To: ERUCA Drafting Committee
From: Courtney Joslin, Observer[1]
Date: August 4, 2020
Re: August 5, 2020 Informal Session

Summary

ERUCA seeks to achieve two key goals with regard to the law regulating the economic rights of unmarried partners:

(1) to promote greater uniformity and predictability in this area of law;[2] and
(2) to ensure that unmarried partners are not denied otherwise available remedies or subjected to additional burdens or barriers because of their status as unmarried partners.[3]

As drafted, the Act runs contrary to these goals. The current draft will *contract* existing rights for nonmarital partners in most states. It penalizes nonmarital partners based on their status as nonmarital partners. And it will create greater disuniformity and uncertainty in a number of ways. I urge reconsideration of these issues.[4]

Legal Context

Historically, *because their relationships were unlawful*, unmarried partners were barred from asserting otherwise generally available causes of action arising in contract and equity.[5] Today, nonmarital relationships are no longer criminal.[6] Consistent with that trend, almost all states today have lifted their historic common law rules that prevented unmarried partners from asserting claims that all other people could assert.

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[1] I am a Professor of Law at UC Davis School of Law. My scholarship explores family and relationship recognition, with a particular focus on unmarried and same-sex couples. I served as the Reporter for the UPA (2017). For scholarship specifically focusing on the recognition and regulation of adult-adult nonmarital relationships, *see, e.g.*, Courtney G. Joslin, *Family Choices*, 51 ARIZ. ST. L.J.1285 (2020); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912 (2019) [hereinafter Joslin, *Autonomy*]; Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. REV. 1 (2018).

[2] *See, e.g.*, May 23, 2018 Memo from the Study Committee to the Executive Committee (identifying the "[n]eed for and benefits of uniformity in this subject matter area").

[3] *See, e.g.*, Jan. 24, 2020 ERUCA Draft, Prefatory Note ("This act is designed to cover economic rights and obligations that arise between cohabitants based on their relationship. *Its goal 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*." (emphasis added)).

[4] I have other drafting concerns related to the current text of the Act. But because I believe the draft currently runs contrary to its purported goals, I am limiting my comments in this memo to addressing those overarching policy issues.

[5] *See, e.g.*, Wallace v. Rappleye, 103 Ill. 229, 249 (1882) ("An agreement in consideration of future illicit cohabitation between the parties is void.").

[6] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

While there is some state-to-state variation, the *strong majority trend* is to allow nonmarital partners to assert the full range of contract and equitable claims that any other person could assert, and *to apply to these parties the same rules that apply to other people.*[7]

- Of the states that follow this majority rule, I am *unaware of any* that expressly apply heightened standards on unmarried partners as compared to persons.
- Of the states that follow this majority rule, no state limits relief under these generally available remedies only to parties who are in a sufficiently committed relationship.
- As far as I know, no state precludes parties who are barred from marrying each other from asserting otherwise available contract and equitable claims.

Again, today most states allow former nonmarital partners—regardless of their level of commitment—to bring claims that would be available to any other person, including those arising in contract and equity. Nonetheless, former nonmarital partners seeking relief under these theories "have not had an impressive record of success in the post-*Marvin* period."[8]

To repeat, in most states today, nonmarital partners can bring otherwise generally available claims against each other; no state that follows this trend applies heightened standards on nonmarital partners because of their status as nonmarital partners or limits these otherwise available remedies based on their level of commitment; nonetheless, former nonmarital partners seeking relief under these theories have not had much success.

Discussion

(1) Limited definition of cohabitant.

The Act includes a very limited definition of cohabitant. Cohabitant is defined in Section 102 to be limited to those couples who are in a "committed relationship and function as an economic, social, and domestic unit." Section 102(a).[9] The draft then applies this narrow definition to every provision in the Act, *including* claims arising in contract and generally available equitable remedies.[10]

As currently drafted, the Act will produce a number of concerning results. For example, in some jurisdictions, parties who do not meet the narrow definition in the Act would be precluded from asserting a claim based on an express written contract. While it may be appropriate to limit newly created, more robust remedy provided in Section 12 to parties who are in relationships that are sufficiently committed and interdependent, *there is no persuasive policy justification* for carving out and

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[7] *See, e.g.*, Joslin, *Autonomy*, *supra* note 1, at 920-27 (surveying case law around the country).

[8] 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).

[9] The Act also categorically excludes cohabitants who are barred from marrying each other. Section 4(a). Section 4(a) ("The [act] does not apply to a claim between cohabitants whose marriage to each other would not be recognized by this [state] if the cohabitants were to marry."). As noted above, this limitation departs from existing rules and would *contract* existing rights of nonmarital partners in most states.

[10] *See, e.g.*, Section 9 (discussing the burden of proof as to contract and equitable claims arising out of "cohabitation agreements").

subjecting people to different requirements with regard to generally available contract and equitable remedies based on the couple's level of commitment or interdependence.[11]

In other states, it is possible that a cohabitant who is in a less committed relationship could pursue claims arising in contract or equity under law other than this Act.[12] To the extent this is the result, the state will then have *two separate bodies of law governing the very same contract and equitable claims, with different people governed by them and different evidentiary standards applying to them*. One body of law would apply to people in less committed relationships (or, more likely, to claims arising out of less committed periods of their nonmarital relationships), and a separate body of law that applies to people in more committed relationships (or again, more likely, to claims arising out of more committed periods of their relationships). This will create enormous confusion, it will exacerbate rather than ameliorate disuniformity, it will make it even more difficult to predict the outcomes of these cases, and it will provide a number of new grounds on which the parties can litigate. For example, in addition to litigating the elements of the causes of action, the parties would be able to litigate whether this Act or law other than this Act applies with respect to each cause of action. And it is possible that many nonmarital partners would move in and out of the "cohabitation" status governed by this Act throughout the course of their relationships. As noted above, no state currently does this with respect to otherwise available contract and equitable claims, and there is no persuasive policy justification for doing so.

Separating out different classes of cohabitants and subjecting them to different *rules for purposes of otherwise available contract and equitable claims* runs directly contrary to the goal of promoting uniformity and predictability. It also runs contrary to the goal of ensuring 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*."

PROPOSED SOLUTION: This problem can be fixed by removing the term "cohabitant" and "cohabitant agreement" from Section 102. The definition of cohabitant should then be added to Section 12, and its limitations would then apply only to that new, more robust remedy.

With respect to contract and otherwise available equitable remedies, Sections 6 and 9 could be combined to read as follows:

(1) Except as otherwise provided under Section 12, the elements of an express contract, implied in fact contract, or equitable claim as between nonmarital partners is governed by the law of this state other than this [act].

(2) Except as otherwise provided under Section 12, a claim between two individuals shall not be precluded or be subjected to an additional procedural or substantive hurdle on account of the individuals being current or previous nonmarital partners.

(2) Subjecting cohabitants to heightened standards

The draft subjects cohabitants—and cohabitants alone—to heightened evidentiary standards for purposes of oral agreements and implied-in-fact agreements. Section 9(2). That is, while the Act

[11] And, indeed, doing so raises constitutional concerns. *See, e.g.*, *Lawrence*, 539 U.S. at 578 (holding that parties have a constitutionally protected interest in nonmarital sexual intimacy).

[12] The majority of states today allow nonmarital partners to assert contract and equitable claims, and, as noted above, no state in this group limits the claims only to people who are in sufficiently committed relationships. I will note, however, that the fact that this Act excludes people who are in less committed relationships might lead courts to *contract the scope of their existing protections.*

provides that express written agreements are subjected to "law of this state other than this [act]," the Act imposes a heightened evidentiary standard on oral and implied in fact claims asserted by "cohabitants" within the meaning of the Act. As a result, the evidentiary standard that applies to these "cohabitants" will, in most states, *depart from law that applies to any other person* asserting such a claim and impose on these parties alone a standard that is higher than that which is applied to others.[13]

As noted above, currently the majority of states allow unmarried partners to assert claims based in contract and equity. And all of the states that do so apply existing contract and equitable principles to these parties. By carving out cohabitants and expressly subjecting them and them alone to heightened standards marks a troubling step backward in the law.

There are a number of concerns about this decision.

First, subjecting cohabitants and cohabitants alone to a heightened evidentiary standard for otherwise available claims is contrary to the asserted goal of the Act, as stated in Section 6: to ensure that "two individuals shall not be precluded or be subjected to an additional procedural or substantive hurdle on account of the individuals being current or previous cohabitants."

Second, this decision also flouts the project's goal of increasing uniformity and predictability. As a result of Section 9(2), parties asserting oral contracts who are in sufficiently committed relationships will be subjected to a different rule than nonmarital partners who are not in a sufficiently committed relationship. The latter group will be subjected to the rules that apply to all other people—generally, a preponderance of the evidence standard. As a result, two different bodies of law will develop with respect to the very same claims. It is not hard to imagine cases in which some agreements were entered into prior to the relationship becoming committed and some were entered into after, and thus different agreements as between the same two parties in the same litigation might be subjected to different rules. Much of the litigation likely will then focus on whether the parties are "cohabitants" within the meaning of the Act.

And, the draft produces what seems to be an odd result, which is that the lower preponderance of the evidence standard likely applies to all oral agreements entered into while the couple was less committed, but the higher clear and convincing evidence standard applies to any oral agreements entered into after their relationship became more committed. This will add to the complications for the parties, their counsel, and the courts. And, most importantly, there is no good policy justification for this new departure in the law.[14]

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[13] The general standard for proving the existence of a simple oral contract is the preponderance of the evidence standard. *See, e.g.*, Steve Owens Constr., Inc. v. Bordelon, 243 So. 3d 601, (La. App. Ct. 2018) ("The facts supporting the existence of the [oral] contract must be proven by a preponderance of the evidence."); Consol. Petroleum Indus., Inc. v. Jacobs, 648 S.W.2d 363, 364 (Tex. App. 1983), writ refused NRE (July 13, 1983). The standard applicable to implied contracts is more mixed. Nonetheless, whatever standard applies to others should be applied equally to nonmarital partners.

[14] Very few former nonmarital partners prevail in lawsuits seeking relief upon the end of their relationship. No persuasive reason has been offered for erecting a new standard that would *make it even harder* for parties to prevail.

PROPOSED SOLUTION: The way to promote uniformity and predictability is to combine Sections 6 and 9 and state simply:

(1) Except as otherwise provided under Section 12, the elements of an express contract, implied in fact contract, or equitable claim as between nonmarital partners is governed by the law of this state other than this [act].

(2) Except as otherwise provided under Section 12, a claim between two individuals shall not be precluded or be subjected to an additional procedural or substantive hurdle on account of the individuals being current or previous nonmarital partners.

Conclusion

While my identified concerns can be addressed with relatively small drafting changes, if those changes are not made, the consequences are serious and far reaching. As drafted, this Act would mark a serious backward step in the law applicable to nonmarital partners. I urge reconsideration of these issues.

The Comment to Section 9 justifies this heightened evidentiary burden for express oral contract and equitable claims by stating that this act "creates new and possibly unprecedented rights and remedies for cohabitants–some very similar to the rights and remedies attendant to marriage."

That is simply an inaccurate description of the scope and effect *of Section 9*.

Section 9 governs *generally available contract and equitable claims* as asserted by unmarried cohabitants. These claims are available to all other parties; they are not "new and possibly unprecedented rights and remedies." Most states currently allow unmarried partners to assert these claims. *See, e.g.*, Joslin, *Autonomy*, *supra* note 1, at 920 (surveying the law and concluding that almost all states currently allow "former partners to pursue claims based on contract or, possibly, equitable theories that are available to any other legal stranger.").

In addition, these remedies—the remedies governed by Section 9—do *not approximate remedies attendant to marriage*. They *are* the remedies available to any other person to seek relief based on the existence of a contract or to avoid unjust enrichment.