MEMORANDUM

To: Uniform Law Commissioners
From: Turney Berry and Mary Devine, Co-Chairs; Naomi Cahn, Reporter
Re: Uniform Cohabitants' Economic Remedies Act (formerly, Uniform Economic Rights of Unmarried Cohabitants Act)
Date: June 28, 2021

The Drafting Committee submits the draft Uniform Cohabitants' Economic Remedies Act to the Commission for a final reading. The goal of the Act is not to create a new status for certain relationships but rather to enable two people who are cohabiting with one another to contract with, or to bring equitable claims against, one another, in the same manner and to the same extent that individuals who are not cohabiting, may under applicable state law.

The Drafting Committee focused on economic remedies, not rights that cohabitants may have or wish to have that are not economic in nature. Accordingly, over the past year, the name of the Act changed from the Economic Rights of Unmarried Cohabitants to the current name.

Summary of Contents

The Committee sought to (i) maintain the integrity of settled state law where possible, (ii) provide significant public benefit to the increasing numbers of unmarried cohabitants, and (iii) provide a uniform response to the most significant issues cohabitants face regarding their economic remedies. Accordingly, the draft gives legal recognition to the fair and reasonable expectations of cohabitants as may be found in their agreement(s) and affords remedies where the parties have equitable claims against one another.

The basic approach of the Act is to recognize that each cohabitant has legally enforceable rights vis-à-vis the other and provide a framework for enforcement of those rights when necessary. The Act does not create a new status for cohabitants, somewhere between married and single. Individuals are still married or not married, unless a state itself (like Washington perhaps) has an intermediate stage. Nor does the Act reinstate common law marriage. In fact, the assumption is that cohabitants affirmatively decide not to marry.

The Act applies to two individuals who live together as a couple. The Act is enabling, and the Committee believed that individuals who may bring claims today under state law may, or may not, want to use the Act. What it means to "live together as a couple" is not defined in the Act. (Like obscenity, most will know what living together as couple means when they see it in the context of an individual relationship.) The Act affirmatively states, however, that close relatives, who would be prohibited from marrying each other are not "cohabitants." Also, because the rights of minors, while they are minors, are different from those of adults, and vary from state to state, minors are excluded under UCERA.

Application of the Act is confined to *couples*. You will see in the comments the example of three individuals who live together: A, B, and C. It may be that A and B cohabit, and A and C

cohabit, and B and C cohabit, but the Act does not allow either contractual or equitable claims to be brought among all three. Other state law may, of course. Finally, in the main, the draft deals only with unmarried cohabitants, i.e., cohabitants who are not married to each other. However, the Committee found itself needing to address the rights of a spouse of an unmarried cohabitant (see later discussion of Section 8).

The Act allows "cohabitants' agreements" whether express or implied, in a record or oral, that are based on contributions that each cohabitant makes to the relationship (Sections 2(1), 6). The Act also allows equitable claims that are related to any contribution to the relationship either cohabitant might make (Section 7).

The term "contributions to the relationship" (Section 2(3)) is broadly defined to cover the multiple exchanges of goods and services between the parties to the relationship, and specifically includes domestic services, such as cooking, cleaning, etc. In the absence of this Act, courts have often presumed that domestic services rendered during an intimate relationship are performed gratuitously.[1] While the cohabitants' relationship may have a sexual component, sexual relations are specifically excluded from the definition of contributions to the relationship.

In the absence of this Act, some courts have imposed heightened requirements when cohabitants bring claims against one another. Accordingly, the Act provides that cohabitants will not be subject to additional requirements based solely on the nature of their relationship when bringing claims against one another (Section 4). Courts are authorized to find that specific terms in an agreement are unenforceable based on unconscionability or other bases (Section 6).

Because the Act enables claims, it defers to other state law on the mechanics, burdens of proof, statutes of limitations, etc. of the bringing of claims. While cohabitant claims will generally be subject to state law governing similar contract and equitable claims, Section 8 provides states with options to address those situations in which one of the cohabitants remains married to a third individual during the course of the cohabitation. The committee struggled with this issue. On the one hand, there is a recognition that the state-sanctioned formal status of marriage should be afforded recognition and primacy; on the other, there is a recognition that a long-term cohabitant should have the same rights as any other creditor. There are options for a state that wants its public policy to favor either the spouse or the cohabitant. There are options for a state that prefers to authorize the court to balance the interests of the parties. During considerable discussion over two years no consensus developed on a preferred option.

The remainder of the Act, we believe, is self-explanatory.

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[1] *E.g., In re Estate of Walsh*, 972 N.E.2d 248, 257 (Ill. App. Ct. 2012) ("[W]hen the claimant is not related to the decedent, the law presumes that the services were provided with the expectation that they would be paid for by the decedent. … However, when the services were provided to the decedent by a family member, the presumption is that the family member provided the services gratuitously, without expectation of payment.").

We are pleased with this final approach which evolved over more than two years following deliberation by an active and engaged group of ULC Commissioners, Advisors, and Observers and consideration of a number of other potential approaches.

For background on the history of UCERA and the reasons for Commission consideration of this issue, the memo submitted to the Conference for the first reading provides additional details.