

To: ERUCA drafting committee
From: Courtney Joslin, Observer; Cathy Sakimura, Observer
Date: March 18, 2020

Thank you for allowing us to participate in this important project.

We submit this memo in advance of the March 20, 2020 call to raise four issues. Because it is our understanding that we will not be permitted to speak at this March 20, 2020 meeting, we hope that people will reach out to us ahead of time if they have any questions about our memo or would like to speak with us about these issues prior to the meeting.

(1) Heightened Evidentiary Burden

Currently, the majority of states in the U.S. allow unmarried cohabitants to assert claims based in contract and equity. In most of these states, the standards applicable to cohabitants *are the same as those applicable to all other people*.

This draft of the Act would mark a significant and troubling step backwards for the law. Unlike existing law, the Act would impose a heightened evidentiary standard on cohabitants asserting oral contract claims, implied contract claims, and equitable claims. Specifically, cohabitants would be subjected to a clear and convincing standard of proof. While all other people would be subject to the usual evidentiary standard, which is most commonly a preponderance of the evidence standard.

The inclusion of a heightened standard of proof is deeply troubling. Very few former cohabitants prevail under existing law.¹ This would make it even harder for former cohabitants to recover. And, to be clear, most of the cases have been brought by and continue to be brought by women who are seeking protection at the end of cohabiting relationships.² Thus, as a group, women will disproportionately feel the negative effects of this backward step in the law. Not only is this harmful policy, it is inconsistent with a stated goal of this Act, which, as stated in the February 2020 draft, is “to ensure that a person’s capacity to contract or to obtain an equitable remedy is not affected by that person’s intimate relationship status with any party.” Feb. 2020 draft, Prefatory Note.

In addition to this substantive concern, we were troubled to see the draft impose a heightened evidentiary standard on equitable claims. Our notes indicate that while the committee voted to apply a heightened evidentiary standard to oral and implied contract claims, it did not vote to do so with regard to equitable claims. Accordingly, it is our belief that this draft reflects choices that are contrary to the direction of the Drafting Committee.

¹ See, e.g., Courtney G. Joslin, *Autonomy in the Law*, 65 UCLA L. REV. 912, 931 (2019). See also Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331, 335 (Robin Fretwell Wilson ed., 2006) (noting that former nonmarital partners “have not had an impressive record of success in the post-Marvin period”).

² See, e.g., Joslin, *supra* note 1, at 937 (“Women continue to make up the majority of the plaintiffs in these cases, cases that are usually unsuccessful.”); Scott, *supra* note 1, at 334 (“The typical claim is brought in contract by the woman ...”). See also Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1981, 1894 (2018).

(2) Bar on Claims Asserted by Married People or People in a Void Marriage

The current draft bars anyone who is married to someone else from asserting claims under this Act. It also adds a new exclusion—it precludes people who are in a void marriage from asserting claims under this Act. The result of these exclusions are to bar such persons from enforcing express written contracts against former cohabitants, among other possible claims.

By barring claims that are otherwise available to any person, this statutory exclusion perpetuates the very problem this Act was intended to address. In the past, unmarried cohabitants were barred from asserting claims that any other person could bring—including contract and equitable claims—based on the reasoning that enforcing a contract between people who were engaging in what was considered immoral behavior--cohabitation outside of marriage--would violate state public policy against that underlying conduct. This Act was intended to remedy this past mistake, and to allow unmarried cohabitants to bring claims that any other person could bring. *See, e.g.*, Prefatory Note, Feb. 2020 draft (“to ensure that a person’s capacity to contract or to obtain an equitable remedy is not affected by that person’s intimate relationship status with any party.”). Instead of fixing this problem, the Draft repeats it, albeit in a narrower form.

To be clear, no state currently includes such a limitation. In fact, many of the cases decided under current law involve couples in which one of the parties was married to someone else for some or all of the cohabitation period. Indeed, the *Marvin* case itself involved such a person. Here, too, the Act *contracts* rights currently available under existing state law.

(3) Excludes Many Cohabitants from General Contract and Equitable Claims

The draft includes a rather narrow definition of cohabitants and applies it to every claim addressed in the Act. Specifically, a “cohabitant” is defined to include only those unmarried persons who “live together as a couple in an intimate, committed relationship who function as an economic, social, and domestic unit.” Among other things, this seems to have the effect of excluding certain cohabitants from being able to bring general contract and equitable claims.

While it may make sense to limit the Section 111 remedy to more committed relationships, it does not make sense to preclude unmarried partners who are in more informal relationships from being able to assert contract and equitable claims that are available to any other person. If one can assert a contract claim against one’s roommate, why shouldn’t one be able to assert a contract claim against one’s partner just because the relationship is not sufficiently “committed.”

No state currently includes such a limitation. Hence, this is just one more way in which this Act *contracts* rights available under existing law for unmarried partners.

(4) Lack of clarity about how Section 111 fits with the rest of the Act

The version of Section 111 that was discussed at the drafting meeting in February included the phrase “in addition to any existing equitable claims otherwise available in this state.” Without some

kind of phrase like this, it is less clear how this provision fits into the Act and how it relates to other equitable remedies.

Conclusion

For the reasons stated in this memo, if this Act were to be approved in its current form, we would vigorously oppose its enactment in any state and we would urge all interested stake holders to do the same. We urge reconsideration of these matters.