

DRAFT
FOR DISCUSSION ONLY

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
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July 24, 2020

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

2 **Prefatory Note**

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

13
14 The economic rights that derive from cohabitation differ greatly depending on the
15 relationship and its recognition under state law. State law across the United States varies widely
16 on the treatment of unmarried cohabitants, both at separation and at death. The Economic Rights
17 of Unmarried Cohabitants Act (ERUCA) provides states with comprehensive and uniform
18 guidance on questions concerning cohabitants’ economic interests and obligations (“economic
19 rights”) based on their relationship.

20
21 Couples have cohabited outside of marriage for millennia. Cohabitants may share
22 financial responsibilities during their cohabitation, or they may keep their finances separate. One
23 cohabitant may move into a dwelling the other had acquired separately. They may acquire
24 property together or they may not. Both may work, or one may work and the other takes care of
25 the household. Upon their breakup or the death of one cohabitant, state courts have in some cases
26 provided relief to a claimant seeking payment or a share of the property of the other cohabitant,
27 but in many cases have not. In declining to recognize a cohabitant’s claim, courts have often
28 referenced the meretricious nature of the couple’s relationship, or a desire to preserve marriage.
29 E.g., *Smith v. Carr*, 2012 WL 3962904 *4 (C.D. Cal. Sept. 12, 2012)(“Without more, plaintiff’s
30 express contract claim must fail for lack of consideration, as plaintiff’s alleged consideration is
31 inextricably intertwined with any meretricious consideration”); Albertina Antognini, *Nonmarital*
32 *Contracts*, 73 STAN. L. REV. __ (forthcoming 2021).

33
34 The act affirms the capacity of each cohabitant to contract with the other and, upon
35 termination of the relationship, claim a remedy against the other without regard to any intimate
36 relationship that exists between them, subject to certain limitations. The legal rights of third
37 parties, such as secured creditors or good faith purchasers, cannot be adversely impacted by a
38 remedy granted under the act. Further, upon termination of the cohabitants’ relationship, a
39 cohabitant may not claim a right or remedy greater than what the cohabitant would receive if the
40 cohabitants had married. Finally, although a cohabitant who is married to another individual may
41 assert claims under this act, the new equitable remedy of property division created by the act is
42 not available. A married cohabitant may be subject to any claim by the other cohabitant and may
43 assert defenses to such a claim.

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
6 the act applies. Not every cohabiting relationship involves sexual conduct. This act addresses
7 only those relationships in which the couple is romantically involved and economically
8 intermingled by using the phrase “intimate committed relationship” in the definition.
9 Washington State uses five factors to determine whether an intimate committed relationship
10 exists. *E.g.*, *In re Long & Fregeau*, 244 P.3d 26, 29 (Wash. 2010); *Connell v. Francisco*, 898
11 P.2d 831, 834 (Wash. 1995); *Matter of Marriage of Lindsey*, 678 P.2d 328, 331 (Wash.
12 1984)(“continuous cohabitation, duration of the relationship, purpose of the relationship, and the
13 pooling of resources and services for joint projects”). We anticipate that those factors, and
14 others, will be used to make the factual determination whether a particular individual is a
15 “cohabitant” within the scope of this 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
20 cohabitant 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 only
23 individuals who live together or whether they could be part of a “living apart together” (“LAT”)
24 couple. This is an increasingly common relationship. *See*, Cynthia Grant Bowman, *Living Apart*
25 *Together As A “Family Form” Among Persons of Retirement Age: The Appropriate Family Law*
26 *Response*, 52 FAM. L.Q. 1 (2018)(exploring the phenomenon of LAT couples among Baby
27 Boomers); *How Should the Law Treat Couples Who Live Apart Together?*, 29 CHILD & FAM. L.
28 Q. 335 (2017)(discussing living apart together couples and suggesting that LAT couples should
29 have certain legal rights, focusing on those designed to promote caretaking, not economic
30 interdependence). Examples of these relationships abound, including for two people living on
31 separate floors in an assisted living facility, or in separate residences because of employment or a
32 variety of other reasons. While these couples remain committed to one another and continue to
33 function as a unit for many purposes, they are not covered by the act. The consensus of the
34 drafting committee was to limit application of the act to couples who reside together.

35
36 Section 7 further illuminates the meaning and purpose of a cohabitation agreement.

37
38 The definition of “domestic services” focuses on the actual provision of these services.
39 Payments made by one cohabitant for these services could be the subject of another claim under
40 this act. “Domestic services” includes activities related to business development, business
41 entertaining, and similar activities for the benefit of the other partner or the relationship generally
42 *E.g.*, *Hills v. Superior Court (Munoz)*, No. B174068, 2004 WL 1657689, at *6 (Cal. Ct. App.

1 July 26, 2004) (reasoning that female plaintiff’s assertions raised triable issues of fact, including
2 that “she gave up her career and devoted herself to performing household and other domestic
3 services for him so as to aid his business career.”) Cohabitation often involves sexual conduct.
4 The term “domestic services” refers to aspects of the relationship other than sexual conduct.
5

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

12 The term does not include and the act does not address tort suits, based on consortium
13 , wrongful death or infliction of emotional distress claims but defers to other state laws on such
14 claims.
15

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

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

38 SECTION 3. SCOPE.

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

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

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

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

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

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

6 **Comment**

7
8 This section states the coverage of the act. The act is intended to give the courts broad
9 discretion to “do equity” between cohabitants.

10
11 Subsection (b)(1) makes clear that the act is not intended as a substitute for common law
12 marriage. Subsection (b)(2) makes clear that a cohabitant may have cognizable rights vis-a-vis
13 the other cohabitant by virtue of other state law (e.g., the state’s partnership law) and that those
14 rights are not lost unless clearly inconsistent with this act. The rights and remedies provided by
15 the act are not intended to be the exclusive rights and remedies afforded to cohabitants. See
16 Section 5(c).

17
18 **SECTION 4. EFFECT OF MARRIAGE.**

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

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

24 **Comment**

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

30
31 The drafting committee discussed at length whether to include claims by married
32 cohabitants within the purview of this act. Many married people cohabit. Recall that even Lee
33 Marvin, the defendant in the groundbreaking “palimony” case, was married when his
34 cohabitation began. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *see also In re Estate of*

1 *Roccamonte*, 174 N.J. 381 (2002)(case involving a 25-year relationship between a unmarried
2 cohabitant and a decedent who was married to a third party throughout the relationship). The
3 reasons for doing so are numerous, including the impracticality of divorce or the illness of the
4 non-cohabiting spouse. Section 12 precludes a claim by a cohabitant who is married to someone
5 else for equitable division of certain property acquired during the cohabitation if the claim arose
6 after the marriage. This represents a compromise approach by the drafting committee to provide
7 limited rights to a married cohabitant.

8
9 **SECTION 5. GOVERNING L AW.**

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

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

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

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

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

20 **Comment**

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

29 As with most other agreements, a cohabitation agreement can specify a governing law,
30 provided that law has a relationship to either the parties or their agreement, and it is not contrary
31 to the enforcing state’s public policy.

32
33 The intent is for other state law to supplement the act unless clearly inconsistent with the
34 act. Note, for example, that to the extent the act establishes burdens of proof for unjust

1 enrichment, it may supersede a state’s common law.

2
3 Subsections (a) and (b) are drawn from the Uniform Premarital and Marital Agreements
4 Act, Section 4:

5
6 *SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation,*
7 *and construction of a premarital agreement or marital agreement are determined:*
8 *(1) by the law of the jurisdiction designated in the agreement if the*
9 *jurisdiction has a significant relationship to the agreement or either party and the*
10 *designated law is not contrary to a fundamental public policy of this state; or*
11 *(2) absent an effective designation described in paragraph (1), by the law*
12 *of this state, including the choice-of-law rules of this state.*
13

14 Subsection (c) is modelled after Section 106 of the Uniform Trust Code (2018), which
15 provides: “The common law of trusts and principles of equity supplement this [Code], except to
16 the extent modified by this [Code] or another statute of this State.”
17

18 This reflects the notion that cohabitants covered by this act may have other rights and
19 remedies in addition to those under this act.
20

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

25 **Comment**

26
27 Some states have imposed restrictions on cohabitants that are not imposed on other
28 litigants; thus, for example, contributions made to the relationship will be considered regardless
29 of whether they take the form of domestic services or monetary contributions. A primary goal of
30 the act is to ensure that in most cases, cohabitants will be treated like other litigants seeking to
31 enforce economic claims. The mere fact that an individual is a cohabitant should not be a basis
32 to preclude a claim or subject the individual to additional requirements, such as the requirement
33 there be a basis apart from the cohabitation to pursue a claim. *Spafford v. Coats*, 118 Ill. App. 3d
34 566 (1983), illustrates the problem. Donna Spafford filed a complaint against her former partner,
35 Richard Coats, for the creation of a constructive trust, alleging that she purchased or paid the
36 down payment for various vehicles from her own funds. *Id.* at 568. However, title to those
37 vehicles was listed in Coats’s name in order to reduce insurance costs Spafford and Coats
38 cohabited for more than six years. The appellate court held that the nature of their relationship
39 did not preclude equitable relief only because Spafford’s claims were “substantially
40 independent” of the nonmarital relationship between the parties, i.e., Spafford had actually paid
41 for the motor vehicles herself. *Id.* at 572-73. Subsequently, in *Blumenthal v. Brewer*, the Illinois
42 Supreme Court rejected a cohabitant’s claim because she failed to show “an independent

1 economic basis apart from the parties' relationship.” *Blumenthal v. Brewer*, 69 N.E.3d 834, 856
2 (Ill. 2016). The court in *Blumenthal* noted:

3
4 There are major public policy questions involved in determining whether, under what
5 circumstances, and to what extent it is desirable to accord some type of legal status to
6 claims arising from [cohabitation] relationships. Of substantially greater importance than
7 the rights of the immediate parties is the impact of such recognition upon our society and
8 the institution of marriage.

9
10 *Id.* at 851.

11
12 **SECTION 7. COHABITATION AGREEMENT.**

13 (a) A cohabitation agreement:

14 (1) is not void as against public policy;

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

16 (3) may waive an economic right of a cohabitant under this [act].

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

20 **Comment**

21
22 A “cohabitation agreement” requires mutual assent, although not expressly stated in the
23 section.

24
25 Subsection (a) is intended to abrogate court decisions that have held that cohabitation
26 agreements are void as against public policy. *See, e.g., Blumenthal v. Brewer*, 69 N.E.3d 834,
27 854 (Ill. 2016) in which the court rejected constructive trust and restitution claims by long-term
28 same-sex cohabitant noting that although the parties may have contracted independent of their
29 cohabiting relationship, recognition of claims based on cohabiting relationship would be
30 inconsistent with legislature’s abolition of common law marriage. In *Gunderson v. Golden*, 360
31 P.3d 353 (Idaho Ct. App. 2015), the court rejected a claim for equitable distribution of property
32 after a 25-year cohabitation stating “The elimination of common-law marriage, supported by an
33 explicit public policy justification, commands our courts to refrain from enforcing contracts in
34 contravention of clearly declared public policy and from legally recognizing cohabitational
35 relationships in general.”

36
37 Subsection (a)(3) specifically allows cohabitants to “opt out” of the act, if they so desire
38 by waiver. An effective “opt out” must be contained in a cohabitation agreement, and so may be

1 in a record, oral, or implied-in-fact.
2

3 Subsection (b) addresses the issue of consideration. An enforceable agreement requires
4 consideration, and the contribution of domestic services or property provides that consideration;
5 that is, the contribution of domestic services is consideration so long as it was for the benefit of
6 the other cohabitant or for the benefit of the relationship. Note that “a promise which is
7 bargained for is consideration if, but only if, the promised performance would be consideration.”
8 Restatement (Second) of Contracts § 75 (1981).
9

10 An implied-in-fact agreement differs from an express contract only “in the mode of
11 manifesting assent. Just as assent may be manifested by words or other conduct, sometimes
12 including silence, so intention to make a promise may be manifested in language or by
13 implication from other circumstances.” Restatement (Second) of Contracts § 4 cmt. (1981).
14 Because some courts refuse to recognize agreements between cohabitants due to public policy
15 considerations and others may impose higher burdens on cohabitants, *Spafford v. Coats*, 118 Ill.
16 App. 3d 566 (1983), this section clearly states that agreements between cohabitants setting forth
17 their rights and obligations with regard to property or contributions of domestic services by
18 either or both are valid and enforceable. *See also* Section 6 and the comments following that
19 section.
20

21 SECTION 8. CLAIM TO ENFORCE ECONOMIC RIGHTS.

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

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

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

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

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

32 (1) terminates the accrual under this [act] of any additional rights between the
33 cohabitants;

1 (2) tolls the statute of limitations on a claim for breach of a cohabitation
2 agreement until either cohabitant dies or files for [separation,] dissolution[,] or divorce; and

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

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

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

9
10 **Comment**

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

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

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

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

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

38
39 The act does not include specific provisions for statutes of limitations. The time period,
40 and except as stated in Subsection (d), the tolling and accrual provisions found in other state law

1 will control. See Section 5, Governing Law. The act also does not preclude either cohabitant
2 from asserting an equitable defense limiting or enlarging the time for enforcement, such as
3 laches or estoppel.
4

5 Subsection (d) includes a very specific tolling provision to cover situations where the
6 cohabitants marry after cohabiting. The statute of limitations on a claim accruing during the
7 cohabitation and prior a to the marriage is tolled by the marriage. Those claims could be raised
8 many years later in in a subsequent divorce or probate proceeding.
9

10 Courts have begun to take into account premarital cohabitation when distributing
11 property at divorce. *See, e.g., Matter of Munson*, 146 A.3d 153, 157-58 (N.H. 2016) holding that
12 the trial court had discretion to consider premarital cohabitation as a factor when dividing
13 property at divorce, and listing other states that do so, including Hawaii, Indiana, Montana,
14 Michigan, and Oregon). The act permits agreements made and equitable rights accruing during
15 premarital cohabitation to be considered at the end of a marriage.
16

17 With respect to subsection (d), separation is bracketed for those states, where the filing of
18 a separation action terminates the marital relationship.
19

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

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

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

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

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

28 **Comment**
29

30 Under this act, cohabitants may acquire certain rights and remedies. They may obtain
31 payments or a share of, the cohabitants' property acquired during the cohabitation. This will
32 come as a surprise to many cohabitants, especially those who may have intentionally decided not
33 to marry and subject themselves to state law regulating the distribution of property upon
34 dissolution or divorce or death. These cohabitants may include seniors who have lost previous
35 spouses either to death or to long-term illness and find companions with whom they want to
36 cohabit but not intermingle finances or property. It also includes cohabitants who, without any
37 serious thought, move in together and find themselves still living together some years later.
38

1 Section 9 establishes heightened burdens of proof for claims based on oral agreements
2 and implied-in-fact-agreements, and for the new equitable division remedy available under
3 Section 12. The burden of proving these claims is clear and convincing evidence. Because this
4 act creates new and possibly unprecedented rights and remedies for cohabitants – some very
5 similar to the rights and remedies attendant to marriage – the drafting committee believes that
6 courts should be incentivized to take a hard look at the evidence supporting these claims
7 particularly where the parties have not formalized their agreement.. The courts should grant
8 relief only in extraordinary circumstances when the evidence is clear that a cohabitant is entitled
9 to these remedies.

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

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

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

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

41 42 **SECTION 10. UNENFORCEABLE TERMS.**

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

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

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

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

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

7 (2) affects a child’s right to support.

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

10 **Comment**

11
12 Most of this section is adapted from the Uniform Premarital and Marital Agreements Act
13 (UPMAA) Sections 9 (f), (g), and 10 (set out below). Subsection (a), concerning “substantial
14 hardship” and “unconscionability,” is drawn from Section 9. As in the UPMAA, there is a
15 bracketed provision for states that wish to include a “second look,” considering the fairness of
16 enforcing a term of agreement at the time of enforcement, rather than when the agreement was
17 made.

18
19 The domestic violence language is drawn from UPMAA Section 10(b)(2). Subsection (c)
20 is drawn from UPMAA Section 10(b)(1). Note that, as the UPMAA Comments to Section 10
21 provide, “parents and prospective parents do not have the power to waive the rights of third
22 parties (their current or future children), and do not have the power to remove the jurisdiction or
23 duty of the courts to protect the best interests of minor children. [This] applies also to step-
24 children, to whatever extent the state imposes child-support obligation on step-parents.”

25
26 UPMAA

27
28 *[Section 9] (f) A court may refuse to enforce a term of a premarital agreement or*
29 *marital agreement if, in the context of the agreement taken as a whole[:] [(1)] the term*
30 *was unconscionable at the time of signing[; or (2) enforcement of the term would result*
31 *in substantial hardship for a party because of a material change in circumstances arising*
32 *after the agreement was signed].*

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

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

37 *(2) limits or restricts a remedy available to a victim of domestic violence*

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

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

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

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

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

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

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

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

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

18 (9) other factors the court considers relevant.

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

21 **Comment**
22

23 The remedy contemplated here is division of only those assets and liabilities acquired
24 during the cohabitation. The assets and liabilities to be divided do not include those acquired
25 prior to the cohabitation nor those acquired by inheritance or gift during the cohabitation.
26

1 Note that in addition to claims under this act, a cohabitant may pursue remedies in
2 contract or equity outside of the act. With respect to the property to be equitably divided, a court
3 may want to refer to other state law regarding the treatment of marital (or community) and
4 separate property under the states divorce or dissolution statutes for guidance. The term “other
5 daily living expenses” in subsection (d)(2) allows for consideration of responsibility for support
6 for a child or other family member of the cohabitants. This is not intended to and will not affect
7 how child support is calculated or ordered in the state.
8

9 Subsection (b) limits the claims under this section to unmarried cohabitants. The drafting
10 committee believes that a cohabitant who is married to a third party during the cohabitation
11 should not have access to this form of extraordinary relief for property acquired after the
12 marriage.
13

14 Subsection (e) is designed to ensure that, unlike the presumption in some states with
15 respect to marital property, there is no presumption that an equal division of assets is warranted.
16 *See, e.g., Odom v. Odom*, 141 P.3d 324, 339 (Alaska 2006)(“we have consistently noted that
17 ‘the trial court generally should begin with the presumption that an equal division of marital
18 property is most equitable.”); Ind. Code Ann. § 31-15-7-5 (2020)(“Presumption for equal
19 division of marital property; rebuttal”).
20

21 **SECTION 13. LIMITATIONS ON RIGHTS AND REMEDIES.**

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

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

27 **Comment**

28
29 This section ensures that the rights of the spouse of a person who cohabits are considered
30 and protected in any proceeding involving a married cohabitant.
31

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

1 and accounted for. These are issues to be considered in any division of property pursuant to this
2 section.

3
4 **SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
5 applying and construing this uniform act, consideration must be given to the need to promote
6 uniformity of the law with respect to its subject matter among states that enact it.

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

13 **SECTION 16. SAVINGS AND TRANSITIONAL PROVISIONS.**

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

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

18 **Comment**

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

25
26 **[SECTION 17. REPEALS; CONFORMING AMENDMENTS.**

27 (a)

28 (b)

1 (c)]

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