

To: ERUCA Drafting Committee
From: Courtney Joslin, Observer
Date: September 5, 2020
Re: Response to concerns about my new Proposed Section 5

Dear Drafting Committee:

On August 15, 2020, I submitted a memo regarding the current draft of ERUCA. This memo also included a proposed alternative version of the Act. In my [August 15, 2020 memo](#), I raised a number of concerns about the current draft's limitation on who can bring general contract and equitable claims. As I previously explained, *no state* that currently allows such claims between unmarried partners imposes limits based on the degree of commitment of the couple. Accordingly, incorporating such a limitation in this Act would *mark a step backward* in the law. Moreover, as I explained in more detail in my memos of [August 4, 2020](#), and [August 15, 2020](#), doing so would introduce new complexity, confusion, and lack of consistency into this body of law.

Thereafter, Chair Berry contacted me. He indicated that he had a drafting question/concern regarding my proposed draft. Chair Berry noted that one could read my proposed Section 5(a) as providing that no agreement between unmarried partners could be void, even if such an agreement would have been void had it been between two people who were not unmarried partners. The example he offered was an agreement between the partners to sell and purchase illegal drugs. That was not my intention.¹ Accordingly, below is a redrafted version of my proposed Section 5 to address and hopefully resolve this concern. I have included my full proposed rewrite of the Act for the committee's convenience. The change to Section 5 is noted with underline and highlight.

I look forward to more conversations about the scope of this provision. Thanks for your consideration.

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Proposed new draft of ERUCA

SECTION 1. SHORT TITLE.

This [act] may be cited as the [Uniform] Economic Rights of Unmarried Partners Act.

SECTION 2. DEFINITIONS.

In this [act]:

(1) "Domestic services" means services and activities performed for the household. The term includes cooking, cleaning, shopping, household maintenance, doing errands, and caring for a nonmarital partner or a family member of a nonmarital partner.

(2) "Economic right" means an interest, duty, promise, or obligation of an individual in a nonmarital relationship relating to domestic services or property.

¹ My proposed Section 5 is based on Section 7 of the September 12, 2020 Draft of ERUCA. Section 7(a)(1) of the September 12, 2020 draft states: "A cohabitation agreement (1) is not void as against public policy." Thus, any concern regarding Section 5 of my proposal also applies to the current draft of the Act.

(3) “Property” means anything that may be the subject of ownership or any interest in the thing, whether real or personal, tangible or intangible, legal or equitable. The term includes a financial obligation or asset.

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

SECTION 3. SCOPE.

This [act] does not affect:

- (1) application of the doctrine of common law marriage to the extent recognized or prohibited by this state; or
- (2) a right, duty, or remedy of an individual in a nonmarital relationship under law of this state other than this [act], except to the extent inconsistent with this [act].

SECTION 4. GOVERNING LAW.

(1) Except as otherwise provided under Sections 5, 6, and 7, a claim to enforce an economic right is governed by the law of this state, including this state’s choice-of-law rules.

(2) The rights and remedies provided by this [act] are not exclusive, and the common law of this state and principles of equity supplement this [act].

SECTION 5. EQUAL ACCESS TO CONTRACT AND EQUITABLE CLAIMS.

(a) An agreement between individuals in a nonmarital relationship:

(1) is not void as against public policy **because the parties are in a nonmarital relationship;**

(2) may be in a written record, oral, or implied-in-fact;

(3) may waive an economic right to which the individual might otherwise be entitled, including a right protected under Section 6; and

(4) a contribution of services, including domestic services, or property constitutes consideration.

(b) An individual in a nonmarital relationship may assert and a court may enforce an equitable claim, including a claim for unjust enrichment based on domestic services.

(c) Except as otherwise provided under Sections 6 and 7, 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 in a current or previous nonmarital relationship.

SECTION 6. EQUITABLE DIVISION FOR COMMITTED NONMARITAL PARTNERS.

(a) In this Section, “committed nonmarital partner” means each of two individuals who are not married to each other and live together as a couple in an intimate, committed relationship and function as an economic, social, and domestic unit, and whose marriage to each other would be recognized by this state if the committed nonmarital partners were to marry, except that if a committed nonmarital partner is married to another individual, this Section applies to a claim between the committed nonmarital partners except as otherwise provided in subsections (c) and (d), unless the committed nonmarital partners’ marriage to each other would not be recognized by this state for a reason other than the committed nonmarital partners’ marriage.

(b) Except as otherwise provided in subsection (c) or in an enforceable agreement between the parties, a committed nonmarital partner may assert a claim for, and a court may order, fair and equitable division of assets acquired and liabilities incurred as a result of the efforts of either committed nonmarital partner during their nonmarital relationship, without regard to legal title.

Commented [CGJ1]: AS I NOTED BEFORE: I moved the definition of cohabitant from Section 1 here (although I provided a new term that is more consistent with the terminology in the rest of the Act), as well as the limitation from previous Section 4.

I otherwise did not edit this section, although I agree with Barbara and others that additional wordsmithing is necessary to make it “work.” I’m happy to ponder this more and give suggestions, but I wanted to get my suggestions as to the other parts along to you as soon as possible.

(c) A committed nonmarital partner who is married to another individual may not assert a claim under subsection (b) except with respect to assets acquired and liabilities incurred as a result of the efforts of either committed nonmarital partner during the nonmarital relationship but before that partner's marriage.

(d) An unmarried committed nonmarital partner cohabiting with a married committed nonmarital partner may assert a claim under subsection (b) against the married committed nonmarital partner.

(e) The court shall consider the following to determine whether and how to order a fair and equitable division of assets and liabilities under subsection (b):

- (1) the duration and continuity of the nonmarital relationship;
- (2) the parties' allocation of financial responsibility for housing, food, clothing, health care, and other daily living expenses of the household;
- (3) the parties' allocation of responsibility for the performance of domestic services;
- (4) the parties' allocation of caretaking responsibility for a family member of either party;
- (5) the parties' intent to share with one another assets acquired or liabilities incurred during the nonmarital relationship;
- (6) whether the property being considered for division is subject to interests of a third party;
- (7) whether a committed nonmarital partner has wasted property or transferred property to a third party in an effort to defeat a right of the other committed nonmarital partner;
- (8) if a committed nonmarital partner is married, the rights and interest of the married partner's spouse; and
- (9) other factors the court considers relevant.

(f) A court may not presume that any particular percentage of division of assets or liabilities is equitable.

(g) A claim under this Section accrues upon termination of the nonmarital relationship between the committed nonmarital partners. "Termination of the nonmarital relationship" means the earliest of: (1) the death of a committed nonmarital partner; (2) the date the relationship between the committed nonmarital partners is irretrievably broken; or (3) the date the committed nonmarital partners marry each other.

SECTION 7. CLAIM ACCRUAL AND TOLLING BASED ON MARRIAGE.

(a) If individuals in a nonmarital relationship marry each other, the marriage:

- (1) terminates the accrual under this [act] of any additional rights between the parties;
- (2) tolls the statute of limitations on a claim for breach of an express contract or an implied in fact contract, an equitable claim, or a claim arising under Section 6 of this [act] until either individual dies or files for [separation,] dissolution[,] or divorce; and

(b) In an action for [separation,] dissolution[,] or divorce of the marriage, an individual can assert a claim against the other spouse for breach of an express contract or an implied in fact contract, or equitable claim, or a claim arising under Section 6 of this [act] arising based on a nonmarital relationship that occurred prior to the marriage.

SECTION 8. LIMITATIONS ON RIGHTS AND REMEDIES

Neither this [act], nor a division of assets and liabilities under this [act], affects the right of a third party, including a good faith purchaser from, or secured creditor.

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