
7. Section 207(b) concerns the non-enforcement of a term for a victim of domestic violence. What is the precise goal of this subsection? Wouldn't such a term be unconscionable in the absence of this provision? (Note that this language is drawn from the UPMAA, which itself draws from the UPAA.) Does it apply to victims of domestic violence when the other cohabitant is the perpetrator, or to someone who has been a victim at any time? And does "law of this state" modify "remedy" or "victim"?
8. Section 304(d) uses the term "including" because it is possible a court in equity, in exceptional circumstances, may decide that other remedies should be ordered in addition to or instead of a division of property. Are there other remedies that should be specifically included here? For example, should it specify ongoing payments akin to support? And if so, should there be specific limitations?
9. Article 4 does not address concerns raised at our last meeting about the potential ability of Medicaid to recover money available through a cohabitants' claims under this Article. We should discuss the policy issues and decide whether and if so how to address. The Committee may want to consider adding the following language: "This [act] does not give states standing or a claim against a cohabitant for purposes of recovering property or assets for Medicaid purposes."
10. Does Article 4 provide the appropriate criteria for finding an "interdependent economic unit"? Is caregiving for other family members appropriately included, for example? Should the cohabitation be continuous or without significant interruption if based upon a term of years?
11. Should Article 4 remedies include the extraordinary remedy of some form of future payments in the black-letter law?
12. Article 4 and Section 304(d) provide for comparable relief, but the claims are different. Should both remain in the act, should they be treated as alternatives, or is there some other resolution?
13. Choice of law issues appear throughout the draft, such as Section 106, "Governing Law." Is this approach appropriate?