

To: ERUCA Drafting Committee
From: Courtney Joslin, Observer, and Catherine Sakimura, Observer
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Dear Drafting Committee:

Thank you for allowing us to participate in this important project, and thank you to the Reporter and Chairs for all their work on this important draft.

We write to raise some global concerns about the current approach of Articles 2 and 3, and to request reconsideration of an earlier proposal that would simplify the Act. The simplified approach would state that general contract and equitable rules apply equally to nonmarital cohabitants, and would specifically address only those issues that are unique to cohabitants.

We also want to strongly restate our support of some form of Article 4, as we believe it is necessary to protect the rights of cohabitants and because we believe that its inclusion *increases enactability* by providing a fairly simple way for states to provide a default protections for long-term cohabitations.

I. CONCERNS

We have two primary concerns with the current approach in Articles 2 and 3. First, the approach will create unintentional conflicts between the rules set forth in this Act and those that have been developed in the existing common law. Second, it unfairly subjects cohabitants to more onerous requirements than those applied to others, particularly by requiring a higher burden of proof.

Conflicts with existing common law. Because every state has a significant body of common law on contracts and equitable remedies, providing a parallel system in this Act that recreates that body law but with some differences raises many questions about how the two sets of doctrines interact with one another. For example, the Act provides a definition for unjust enrichment that differs slightly from the existing definition of unjust enrichment in many states. How will existing precedent defining aspects of unjust enrichment be applied to claims under this Act, such as case law addressing the standard for determining whether the other party “had reason to know” the benefit was conferred, given that cohabitants are subject to a higher level of proof and the definition of unjust enrichment in the Act may differ than the definition in the state’s existing common law? Additionally, what would happen in an action between cohabitants that involved both an oral agreement to share their property and an oral agreement regarding a shared business enterprise? Would different understandings of the same terms apply to the two different oral agreement claims? Would the higher standard for cohabitants apply to business disputes simply because they are cohabitants? If different standards of proof apply, is that fair? By providing parallel but slightly different definitions for existing common law doctrines, the Act raises significant litigation issues.

While we think that the most simple, and indeed the best approach, is to clarify that the existing doctrines apply equally to cohabitants, there are some issues which are unique to cohabitants. For this reason, we would support retaining some of the provisions in the Draft. These provisions

include, for example, rules regarding conflicts of law, inheritance, unenforceable terms, extraordinary equitable remedies, statutes of limitation, and claims where the cohabitants later marry.

Unfairness. Based on our research, it appears that many (if not most) states use a preponderance of the evidence standard for oral or implied-in-fact contracts,¹ and at least some states also use that standard for various equitable claims.² In our view, requiring a higher standard of proof for cohabitants compared to other litigants is unfair. Why should it be more difficult for cohabitants than for any other two people to enter into enforceable oral or implied in fact agreements? Indeed, if anything, it seems more reasonable that cohabitants would be more likely to enter such agreements with the expectation that they would be honored rather than the other way around. In any event, requiring a higher standard of proof for cohabitants seems unfair, unnecessary, and likely to produce confusion and conflict.

II. PROPOSAL

A provision would be added to provide the following and would replace most of Articles 2 & 3:

Existing contract and equitable claims can be asserted by parties in a nonmarital intimate relationship on the same terms as litigants who are not in such a relationship. The fact that the parties are in a nonmarital intimate relationship is not a basis for precluding the claim or subjecting litigants to additional requirements.

Article 2 would be deleted other than Section 207, which relates uniquely to cohabitants. Article 3 would be deleted other than Section 304(d). The definitions in Section 102 for cohabitant and termination of the cohabitants' relationship would move into Article 4, but the remaining definitions would be deleted and left to existing law of the state. The remaining provisions could be included with some modifications, although the Committee might consider leaving the issue of unemancipated minors to underlying law.

¹ See, e.g., Walter Boss, Inc. v. Roncalli Freight Co., Inc., 62 Misc. 3d 1203 (N.Y. Sup. Ct. 2018) ("In short, the Defendants have proven by the fair preponderance of the evidence that the Plaintiffs 'conducted [themselves] in such a manner that [their] assert may fairly be inferred.' The existence of an implied in fact contract has been established."); Lee v. Yang, 111 Cal. App. 4th 481, 490, 3 Cal. Rptr. 3d 819, 825 (2003) (using preponderance of the evidence).

² See, e.g., Wachter v. Wachter, 178 W. Va. 5, 6, 357 S.E.2d 38, 39 (1987) (applying preponderance of the evidence standard to assess a constructive trust claim); Cerling v. Hedstrom, 51 Mich. App. 338, 341, 214 N.W.2d 904, 905–06 (1974) (applying a preponderance of the evidence standard for constructive trust claim). See also Washington State Civil Jury Instruction, 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 301A.02 (7th ed.) (directing jury to determine whether plaintiff proved the elements of a quasi contract by "a preponderance of the evidence").