

DRAFT
FOR DISCUSSION ONLY

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
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ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

Prefatory Note

The number of nonmarital cohabitants in the United States has increased substantially over the past half-century. Today, more than 17 million people, representing seven percent of American adults, are cohabiting. Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners* (2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html>. More adults have cohabited than have been married. Nikki Graf, *Key Findings on Marriage and Cohabitation in the U.S.* (2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/>. The number of older adults who cohabit is growing. In 1996, only two percent of partners in cohabiting households were ages 65 or older. By 2017, that number had tripled to six percent. Gurrentz, *supra*.

The economic rights that derive from cohabitation differ greatly depending on the relationship and its recognition under state law. State law across the United States varies widely on the treatment of unmarried cohabitants, both at separation and at death. The Economic Rights of Unmarried Cohabitants Act (ERUCA) provides states with comprehensive and uniform guidance on questions concerning cohabitants' economic interests and obligations ("economic rights") based on their relationship.

Couples have cohabited outside of marriage for millennia. Cohabitants may share financial responsibilities during their cohabitation, or they may keep their finances separate. One cohabitant may move into a dwelling the other had acquired separately. They may acquire property together or they may not. Both may work, or one may work and the other takes care of the household. Upon their breakup or the death of one cohabitant, state courts have in some cases provided relief to a claimant seeking payment or a share of the property of the other cohabitant, but in many cases have not. In declining to recognize a cohabitant's claim, courts have often referenced the meretricious nature of the couple's relationship, or a desire to preserve marriage. *E.g., Smith v. Carr*, 2012 WL 3962904 *4 (C.D. Cal. Sept. 12, 2012) ("Wi n"); Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. __ (forthcoming 2021).

The act affirms the capacity of each cohabitant to contract with the other and, upon termination of the relationship, claim a remedy against the other without regard to any intimate relationship that exists between them, subject to certain limitations. The legal rights of third parties, such as secured creditors or good faith purchasers, cannot be adversely impacted by a remedy granted under the act. Further, upon termination of the cohabitants' relationship, a cohabitant may not claim a right or remedy greater than what the cohabitant would receive if the cohabitants had married. Finally, although a cohabitant who is married to another individual may assert claims under this act, the new equitable remedy of property division created by the act is not available. A married cohabitant may be subject to any claim by the other cohabitant and may assert defenses to such a claim.

1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the [Uniform] Economic

3 Rights of Unmarried Cohabitants Act.

4 **Comment**

5
6 The charge to the Drafting Committee from the Executive Committee of the Uniform
7 Law Commission was to draft an act relating to the economic rights of unmarried cohabitants.
8 The act recognizes that a number of cohabiting partners may be married to someone else during
9 all or part of the cohabitation. This happens for many reasons, some intentional and with both
10 cohabitants fully aware, some unintentionally, or even some surreptitiously. Although the act
11 recognizes the existence of married cohabitants and grants them limited rights, the primary
12 purpose of the act is to address the rights of cohabitants who are not married to each other but
13 who, in most circumstances, could be. The title of the act reflects that purpose. *See* Section 4,
14 Effect of Marriage.
15

16 **SECTION 2. DEFINITIONS.** In this [act]:

17 (1) “Cohabitant” means each of two individuals who are not married to each other and
18 live together as a couple in an intimate, committed relationship and function as an economic,
19 social, and domestic unit.

20 (2) “Cohabitation agreement” means an agreement between two cohabitants regarding the
21 management, allocation, disposition, or waiver of a cohabitant’s economic right.

22 (3) “Domestic services” means services and activities performed for the household by a
23 cohabitant for the benefit of the other cohabitant or the cohabitants’ relationship. The term
24 includes cooking, cleaning, shopping, household maintenance, doing errands, and caring for the
25 other cohabitant or a family member of the other cohabitant.

26 (4) “Economic right” means an interest, duty, promise, or obligation of a cohabitant
27 relating to domestic services or property.

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

1 financial obligation or asset.

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

4 **Comment**

5 Definitions have substantive impact. The definition of “cohabitant” specifies to whom the
6 act applies. Not every cohabiting relationship involves sexual conduct. This act addresses only
7 those relationships in which the couple is romantically involved and economically intermingled
8 by using the phrase “intimate committed relationship” in the definition. Washington State uses
9 five factors to determine whether an intimate committed relationship exists. *E.g.*, *In re Long &*
10 *Fregeau*, 244 P.3d 26, 29 (Wash. 2010); *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995);
11 *Matter of Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984)(“continuous cohabitation,
12 duration of the relationship, purpose of the relationship, and the pooling of resources and
13 services for joint projects”). We anticipate that those factors, and others, will be used to make the
14 factual determination whether a particular individual is a “cohabitant” within the scope of this
15 act.

16
17 As set forth in Section 4, cohabitants whose marriage to each other would be unlawful are
18 not covered by the act. Thus, if the cohabitants’ marriage would be incestuous, or if one of the
19 cohabitants is a minor who is not eligible to marry, the act does not apply. However, a cohabitant
20 who is married to a third party may bring some claims under the act. *See* Section 12.

21
22 The drafting committee discussed whether the definition of “cohabitant” should include
23 only individuals who live together or whether they could be part of a “living apart together”
24 (“LAT”) couple. This is an increasingly common relationship. *See*, Cynthia Grant
25 Bowman, *Living Apart Together As A “Family Form” Among Persons of Retirement Age: The*
26 *Appropriate Family Law Response*, 52 FAM. L.Q. 1 (2018)(exploring the phenomenon of LAT
27 couples among Baby Boomers); *How Should the Law Treat Couples Who Live Apart Together?*,
28 29 CHILD & FAM. L. Q. 335 (2017)(discussing living apart together couples and suggesting that
29 LAT couples should have certain legal rights, focusing on those designed to promote caretaking,
30 not economic interdependence). Examples of these relationships abound, including for two
31 people living on separate floors in an assisted living facility, or in separate residences because of
32 employment or a variety of other reasons. While these couples remain committed to one another
33 and continue to function as a unit for many purposes, they are not covered by the act. The
34 consensus of the drafting committee was to limit application of the act to couples who reside
35 together.

36
37 Section 7 further illuminates the meaning and purpose of a cohabitation agreement.

38
39 The definition of “cohabitant agreement” allows cohabitants to “opt out” of any aspect of
40 the act, if they so desire, by waiver. An effective “opt out” must be contained in a cohabitation
41 agreement, and so may be in a record, oral, or implied-in-fact.

1 The definition of “domestic services” focuses on the actual provision of these services.
2 Payments made by one cohabitant for these services could be the subject of another claim under
3 this act. “Domestic services” includes activities related to business development, business
4 entertaining, and similar activities for the benefit of the other partner or the relationship generally
5 *E.g., Hills v. Superior Court (Munoz)*, No. B174068, 2004 WL 1657689, at *6 (Cal. Ct. App.
6 July 26, 2004) (reasoning that female plaintiff’s assertions raised triable issues of fact, including
7 that “she gave up her career and devoted herself to performing household and other domestic
8 services for him so as to aid his business career.”) Cohabitation often involves sexual conduct.
9 The term “domestic services” refers to aspects of the relationship other than sexual conduct.

10
11 The definition of “economic right” is intentionally broad. The term includes, for example,
12 contributions of salary or other financial assets to the relationship. The term may be construed to
13 include payments to be made after the cohabitation terminates if an agreement were to so
14 provide, but in few, if any, other circumstances. The act does not grant any continuing rights to
15 support following dissolution of the cohabitation.

16
17 The term does not include and the act does not address tort suits, based on consortium,
18 wrongful death or infliction of emotional distress claims but defers to other state laws on such
19 claims.

20
21 With respect to the value of domestic services, “economic right” means the value of any
22 benefit conferred as a result of the domestic services or the actual replacement value of the
23 domestic services. Domestic services may allow for or enhance the other cohabitant’s ability to
24 earn money, but that courts have struggled with how to handle these cases. *See* Albertina
25 Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019) (cases routinely deny access to
26 property in the context of a relationship that involved domestic services). The definition of
27 economic right reiterates the concept of the benefit and value to the relationship of “domestic
28 services” provided by one cohabitant in order to emphasize the importance of this concept to the
29 act.

30
31 The act does not designate an appropriate tribunal to determine claims brought under the
32 act. Cohabitants’ claims may involve elements of traditional contract claims, family law claims,
33 and probate claims. Enacting states will need to decide on the appropriate tribunal to hear these
34 cases. The drafting committee believes that these claims differ significantly enough from
35 commercial claims that upon dissolution of the cohabitation other than by death, the claims
36 should be heard in the state court that handles family law matters. Upon termination by death, the
37 tribunal that handles probate matters would be appropriate. *Cf. Matter of Estate of Cooney*, 454
38 P.3d 1190, 1193 (Mont. 2019)(“A probate court has authority to settle claims against the estate,
39 such as creditor claims.[] Enforcement of a contract to devise property is not a claim against the
40 estate. . . The probate court’s limited jurisdiction does not extend to adjudicating a breach of
41 contract claim.”).

42 43 **SECTION 3. SCOPE.**

44 (a) This [act] applies to the recognition and enforcement of economic rights between two
45 cohabitants that arise:

1 (1) by virtue of a cohabitation agreement; or

2 (2) under circumstances in which equity requires a remedy.

3 (b) This [act] does not affect:

4 (1) application of the doctrine of common law marriage to the extent recognized
5 or prohibited by this state; or

6 (2) a right, duty, or remedy of a cohabitant under law of this state other than this
7 [act], except to the extent inconsistent with this [act].

8 **Comment**

9
10 This section states the coverage of the act. The act is intended to give the courts broad
11 discretion to “do equity” between cohabitants.

12
13 Subsection (b)(1) makes clear that the act is not intended as a substitute for common law
14 marriage. Subsection (b)(2) makes clear that a cohabitant may have cognizable rights vis-a-vis
15 the other cohabitant by virtue of other state law (e.g., the state’s partnership law) and that those
16 rights are not lost unless clearly inconsistent with this act. The rights and remedies provided by
17 the act are not intended to be the exclusive rights and remedies afforded to cohabitants. *See*
18 Section 5(c).

19
20 **SECTION 4. EFFECT OF MARRIAGE.**

21 (a) The [act] does not apply to a claim between cohabitants whose marriage to each other
22 would not be recognized by this [state] if the cohabitants were to marry.

23 (b) Subject to Section 12(b), if a cohabitant is married to another individual, the [act]
24 applies to a claim between the cohabitants, unless the cohabitants’ marriage to each other would
25 not be recognized by this state for a reason other than the cohabitant’s marriage.

26 **Comment**

27 This section clarifies that a cohabitant cannot bring a claim under this act against another
28 cohabitant if, were they to marry, their marriage would not be recognized in this state, unless the
29 cohabitant is married to a third party. This section excludes claims based on a cohabiting
30 relationship if either cohabitant is a minor who could not be married under state law. The section
31 also excludes individuals who are in an unlawful incestuous cohabiting relationship.
32

1 The drafting committee discussed at length whether to include claims by married
2 cohabitants within the purview of this act. Many married people cohabit. Recall that even Lee
3 Marvin, the defendant in the groundbreaking “palimony” case, was married when his
4 cohabitation began. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *see also In re Estate of*
5 *Roccamonte*, 174 N.J. 381 (2002)(case involving a 25-year relationship between a unmarried
6 cohabitant and a decedent who was married to a third party throughout the relationship). The
7 reasons for doing so are numerous, including the impracticality of divorce or the illness of the
8 non-cohabiting spouse. Section 12 precludes a claim by a cohabitant who is married to someone
9 else for equitable division of certain property acquired during the cohabitation if the claim arose
10 after the marriage. This represents a compromise approach by the drafting committee to provide
11 limited rights to a married cohabitant.

12 **SECTION 5. GOVERNING LAW.**

13
14 (a) Except as otherwise provided under subsection (b), Section 8(d), Section 9, and
15 Section 12, a claim to enforce an economic right is governed by the law of this state, including
16 this state’s choice-of-law rules.

17 (b) A cohabitation agreement may designate the law of a jurisdiction which governs the
18 validity, enforceability, interpretation, and construction of the agreement if:

19 (1) the jurisdiction has a significant relationship to the agreement or either
20 cohabitant; and

21 (2) the designated law is not contrary to fundamental public policy of this state.

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

24 **Comment**

25 This act is designed to coordinate with, and not change, existing state law, except to the
26 extent necessary to recognize that each cohabitant has some legally cognizable interests in the
27 property of the other. The act provides a floor of basic, enforceable rights and remedies. With
28 limited exceptions, state procedural law governing statutes of limitations, choice of law rules,
29 transfers of property, probate proceedings, etc. will control. The most significant exceptions are
30 the provision for tolling of the statute of limitations if the cohabitants marry each other found in
31 Section 8(d). For some states and for some claims, the burden of proof provisions of Section 9
32 will represent a change in state law.

33 As with most other agreements, a cohabitation agreement can specify a governing law,
34 provided that law has a relationship to either the parties or their agreement, and it is not contrary

1 to the enforcing state's public policy.

2
3 The intent is for other state law to supplement the act unless clearly inconsistent with the
4 act. Note, for example, that to the extent the act establishes burdens of proof for unjust
5 enrichment, it may supersede a state's common law.

6
7 Subsections (a) and (b) are drawn from the Uniform Premarital and Marital Agreements
8 Act, Section 4:

9
10 *SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation,*
11 *and construction of a premarital agreement or marital agreement are determined:*
12 *(1) by the law of the jurisdiction designated in the agreement if the*
13 *jurisdiction has a significant relationship to the agreement or either party and the*
14 *designated law is not contrary to a fundamental public policy of this state; or*
15 *(2) absent an effective designation described in paragraph (1), by the law*
16 *of this state, including the choice-of-law rules of this state.*
17

18 Subsection (c) is modelled after Section 106 of the Uniform Trust Code (2018), which
19 provides: "The common law of trusts and principles of equity supplement this [Code], except to
20 the extent modified by this [Code] or another statute of this State."

21
22 This reflects the notion that cohabitants covered by this act may have other rights and
23 remedies in addition to those under this act.

24
25 **SECTION 6. TREATMENT OF COHABITANTS' CLAIMS.** Except as otherwise
26 provided under Sections 9 and 12, a claim between two individuals shall not be precluded or be
27 subjected to an additional procedural or substantive hurdle on account of the individuals being
28 current or previous cohabitants.

29 **Comment**

30
31 Some states have imposed restrictions on cohabitants that are not imposed on other
32 litigants; thus, for example, contributions made to the relationship will be considered regardless
33 of whether they take the form of domestic services or monetary contributions. A primary goal of
34 the act is to ensure that in most cases, cohabitants will be treated like other litigants seeking to
35 enforce economic claims. The mere fact that an individual is a cohabitant should not be a basis to
36 preclude a claim or subject the individual to additional requirements, such as the requirement
37 there be a basis apart from the cohabitation to pursue a claim. *Spafford v. Coats*, 118 Ill. App. 3d
38 566 (1983), illustrates the problem. Donna Spafford filed a complaint against her former partner,
39 Richard Coats, for the creation of a constructive trust, alleging that she purchased or paid the
40 down payment for various vehicles from her own funds. *Id.* at 568. However, title to those
41 vehicles was listed in Coats's name in order to reduce insurance costs Spafford and Coats
42 cohabited for more than six years. The appellate court held that the nature of their relationship

1 did not preclude equitable relief only because Spafford’s claims were “substantially
2 independent” of the nonmarital relationship between the parties, i.e., Spafford had actually paid
3 for the motor vehicles herself. *Id.* at 572-73. Subsequently, in *Blumenthal v. Brewer*, the Illinois
4 Supreme Court rejected a cohabitant’s claim because she failed to show “an independent
5 economic basis apart from the parties’ relationship.” *Blumenthal v. Brewer*, 69 N.E.3d 834, 856
6 (Ill. 2016). The court in *Blumenthal* noted:

7
8 There are major public policy questions involved in determining whether, under what
9 circumstances, and to what extent it is desirable to accord some type of legal status to
10 claims arising from [cohabitation] relationships. Of substantially greater importance than
11 the rights of the immediate parties is the impact of such recognition upon our society and
12 the institution of marriage.

13
14 *Id.* at 851.

15 16 **SECTION 7. COHABITATION AGREEMENT.**

17 (a) A cohabitation agreement:

18 (1) is not void as against public policy; and

19 (2) may be in a record, oral, or implied-in-fact.

20 (b) A cohabitant’s contribution of domestic services or property for the benefit of the
21 other cohabitant or the cohabitants’ relationship is sufficient consideration for a cohabitation
22 agreement.

23 **Comment**

24
25 A “cohabitation agreement” requires mutual assent, although not expressly stated in the
26 section.

27
28 Subsection (a) is intended to abrogate court decisions that have held that cohabitation
29 agreements are void as against public policy. *See, e.g., Blumenthal v. Brewer*, 69 N.E.3d 834,
30 854 (Ill. 2016), in which the court rejected constructive trust and restitution claims by long-term
31 same-sex cohabitant noting that although the parties may have contracted independent of their
32 cohabiting relationship, recognition of claims based on cohabiting relationship would be
33 inconsistent with legislature’s abolition of common law marriage. In *Gunderson v. Golden*, 360
34 P.3d 353 (Idaho Ct. App. 2015), the court rejected a claim for equitable distribution of property
35 after a 25-year cohabitation stating “[t]he elimination of common-law marriage, supported by an
36 explicit public policy justification, commands our courts to refrain from enforcing contracts in
37 contravention of clearly declared public policy and from legally recognizing cohabitational
38 relationships in general.”
39

1 Subsection (b) addresses the issue of consideration. An enforceable agreement requires
2 consideration, and the contribution of domestic services or property provides that consideration;
3 that is, the contribution of domestic services is consideration so long as it was for the benefit of
4 the other cohabitant or for the benefit of the relationship. Note that “a promise which is
5 bargained for is consideration if, but only if, the promised performance would be consideration.”
6 Restatement (Second) of Contracts § 75 (1981).

7
8 An implied-in-fact agreement differs from an express contract only “in the mode of
9 manifesting assent. Just as assent may be manifested by words or other conduct, sometimes
10 including silence, so intention to make a promise may be manifested in language or by
11 implication from other circumstances.” Restatement (Second) of Contracts § 4 cmt. (1981).
12 Because some courts refuse to recognize agreements between cohabitants due to public policy
13 considerations and others may impose higher burdens on cohabitants, *Spafford v. Coats*, 118 Ill.
14 App. 3d 566 (1983), this section clearly states that agreements between cohabitants setting forth
15 their rights and obligations with regard to property or contributions of domestic services by
16 either or both are valid and enforceable. *See also* Section 6 and the comments following that
17 section.

18 **SECTION 8. CLAIM TO ENFORCE ECONOMIC RIGHTS.**

19 (a) In this section, “termination of cohabitation” means the earliest of:

- 20
21 (1) the death of a cohabitant;
22 (2) the date the cohabitants’ relationship is irretrievably broken; or
23 (3) the date the cohabitants marry each other.

24 (b) A claim for breach of a cohabitation agreement accrues on breach and may be
25 commenced, within the applicable limitations period, during cohabitation, or after termination of
26 cohabitation.

27 (c) A claim for equitable relief under Section 11 or 12 accrues on termination of
28 cohabitation.

29 (d) If cohabitants marry each other, the marriage:

- 30 (1) terminates the accrual under this [act] of any additional rights between the
31 cohabitants;
32 (2) tolls the statute of limitations on a claim for breach of a cohabitation

1 agreement until either cohabitant dies or files for [separation,] dissolution[, or divorce; and

2 (3) extends the time for filing an equitable claim until either cohabitant dies or
3 files for [separation,] dissolution[, or divorce.

4 (e) A cohabitant may assert in the same action a claim for relief in equity and a claim
5 based on a cohabitation agreement.

6 **Legislative Note:** *In subsection (d), a state should include “separation” if the filing of a*
7 *separation action terminates the marital community under the state’s laws.*

9 **Comment**

10
11 Termination of cohabitation is relevant to when an equitable claim under the act accrued.
12 Upon termination, each cohabitant stops accruing any additional rights vis a vis the other.

13
14 The reference to the relationship being “irretrievably broken” is based on a concept
15 which is common in many states with respect to the end of a marital relationship. *See, e.g.,* Unif.
16 Marriage & Div. Act Sec. 305; Ky Rev. Stat. 403.170 (2020). The date that the relationship is
17 irretrievably broken is highly fact-specific. Serving a prison sentence, being on an overseas
18 deployment, or working in another jurisdiction for an extended period of time, for example
19 would not alone constitute a “termination.”

20
21 When cohabitation is terminated by death, there may be questions about the
22 enforceability of an agreement concerning a provision to be made – or not to be made – in a will.
23 An express contract, for example, may be covered by Uniform Probate Code Section 2-514 (iii),
24 which permits “a writing signed by the decedent evidencing the contract” to be enforceable.

25
26 A nonprobate transfer, such as a joint tenancy with right of survivorship bank account, is
27 enforceable under other state law at the death of one of the cohabitants. *See, e.g.,* Uniform
28 Probate Code Section 6-101 (“Nonprobate Transfers on Death”). Nonprobate transfers ordinarily
29 take the form of a gift, trust, contract, or other nontestamentary arrangement that technically
30 operates as a lifetime transfer while leaving the transferor with substantially undiminished
31 ownership rights (i.e., access to the property as well as power to revoke or amend the beneficiary
32 designation) until death.” Grayson M.P. McCouch, *Probate Law Reform and Nonprobate*
33 *Transfers*, 62 U. MIAMI L. REV. 757, 758–59 (2008).

34
35 The significance of subsection (b) is that it allows an agreement to be enforced upon
36 breach, even if the cohabitation is ongoing.

37
38 The act does not include specific provisions for statutes of limitations. The time period,
39 and except as stated in Subsection (d), the tolling and accrual provisions found in other state law
40 will control. *See* Section 5, Governing Law. The act also does not preclude either cohabitant
41 from asserting an equitable defense limiting or enlarging the time for enforcement, such as

1 laches or estoppel.

2
3 Subsection (d) includes a very specific tolling provision to cover situations where the
4 cohabitants marry after cohabiting. The statute of limitations on a claim accruing during the
5 cohabitation and prior **a to** the marriage is tolled by the marriage. Those claims could be raised
6 many years later in a subsequent divorce or probate proceeding.

7
8 Courts have begun to take into account premarital cohabitation when distributing
9 property at divorce. *See, e.g., Matter of Munson*, 146 A.3d 153, 157-58 (N.H. 2016) holding that
10 the trial court had discretion to consider premarital cohabitation as a factor when dividing
11 property at divorce, and listing other states that do so, including Hawaii, Indiana, Montana,
12 Michigan, and Oregon). The act permits agreements made and equitable rights accruing during
13 premarital cohabitation to be considered at the end of a marriage.

14
15 With respect to subsection (d), separation is bracketed for those states, where the filing of
16 a separation action terminates the marital relationship.

17
18 **SECTION 9. BURDEN OF PROOF.** The burden of proof to establish:

19 (1) the terms of a cohabitation agreement in a record is governed by law of this state
20 other than this [act] applicable to an express agreement;

21 (2) the terms of an oral or implied-in-fact cohabitation agreement is clear and convincing
22 evidence;

23 (3) the elements of an equitable claim under Section 11 is a preponderance of the
24 evidence; and

25 (4) the elements of an equitable claim under Section 12 is clear and convincing evidence.

26 **Comment**

27
28 Under this act, cohabitants may acquire certain rights and remedies. They may obtain
29 payments or a share of, the cohabitants' property acquired during the cohabitation. This will
30 come as a surprise to many cohabitants, especially those who may have intentionally decided not
31 to marry and subject themselves to state law regulating the distribution of property upon
32 dissolution or divorce or death. These cohabitants may include seniors who have lost previous
33 spouses either to death or to long-term illness and find companions with whom they want to
34 cohabit but not intermingle finances or property. It also includes cohabitants who, without any
35 serious thought, move in together and find themselves still living together some years later.

36
37 Section 9 establishes heightened burdens of proof for claims based on oral agreements
38 and implied-in-fact-agreements, and for the new equitable division remedy available under

1 Section 12. The burden of proving these claims is clear and convincing evidence. Because this
2 act creates new and possibly unprecedented rights and remedies for cohabitants – some very
3 similar to the rights and remedies attendant to marriage – the drafting committee believes that
4 courts should be incentivized to take a hard look at the evidence supporting these claims
5 particularly where the parties have not formalized their agreement. The courts should grant relief
6 only in extraordinary circumstances when the evidence is clear that a cohabitant is entitled to
7 these remedies.
8

9 The Supreme Court has recognized that “even if the particular standard-of-proof
10 catchwords do not always make a great difference in a particular case, adopting a standard of
11 proof is more than an empty semantic exercise.” *Addington v. Texas*, 441 U.S. 418, 425
12 (1979)(internal citations omitted). “***Increasing the standard of proof is one way to impress***
13 ***the factfinder with the importance of the decision.***” *Id.* at 427 (emphasis added); see DAN L.
14 DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 399 (3d
15 ed. 2018)(“the constructive trust plaintiff who proves her claim by clear and convincing
16 evidence wins an in personam order that requires defendant to transfer legal rights and title of
17 specific property or intangibles to plaintiff.”).
18

19 When the parties to a cohabitation agreement express their agreement in writing or
20 another form of a record, the evidence of their intent is contained in the record. Therefore, the
21 usual burden of proof for civil actions – preponderance of the evidence – is sufficient. But when
22 a cohabitant claims that the parties made an oral agreement, or that there was an implied
23 agreement based on the parties’ conduct or language, the evidence may not be so clear.
24 Whenever a claimant seeks the extraordinary remedy of equitable division, a higher standard for
25 evaluating the evidence is justified.
26

27 A heightened burden of proof will go a long way in assuring state legislatures that only
28 those cohabitants who can clearly and convincingly prove an oral or implied-in-fact agreement
29 or an equitable basis for the extraordinary relief of equitable division will be granted remedies
30 under the act. Some of the rights and remedies provided by the act, if not the act as a whole, will
31 be controversial. The heightened burden of proof should help promote enactability.
32

33 Subsection (3) adopts the generally accepted standard of proof for an equitable claim,
34 preponderance of the evidence. “In an action for quantum meruit or unjust enrichment, the
35 burden of proof is upon the plaintiff . . . [to show] facts and circumstances sufficient to justify
36 the inference of an implied promise to pay for the services or materials in question and of
37 proving the amount and value thereof to a reasonable degree of certainty or by a preponderance
38 of the evidence.” 66 AM. JUR. 2D RESTITUTION AND IMPLIED CONTRACTS § 87 (2020).
39

40 SECTION 10. UNENFORCEABLE TERMS.

41 (a) A court may refuse to enforce a term in a cohabitation agreement if, in the context of
42 the agreement taken as a whole:

43 [(1)] the term was unconscionable at the time the agreement was made[; or

(2) enforcement of the term would result in substantial economic hardship for a cohabitant because of a material change in circumstances arising after the agreement was made].

(b) A term in a cohabitation agreement is not enforceable to the extent that it:

(1) limits or restricts a remedy available for a cohabitant who is a victim of domestic violence, sexual assault, or stalking under law of this state other than this [act]; or

(2) affects a child's right to support.

(c) The court shall decide a question of unconscionability or substantial economic hardship as a matter of law.

Comment

Most of this section is adapted from the Uniform Premarital and Marital Agreements Act (UPMAA) Sections 9 (f), (g), and 10 (set out below). Subsection (a), concerning "substantial hardship" and "unconscionability," is drawn from Section 9. As in the UPMAA, there is a bracketed provision for states that wish to include a "second look," considering the fairness of enforcing a term of agreement at the time of enforcement, rather than when the agreement was made.

The domestic violence language is drawn from UPMAA Section 10(b)(2). Subsection (c) is drawn from UPMAA Section 10(b)(1). Note that, as the UPMAA Comments to Section 10 provide, "parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children. [This] applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents."

UPMAA

[Section 9] (f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:] [(1)] the term was unconscionable at the time of signing[:] or (2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed].

(g) The court shall decide a question of unconscionability [or substantial hardship] under subsection (f) as a matter of law.

[Section 10] (b) A term in a premarital agreement or marital agreement is not enforceable to the extent that it . . .

(2) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act] . . .

SECTION 11. EQUITABLE CLAIMS. Except as otherwise provided in an enforceable cohabitation agreement, a cohabitant may assert and a court may enforce an equitable claim, including a claim for unjust enrichment based on domestic services.

Comment

This section and Section 12 affirm the rights of cohabitants to seek equitable relief.

Some courts have not accorded adequate weight to domestic services. *See* Albertina Antognini, *Nonmarital Contracts*, __ STAN. L. REV. __ (forthcoming 2021). This act emphasizes that domestic services have value beyond the hourly payment for such services

This section makes clear that unjust enrichment and other equitable claims are available to cohabitants, along with appropriate forms of relief, such as disgorgement or constructive trust. A married cohabitant may assert an equitable claim under Section 11 but claims for equitable division of property by a married cohabitant are limited under Section 12(b).

With respect to types of relief, injunctive relief, and particularly preliminary injunctive relief, may be critical to preventing dissipation of assets.

There are numerous ways to measure unjust enrichment. *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 49 (2011)(setting out six different methods for measuring unjust enrichment).

SECTION 12. EQUITABLE DIVISION OF PROPERTY.

(a) Except as otherwise provided in subsection (b) or in an enforceable cohabitation agreement, a cohabitant may assert a claim for, and a court may order, fair and equitable division of property acquired and liabilities incurred as a result of the efforts of either cohabitant during cohabitation, without regard to legal title.

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

(c) An unmarried cohabitant cohabiting with a married cohabitant may assert a claim under subsection (a) against the married cohabitant.

(d) The court shall consider the following to determine whether and how to order a fair

1 and equitable division of assets and liabilities under subsection (a):

2 (1) the duration and continuity of the cohabitation;

3 (2) the cohabitants' allocation of financial responsibility for housing, food,
4 clothing, health care, and other daily living expenses of the household;

5 (3) the cohabitants' allocation of responsibility for the performance of domestic
6 services;

7 (4) the cohabitants' allocation of caretaking responsibility for a family member of
8 either cohabitant;

9 (5) the cohabitants' intent to share with one another assets acquired or liabilities
10 incurred during the cohabitation;

11 (6) whether the property being considered for division is subject to interests of a
12 third party;

13 (7) whether a cohabitant has wasted property or transferred property to a third
14 party in an effort to defeat a right of the other cohabitant;

15 (8) if a cohabitant is married, the rights and interest of the married cohabitant's
16 spouse; and

17 (9) other factors the court considers relevant.

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

20 **Comment**

21
22 The remedy contemplated here is division of only those assets and liabilities acquired
23 during the cohabitation. The assets and liabilities to be divided do not include those acquired
24 prior to the cohabitation nor those acquired by inheritance or gift during the cohabitation.

25
26 Note that in addition to claims under this act, a cohabitant may pursue remedies in
27 contract or equity outside of the act. With respect to the property to be equitably divided, a court

1 may want to refer to other state law regarding the treatment of marital (or community) and
2 separate property under the states divorce or dissolution statutes for guidance. The term “other
3 daily living expenses” in subsection (d)(2) allows for consideration of responsibility for support
4 for a child or other family member of the cohabitants. This is not intended to and will not affect
5 how child support is calculated or ordered in the state.

6
7 Subsection (b) limits the claims under this section to unmarried cohabitants. The drafting
8 committee believes that a cohabitant who is married to a third party during the cohabitation
9 should not have access to this form of extraordinary relief for property acquired after the
10 marriage.

11
12 Subsection (e) is designed to ensure that, unlike the presumption in some states with
13 respect to marital property, there is no presumption that an equal division of assets is warranted.
14 *See, e.g., Odom v. Odom*, 141 P.3d 324, 339 (Alaska 2006)(“we have consistently noted that ‘the
15 trial court generally should begin with the presumption that an equal division of marital property
16 is most equitable.”); Ind. Code Ann. § 31-15-7-5 (2020)(“Presumption for equal division of
17 marital property; rebuttal”).

18 19 **SECTION 13. LIMITATIONS ON RIGHTS AND REMEDIES.**

20 (a) The rights and remedies under this [act] granted to a cohabitant may not be greater
21 than the rights and remedies the cohabitant would receive on divorce, dissolution, or death, if the
22 cohabitants had married.

23 (b) Neither this [act], nor a division of assets or liabilities under this [act], affects the right
24 of a third party, including a good faith purchaser from, or secured creditor of, a cohabitant.

25 **Comment**

26
27 This section ensures that the rights of the spouse of a person who cohabits are considered
28 and protected in any proceeding involving a married cohabitant.

29
30 On the other hand, as a general matter, one spouse has claims against the other spouse
31 based solely on their marital status. In community property states, a spouse owns a one-half
32 share of any property earned by either party during the marriage. In non-community property
33 states, any property earned by either spouse can be distributed at divorce and may be available
34 for inheritance at death. Nonetheless, claims of legitimate creditors against a married person are
35 debts that must be satisfied before a spouse is entitled to a share. That is, a mortgage on a house
36 means that the value of the house is less than the fair market value; a claim by a plumber must be
37 satisfied, and thus the amount available financially is decreased. A cohabitant is similar to
38 another creditor, so this simply means that a cohabitant’s claims must be legitimately recognized
39 and accounted for. These are issues to be considered in any division of property pursuant to this
40 section.

SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 15. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 16. SAVINGS AND TRANSITIONAL PROVISIONS.

(a) This [act] does not affect the validity or effect of a cohabitation agreement made before [the effective date of this [act]].

(b) This [act] applies to an equitable claim that accrues on or after [the effective date of this [act]].

Comment

The act will apply prospectively only to cohabitation agreements, oral or written, express or implied, which are entered into after the act's effective date, and to claims between cohabitants that accrue after the act's effective date. Thus the large number of individuals currently cohabiting will be unaffected except to the extent that new agreements are made or old agreements are clearly ratified. Equitable rights accruing prior to the effective date will be enforceable only under other state law, if applicable to the claim.

[SECTION 17. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)]

SECTION 18. EFFECTIVE DATE. This [act] takes effect