

D R A F T
FOR DISCUSSION ONLY

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

Prefatory Note

The number of nonmarital cohabitants in the United States has increased substantially over the past half-century. Today, more than 17 million people are cohabiting. Approximately 7 percent of American adults are cohabiting. The number of older adults who cohabit is increasing. Four percent of 50-and-older people were cohabiting, while 14 percent of 25-to-34-year-olds were cohabiting. William E. Gibson, *Far More 50+ Couples Shacking Up* (May 8, 2017), <https://www.aarp.org/home-family/friends-family/info-2017/older-couples-cohabitation.html>.

The economic rights that derive from cohabitation differ greatly depending on the relationship and its recognition under state law. State law across the United States varies widely on the treatment of unmarried cohabitants, both at separation and at death. The Economic Rights of Unmarried Cohabitants Act (ERUCA) provides states with comprehensive and uniform guidance on questions concerning cohabitants' economic interests and obligations ("economic rights") based on their relationship.

Couples have cohabited outside of marriage for millennia. Cohabitants may share financial responsibilities during their cohabitation, or they may keep their finances separate. One cohabitant may move into a dwelling the other had acquired separately. They may acquire property together or they may not. Both may work, or one may work and the other takes care of the household. Upon their breakup or the death of one cohabitant, state courts have in some cases provided relief to a claimant seeking payment or a share of the property of the other cohabitant, but in many cases no relief is given.

The act affirms the capacity of each cohabitant to contract with and, upon termination of the relationship, claim a remedy against the other cohabitant without regard to any intimate relationship that exists between them, subject to certain limitations. The legal rights of third parties, such as secured creditors or good faith purchasers, cannot be adversely impacted by a remedy granted under the act. Further, upon termination of the cohabitants' relationship, a cohabitant may not claim a right or remedy greater than what the cohabitant would receive if the cohabitants had married. Finally, a cohabitant who is married to another individual may not assert a claim for relief under this act, but may be subject to a claim by the other cohabitant and may assert defenses to such a claim.

1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

2 **SECTION 101. SHORT TITLE.** This [act] may be cited as the [Uniform] Economic
3 Rights of Unmarried Cohabitants Act.

4 **SECTION 102. DEFINITIONS.** In this [act]:

5 (1) “Cohabitant” means one of two individuals who live together as a couple in an
6 intimate, committed relationship and function as an economic, social, and domestic unit.

7 (2) “Cohabitation agreement” means the agreement between two cohabitants regarding
8 the management, allocation, or disposition of their economic rights arising within the context of
9 their relationship.

10 (3) “Domestic services” means services and activities performed by a cohabitant for the
11 benefit of the other cohabitant or their relationship and includes cooking, cleaning, shopping,
12 household maintenance, doing errands for the household, caring for the other cohabitant or a
13 family member of the other cohabitant, or other similar activities.

14 (4) “Economic right” means any interest, right, responsibility, duty, promise, or
15 obligation of a cohabitant relating to domestic services or property.

16 (5) “Property” means anything that may be the subject of ownership or any interest in the
17 thing, whether real or personal, tangible or intangible, legal or equitable. The term includes
18 financial obligations and assets.

19 (6) “Record” means information that is inscribed on a tangible medium or that is stored in
20 an electronic or other medium and is retrievable in perceivable form.

21 (7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
22 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
23 the United States.
24

(8) “Termination of the cohabitants’ relationship” means:

(A) the death of one of the cohabitants;

*(B) the date that the cohabitants cease functioning as an economic, social, and domestic unit; or

(C) the date the cohabitants marry each other.

NOTE TO COMMITTEE: The definition of “termination” has been tweaked from the language provided in the Cathy/Courtney/Andrea proposal agreed to in principle at the February meeting (“a complete and final break as demonstrated by a party to cease acting as a cohabitant as defined by Section 102(1)”) to the current language in an effort to clarify it.

We eliminated definitions for court, individual, and sign as unnecessary.

Comment

The definition of “cohabitant” specifies to whom the act applies. Because definitions have substantive impact, this definition tries to put in plain English the concept of a cohabitant. Not every cohabiting relationship will involve sexual conduct, but the intent of the act is to include only relationships which have a romantic component. The phrase “intimate committed relationship” conveys this aspect of the relationship.

As set forth in Section 104, cohabitants whose marriage to each other would be unlawful are not covered by the act, except that a cohabitant who is married to a third party can bring some claims under the act.

The committee discussed whether, to qualify as a cohabitant, the individuals must live together or can be part of a “living apart together” (“LAT”) couple. This is an increasingly common relationship. *See, e.g., Cynthia Grant Bowman, Living Apart Together As A “Family Form” Among Persons of Retirement Age: The Appropriate Family Law Response*, 52 Fam. L.Q. 1 (2018)(exploring the phenomenon of LAT couples among Baby Boomers); *How Should the Law Treat Couples Who Live Apart Together?*, 29 Child & Fam. L. Q. 335 (2017)(discussing living apart together couples and suggesting that LAT couples should have certain legal rights, focusing on those designed to promote caretaking, not economic interdependence). For example, two people may live on separate floors in an assisted living facility, or two people may live in separate residences because of employment or imprisonment or a variety of other reasons. While these couples remain committed to one another and continue to function as a unit for many purposes, they are not covered by the act. The consensus of the committee was to limit application of the act to couples who reside together.

A “cohabitation agreement” requires mutual assent although not expressly stated in the definition. The cohabitation itself is sufficient consideration for the agreement. *See Section 106*

1 (b). An agreement may specify that the cohabitants will have no reciprocal rights or obligations.
2 See Section 106 (d). The definition is broad enough to include agreements which are written or
3 oral, express or implied.
4

5 The definition of “domestic services” focuses on the actual provision of these services.
6 Payments made by one cohabitant for these services could be the subject of another claim under
7 this act. Domestic services may include business development, business entertaining, and similar
8 activities. E.g., *Hills v. Superior Court (Munoz)*, No. B174068, 2004 WL 1657689, at *6 (Cal.
9 Ct. App. July 26, 2004) (reasoning that female plaintiff’s assertions raised triable issues of fact,
10 including that “she gave up her career and devoted herself to performing household and other
11 domestic services for him so as to aid his business career”).
12

13 The definition of “economic right” is intentionally broad. We mean to include, for
14 example, contributions of salary or other financial assets to the relationship. The term may also
15 include payments after the cohabitation terminates, if an agreement so provides, but in few, if
16 any, other circumstances.
17

18 It does not cover tort suits, such as loss of consortium or wrongful death or intentional
19 infliction of emotional distress claims. The act defers to other state laws on such claims. With
20 respect to the value of domestic services, “economic right” means the value of any benefit
21 conferred as a result of the domestic services or the actual replacement value of the domestic
22 services. For example, domestic services may contribute to the other cohabitant’s ability to earn
23 money. See Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. Rev. 2139 (2019) (cases
24 routinely deny access to property in the context of a relationship that involved domestic
25 services). The definition of economic right repeats the concept of the benefit of “domestic
26 services” in order to emphasize it.
27

28 “Termination of the cohabitants’ relationship” refers to death of a cohabitant, dissolution
29 of the relationship, and the cohabitants’ marriage to one another. The date that the cohabitants
30 “ceased functioning as an economic, social, and domestic unit” is highly fact specific. Serving a
31 prison sentence or being on an overseas deployment, or working in another jurisdiction for an
32 extended period of time, for example, does not, in and of itself, show that the cohabitants ceased
33 functioning as an economic, social, and domestic unit.
34

35 Issues concerning commencement of the statute of limitations upon termination are
36 addressed in Sections 105 and 107.
37

38 The act does not designate the appropriate tribunal to determine claims brought under the
39 act. Cohabitants’ claims will involve elements of traditional contract claims, family law claims
40 and probate claims.
41

42 Enacting states will need to decide on the appropriate tribunal(s) to hear these cases. The
43 Committee believes that these claims differ significantly enough from commercial claims that
44 upon dissolution of the cohabitation other than by death, the claims should be heard in the state
45 court that handles family law matters. Upon termination by death, the tribunal that handles
46 probate matters would be appropriate. Cf., *Matter of Estate of Cooney*, __ P.3d. __, 2019 WL

1 7161295 *3 (Mont. 2019)(“A probate court has authority to settle claims against the estate, such
2 as creditor claims.[] Enforcement of a contract to devise property is not a claim against the
3 estate. . . The probate court’s limited jurisdiction does not extend to adjudicating a breach of
4 contract claim.”).

5
6 Because the act does not designate a state court tribunal, there was no need to include a
7 definition of “court” or “tribunal” as might be expected in a uniform act of this sort.
8

9 **SECTION 103. SCOPE.**

10 (a) This [act] applies to the recognition and enforcement of economic rights between two
11 cohabitants that arise:

12 (1) by virtue of a cohabitation agreement;

13 (2) under circumstances where one cohabitant has been unjustly enriched; or

14 (3) under circumstances in which equity otherwise requires a remedy.

15 (b) This [act] does not create, alter, diminish, enlarge or otherwise affect the application
16 of the doctrine of common law marriage as may be recognized or prohibited by this state.

17 (c) The [act] does not create, alter, diminish, enlarge, or otherwise affect a cohabitant’s
18 rights or duties under law of this state other than this [act].

19 (d) Except as otherwise provided in this [act], the fact that two individuals are, or were, in
20 a cohabiting relationship is not a basis for precluding a claim between the two cohabitants or
21 subjecting either to additional procedural or substantive requirements in order to prevail on the
22 claim.

23 ***Note to Committee:** Subsection (d) has been moved up from Section 107 of the March*
24 *Zoom call draft, and it has been tweaked for clarity. Subsection (d) should be read in*
25 *conjunction with Section 105(a).*

26 **Comment**

27
28
29 This section states the coverage of the act. The act is intended to give the courts broad
30 discretion to “do equity” between cohabitants.

31
32 The act is not intended as a substitute for common law marriage, as subsection (b) makes
33 clear.

1 Because some states have imposed restrictions on cohabitants that are not imposed on
2 other litigants, the act includes subsection (d).

3
4 The goal of the act is to treat cohabitants like other litigants in most cases. Consequently,
5 the fact that an individual is a cohabitant is not a basis for precluding the claim or subjecting the
6 individual to additional requirements, such as the requirement there be a basis apart from the
7 cohabitation to pursue a claim. For example, in *Spafford v. Coats*, 118 Ill. App. 3d 566 (1983),
8 Donna Spafford filed a complaint against her former partner, Richard Coats, for the creation of a
9 constructive trust, alleging that she purchased or paid the down payment from her own funds for
10 various vehicles. *Id.* at 568. The problem, however, was that the vehicles purchased by Spafford
11 were titled in Coats's name because insurance premiums would be less. *Id.* Spafford and Coats
12 cohabited for more than six years. *Id.* at 568-69. The appellate court held that the nature of their
13 relationship did not preclude equitable relief because Spafford's claims were "substantially
14 independent" of the nonmarital relationship between the parties and not based on rights arising
15 from their cohabitation, i.e., Spafford had actually paid for the motor vehicles herself. *Id.* at 572-
16 73. Spafford's claims "had an economic basis independent of the nonmarital, cohabiting
17 relationship, [so] she was permitted to recover those independent contributions." *Blumenthal v.*
18 *Brewer*, 69 N.E.3d 834, 854 (Ill. 2016).

19 20 **SECTION 104. EXCLUSION.**

21 (a) This [act] does not apply to claims brought by a cohabitant whose marriage to the
22 other individual would not be recognized under law of this state other than this [act].

23 (b) Notwithstanding subsection (a), if one of the cohabitants is married to a third party,
24 the [act] applies, subject to the limitations on claims of married cohabitants set out in Section
25 111.

26 **Comment**

27
28 This section clarifies that a cohabitant cannot bring a claim under this act against another
29 cohabitant if, were they to marry, their marriage would not be recognized in this state. This
30 provision excludes claims based on a cohabiting relationship if either cohabitant is a minor who
31 could not be married under state law. It also excludes individuals who are in an incestuous
32 cohabiting relationship if a marriage between those individuals would not be recognized under
33 state law.

34
35 With respect to subsection (b), the committee discussed at length whether to include
36 claims by married cohabitants within the purview of this act, and it decided to do so. Many
37 married people cohabit. *E.g., Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). The reasons for doing
38 so are numerous, including the impracticality of divorce or the illness of the non-cohabiting
39 spouse. Section 111, concerning equitable division, precludes recognition of claims under that
40 Section by a person married to a third party for claims that accrue after that marriage.

1 **SECTION 105. GOVERNING LAW.**

2 (a) Claims to enforce economic rights pursuant to a cohabitation agreement or in equity
3 under this [act] are governed by law of this state other than this [act] relating to contract or
4 equitable claims generally, including the choice-of-law rules of this state, the applicable statutes
5 of limitation, and the laws governing transfer or ownership of real property.

6 (b) A claim for relief by or against the estate of a deceased cohabitant is governed by law
7 of this state other than this [act] including choice of law rules and is subject to the requirements
8 of the [state probate code] [concerning creditor claims against a decedent's estate, including the
9 statutes of limitations, the manner of presenting a claim, the time within which a claim must be
10 presented and provisions concerning the satisfaction of claims].

11 (c) The law of the jurisdiction which governs the validity, enforceability, interpretation
12 and construction of a cohabitation agreement may be designated in the agreement, if the
13 jurisdiction has a significant relationship to the agreement or either cohabitant, and the
14 designated law is not contrary to fundamental public policy of this state.

15 (d) The common law of this state and principles of equity supplement this [act].

16 **Comment**

17 This act is designed to coordinate with, and not change, existing state law, except to the
18 extent necessary to recognize that each cohabitant has some legally cognizable interests in the
19 property of the other. With limited exceptions, state procedural law governing statutes of
20 limitations, choice of law rules, transfers of property, probate proceedings, etc. will control. The
21 most significant exceptions are the provision for tolling of the statute of limitations if the
22 cohabitants marry each other found in Section 106(d). For some states and for some claims, the
23 burden of proof provisions of Section 108 may represent a change in state law.

24 As with most other agreements, a cohabitation agreement can specify a governing law,
25 provided that law has a relationship to either the parties or their agreement, and it is not contrary
26 to the enforcing state's public policy.

27
28 The intent is for other state law to supplement the act unless clearly inconsistent with the
29 act. Note, for example, that to the extent the act establishes burdens of proof for unjust
30 enrichment, it may supersede a state's common law.

Subsections (a) and (c) are drawn from UPMAA Section 4:

SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined: (1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or (2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

Subsection (e) recognizes that a jurisdiction’s law concerning unjust enrichment and other legal and equitable principles is otherwise applicable. This subsection is drawn from Section 106 of the Uniform Trust Code (2018), which provides: “The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”

SECTION 106. COHABITATION AGREEMENTS.

(a) A cohabitation agreement is not void as against public policy.

(b) Cohabitation is sufficient consideration for a cohabitation agreement.

(c) A cohabitation agreement may be in a record, oral, or implied-in-fact.

(d) A cohabitation agreement may waive, in whole or in part, the cohabitants’ economic rights under this [act].

Comment

Subsection (a) is intended to abrogate court decisions that have held that cohabitation agreements are void as against public policy. *See, e.g., Blumenthal v. Brewer*, 69 N.E.3d 834, 854 (Ill. 2016) (rejecting constructive trust and restitution claims by long-term same-sex cohabitant where claims arose from marriage-like relationship; court notes that parties may enter into contracts independent of their cohabiting relationship, but recognition of claims based on cohabiting relationship would be inconsistent with legislature’s abolition of common law marriage, and creation of remedies must come from legislative branch); *Gunderson v. Golden*, 360 P.3d 353 (Idaho Ct. App. 2015) (rejecting claim for equitable distribution of property after 25-year cohabitation, based on public policy: “The elimination of common-law marriage, supported by an explicit public policy justification, commands our courts to refrain from enforcing contracts in contravention of clearly declared public policy and from legally recognizing cohabitational relationships in general.”).

Subsection (b) provides that cohabitation agreements are enforceable without consideration under subsection (b). This is based on a similar provision in the Uniform Premarital and Marital Agreements Act. *See* UPMAA Sec. 6. However, note that marriage is deemed a substitute for consideration in that context, and that these agreements are therefore

distinguishable. Nonetheless, the committee believed that courts should treat the cohabitation as an adequate basis for finding consideration.

An implied-in-fact agreement differs from an express contract only “in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances.” Restatement (Second) of Contracts § 4 cmt. (1981). Because some states refuse to recognize agreements between cohabitants due to the “meretricious nature of their relationship” and others may impose higher burdens on cohabitants, *Spafford v. Coats*, 118 Ill. App. 3d 566 (1983), this section clearly states that agreements between cohabitants setting forth their rights and obligations with regard to property or contributions of domestic services by either or both are valid and enforceable. See also Section 107 (a) and the comments following that section.

The act also specifically allows cohabitants to “opt out” of the protections afforded by the act, if they so desire. An effective “opt out” must be contained in a cohabitation agreement, and so may be written or oral, express or implied.

**SECTION 107. CLAIMS TO ENFORCE ECONOMIC RIGHTS GENERALLY;
SPECIAL TOLLING; CUMULATIVE CLAIMS.**

(a) A claim for breach of a cohabitation agreement accrues upon breach and may be commenced within the applicable limitations period during the period of cohabitation or thereafter.

(b) A claim for equitable relief under Sections 110 or 111 accrues upon termination of the cohabitation.

(c) If cohabitants marry each other, the marriage terminates the accrual of any additional rights between the cohabitants under this [act], tolls the statute of limitations, and extends the period for filing an equitable claim until either cohabitant files for [separation,] dissolution [,] or divorce, or dies.

(d) A cohabitant may assert a claim for relief in equity and a claim based upon a cohabitation agreement in the same action.

Note to committee: Former subsection (a) from the first Zoom meeting draft has been moved to new subsection (d) of Scope.

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Comment

The significance of subsection (a) is that it allows the agreement to be enforced upon breach, even if the cohabitation is ongoing.

The act does not include specific provisions for statutes of limitations. The time period, and except as stated here, the accrual provisions found in other state law will control. See Section 105, Governing Law. The act also does not preclude either cohabitant from asserting an equitable defense limiting or enlarging the time for enforcement, such as laches or estoppel.

The act includes a very specific tolling provision to cover situations where the cohabitants marry after cohabiting. The act tolls the statute of limitations on the enforcement of any claims accruing during the cohabitation during a marriage that follows the cohabitation and allows consideration of such claims in any subsequent divorce or probate proceeding.

With respect to subsection (c), separation is bracketed because in some states, the filing of a separation action also terminates the marital community.

Courts increasingly take into account premarital cohabitation in distributing property at divorce. *See, e.g., Matter of Munson*, 146 A.3d 153, 157-58 (N.H. 2016)(permitting trial court to consider premarital cohabitation in dividing property at divorce, and listing other states that do so, including Indiana, Montana, Michigan, and Oregon). In light of this trend, the act permits agreements made during premarital cohabitation to be considered at the end of a marriage. The act tolls the statute of limitations on the enforcement of such agreements during a marriage that follows a cohabitation and allows consideration of the agreement in any subsequent divorce or probate proceeding. Note that equitable distribution in most jurisdictions applies only to property acquired during the marriage; only in a minority of jurisdictions would premarital property be covered.

Note that the parties cannot agree that the cohabitation agreement will not terminate the accrual of additional rights under subsection (c) if the cohabitants marry.

With respect to the enforceability of an agreement concerning provisions to be made at death, an express contract, for example, may be covered by UPC Section 2-514 (iii); that provision permits “a writing signed by the decedent evidencing the contract.” If there is no writing and a court has found an implied-in-fact agreement term concerning provisions to be made for the surviving partner at death, that term may be enforceable.

SECTION 108. BURDEN OF PROOF. The burden of proof to establish:

(1) the terms of an express cohabitation agreement is governed by law of this state other than this [act] applicable to express agreements;

(2) the terms of an oral or implied-in-fact cohabitation agreement is clear and convincing

evidence;

(3) the elements of an equitable claim under Section 110 is a preponderance of the evidence; and

(4) the elements of an equitable claim under Section 111 is clear and convincing evidence.

Comment

Under this act, cohabitants may acquire certain rights and remedies to obtain payment or a share of the cohabitants' property acquired during the cohabitation. This will come as a surprise to many cohabitants, especially cohabitants who may have intentionally decided not to marry and not to become subject to state law regulating the distribution of property upon dissolution or divorce or death (for example, seniors who have lost previous spouses and find companions with whom they cohabit but who do not want to entangle their finances and property); or cohabitants who without any serious thought move in together and find themselves still living together some years later.

Section 108 establishes heightened burdens of proof for claims based on oral agreements and implied-in-fact-agreements, and for the new equitable remedy available under Section 111: the burden of proving these claims is clear and convincing evidence. The rationale for these heightened burdens is that the act is creating new and in some cases unprecedented rights and remedies for cohabitants – rights and remedies that in some sense are similar to the rights and remedies attendant to marriage – and the drafting committee believes it is important that courts be incentivized to take a hard look at the evidence supporting claims for these marriage-like rights and remedies where the parties have not formalized their agreement, and grant relief only when the evidence is clear that a cohabitant is entitled to these remedies.

When the parties to a written cohabitation agreement express their agreement in writing about their financial dealings and how they intend to treat the property they bring into or acquire during their cohabitation, the evidence of their intent is evident on the face of their agreement, and the usual burden of proof for civil actions – preponderance of the evidence – is sufficient. But when a cohabitant claims that the parties made an oral agreement, or that there was an implied agreement based on the parties' conduct or language, or that the parties' conduct and language resulted in unjust enrichment to the other cohabitant such that the property acquired during the cohabitation should be equitable divided, the evidence may not be so clear.

The Supreme Court has recognized that “even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a standard of proof is more than an empty semantic exercise.” *Addington v. Texas*, 441 U.S. 418, 425 (1979)(internal citations omitted). “*Increasing the standard of proof is one way to impress the factfinder with the importance of the decision.*” *Id.* At 427 (emphasis added); see Dan L. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages-Equity-Restitution* 399 (3d ed.

1 2018)(“the constructive trust plaintiff who proves her claim by clear and convincing evidence
2 wins an in personam order that requires defendant to transfer legal rights and title of specific
3 property or intangibles to plaintiff”).
4

5 There is also an element of promoting enactability by establishing a heightened burden of
6 proof in these situations. Some of the rights and remedies provided by the act, if not the act as a
7 whole, will be controversial. A heightened burden of proof will go a long way in assuring
8 legislatures that only those cohabitants who can clearly and convincingly prove an oral or
9 implied-in-fact agreement or an equitable basis for relief will be granted remedies under the act.
10

11 By contrast, as subsection (b) provides, the standard of proof for an equitable claim is
12 typically a preponderance of the evidence. “In an action for quantum meruit¹ or unjust
13 enrichment, the burden of proof is upon the plaintiff . . . [to show] facts and circumstances
14 sufficient to justify the inference of an implied promise to pay for the services or materials in
15 question and of proving the amount and value thereof to a reasonable degree of certainty or by a
16 preponderance of the evidence.” 66 Am. Jur. 2d Restitution and Implied Contracts § 87 (2020).
17

18 **SECTION 109. UNENFORCEABLE TERMS.**

19 (a) A term in a cohabitation agreement may be unenforceable if, in the context of the
20 circumstances taken as a whole, enforcement of the term would result in substantial economic
21 hardship for a cohabitant because of a material change in circumstances arising after the
22 agreement was made.

23 (b) A term in a cohabitation agreement is not enforceable to the extent that it:

24 (1) limits or restricts a remedy available for one of the cohabitants who is a victim
25 of domestic violence, sexual assault, or stalking under law of this state other than this [act]
26 relating to domestic violence; or

27 (2) affects a child’s right to support.

28 (c) The court shall decide questions of the enforceability of a term as a matter of law.

29 **Comment**

30
31 Given that the act is intended to supplement existing state law, courts can still use the
32 doctrines of unconscionability and illegality.
33

34 Most of this section is adapted from UPMAA Sections 9 (f), (g), and 10 (set out below).
35 Subsection (a), concerning “substantial hardship” is drawn from Section 9.

1 The domestic violence language is drawn from the UPMAA Section 10(b)(2). Subsection
2 (c) is drawn from UPMAA Section 10(b)(1). Note that, as the UPMAA Comments to Section 10
3 provide, “parents and prospective parents do not have the power to waive the rights of third
4 parties (their current or future children), and do not have the power to remove the jurisdiction or
5 duty of the courts to protect the best interests of minor children. [This] applies also to step-
6 children, to whatever extent the state imposes child-support obligation on step-parents.”

7
8 UPMAA

9
10 *[Section 9] (f) A court may refuse to enforce a term of a premarital agreement or*
11 *marital agreement if, in the context of the agreement taken as a whole[:] [(1)] the term*
12 *was unconscionable at the time of signing[; or (2) enforcement of the term would result*
13 *in substantial hardship for a party because of a material change in circumstances arising*
14 *after the agreement was signed].*

15 *(g) The court shall decide a question of unconscionability [or substantial*
16 *hardship] under subsection (f) as a matter of law.*

17 *[Section 10] (b) A term in a premarital agreement or marital agreement is not*
18 *enforceable to the extent that it . . .*

19 *(2) limits or restricts a remedy available to a victim of domestic violence*
20 *under law of this state other than this [act] . . .*

21
22 **SECTION 110. EQUITABLE CLAIMS.** Except as otherwise provided in this [act], an
23 equitable claim by a cohabitant, including a claim based on domestic services, may be asserted
24 and enforced unless the claim is inconsistent with a term of an enforceable cohabitation
25 agreement.

26 **Comment**

27 This section and section 111 affirm the rights of cohabitants to seek equitable relief.

28 There are some courts that have historically not accorded adequate weight to domestic
29 services. This act emphasizes that domestic services have value beyond the hourly payment for
30 such services. *See* Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. Rev. 2139 (2019).

31
32 As this section makes clear, unjust enrichment and other equitable claims are available to
33 cohabitants, along with appropriate forms of relief, such as disgorgement or constructive trust.
34 With respect to types of relief, injunctive relief, and particularly preliminary injunctive relief,
35 may be critical to preventing dissipation of assets.

36
37 The Restatement (Third) of Restitution notes:

38 *Courts in some jurisdictions refer to checklists of factors, such as the following, to*
39 *identify cases in which the receipt of a benefit gives rise to a liability in restitution:*

40 *To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1)*

1 *the plaintiff conferred a benefit upon the defendant; (2) the defendant had an*
2 *appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the*
3 *benefit under circumstances making it inequitable for the defendant to retain the benefit*
4 *without payment of its value.*

5
6 Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt (2011).
7

8 There are numerous ways to measure unjust enrichment. *See, e.g.,* Restatement (Third)
9 of Restitution and Unjust Enrichment § 49 (2011)(setting out six different methods for
10 measuring unjust enrichment).

11 **SECTION 111. EQUITABLE DIVISION OF PROPERTY.**

12 (a) Unless inconsistent with a term of an enforceable cohabitation agreement or precluded
13 by subsection (b), a cohabitant may assert a claim for fair and equitable division of the assets
14 acquired and liabilities incurred as a result of the efforts of either cohabitant during the
15 cohabitation, without regard to legal title.

16 (b) A cohabitant who is married to a third person may not bring a claim under this
17 Section with respect to equitable division of the assets acquired and liabilities incurred as a result
18 of the efforts of either cohabitant during the cohabitation and after the date of that cohabitant's
19 marriage. An unmarried cohabitant cohabiting with a married cohabitant may bring a claim
20 under this Section against the married cohabitant.

21 (c) In determining whether and how to order a fair and equitable division of the assets
22 and liabilities under subsection (a), the court shall consider the following factors:

23 (1) the duration and continuity of the cohabitation;

24 (2) the cohabitants' allocation of financial responsibility for housing, food,
25 clothing, health care, and other daily living expenses for the household;

26 (3) the cohabitants' allocation of responsibility for the performance of domestic
27 services;

28 (4) the cohabitants' allocation of caretaking responsibilities for family members

1 of either;

2 (5) the cohabitants' intent to share assets acquired or liabilities incurred during the
3 cohabitation.

4 (6) Whether the property being considered for division is subject to choate or
5 inchoate interests of a third party;

6 (7) Whether a cohabitant has wasted property or transferred property to a third
7 party in an effort to defeat rights of the other cohabitant;

8 (8) if one of the cohabitants is married, the rights and interest of the married
9 cohabitant's spouse; and

10 (9) Other factors that the court considers relevant.

11 (d) There is no presumption that any particular percentage of division of assets or
12 liabilities is equitable.

13 *As a **policy** issue with respect to this entire Section, the Joint Editorial Board for*
14 *Uniform Real Property Acts noted concerns about credit provided based on one*
15 *cohabitants' ownership of property that might then be transferable pursuant to this*
16 *Section. See Email to the Committee from R. Wilson Freyermuth, dated Feb. 6, 2020*
17 *(distributed Feb. 7 via email from Rachel Hewitt).*

19 **Comment**

20
21 The remedy contemplated here is division of only those assets and liabilities acquired
22 during the cohabitation.

23
24 Note that in addition to claims under this Section and other provisions of the act, a
25 cohabitant may pursue remedies in contract or equity outside of the act. With respect to the
26 property to be equitably divided, a court may want to refer to other state law regarding the
27 treatment of marital (or community) and separate property under the states divorce or dissolution
28 statutes for guidance. The term "other daily living expenses" in Section 111(b)(2) allows for
29 consideration of responsibility for support for a child or other family member of the cohabitants.
30 This is not intended to and will not affect how child support is calculated or ordered in the state.

31
32 Subsection (d) limits the claims under this Section to unmarried cohabitants. The
33 Committee believed that a married cohabitant should not have access to this form of
34 extraordinary relief.

1 ***SECTION 112. LIMITATIONS ON REMEDIES.**

2 (a) This [act] shall not be applied to provide rights or remedies to a cohabitant that would
3 be greater than what the cohabitant would receive upon divorce, dissolution, or death if the
4 cohabitants had married.

5 *NOTE TO COMMITTEE: This was added based on comments by Turney and others*
6 *at the February meeting. Committee members are encouraged to think about the*
7 *phrasing and **policy**. For example, if a cohabitant is treated as a creditor of an estate,*
8 *then the cohabitant may have a right or remedy greater than a surviving spouse.*

9 *(b) Nothing in this [act] nor a division of assets or liabilities pursuant to this [act] affects
10 the rights of third parties, including a good faith purchaser from, or secured creditor of, a
11 cohabitant.

12 *NOTE TO COMMITTEE: Source Note: Comm. Perlman's language agreed to by the*
13 *committee at the February meeting. We may need to reassess the language of subsection*
14 *(b) after review of the act by the Joint Editorial Board for Uniform Real Property Acts.*
15

16 **SECTION 113. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
17 applying and construing this uniform act, consideration must be given to the need to promote
18 uniformity of the law with respect to its subject matter among states that enact it.

19 ***SECTION 114. SAVINGS AND TRANSITIONAL PROVISIONS.** This [act] does
20 not affect the validity or effect of a cohabitation agreement entered into before [the effective date
21 of this [act]], and applies only to equitable claims that accrue after the effective date of this [act].

22 *NOTE TO COMMITTEE: This is a new provision, and Committee members are*
23 *encouraged to consider whether this **policy** appropriately addresses transition issues.*
24 *The Committee should discuss whether this act should apply to validate cohabitation*
25 *agreements made prior to the effective date of the act, as well as to any equitable claims*
26 *that accrued before the effective date of this act.*
27

28 **SECTION 115. [REPEALS; CONFORMING AMENDMENTS.]**

29 (a)

30 (b)

1 (c)]

2 **SECTION 116. EFFECTIVE DATE.** This [act] takes effect