

From: John Culhane

Sent: Wednesday, December 4, 2019

To: Mary Devine, Craig Stowers, Naomi Cahn

Subject: Re: Economic Rights of Unmarried Cohabitants Act: a message from Committee Co-Chairs Mary Devine and Craig Stowers

Dear all,

First, thanks to Mary, Craig, and Naomi for all of the hard work and thought that so obviously went into this draft, and the accompanying memorandum.

I will reserve my comments about the specific questions (except one!) here, saving them for the meeting. I'd like to address a scope issue here. Generally, I think the Act, as drafted, is very good. ("Knocked it out of the park...")

Even if Article 4 is omitted, this proposed Act stands to do a great deal of good, perhaps focusing state legislatures in places that still make it difficult or impossible for people in cohabitating relationships to obtain judicial redress. I am also respectful of the consideration that whatever is drafted should be made with realistic consideration of the prospects for passage.

That said, I both support Article 4 -- and think it's not enough. Article 4 looks something like the ALI Principles -- a good thing, in my view. But two observations: First, Unlike the Principles, Article 4 -- like the rest of the proposed Act -- excludes from consideration any couple that could not have married (setting aside for now the issue of putative spouse). Why? The Principles make it harder (by removing the presumption of "domestic partnership") for those who can't marry to establish the kind of interdependent relationship that should confer rights upon dissolution or death. But they do not make it impossible. Nor does the Alberta law that is referenced in the draft. (More on this later.) And given the flexibility of remedies favored throughout the proposed Act, it seems like a more expansive definition of cohabitant would be more concordant with that nuanced approach.

Second, one possible reason for legislative reluctance to pass a law something like Article 4 may be because of the intensity of the factual analysis that often needs to be done. That's also true of implied-in-fact agreements, but maybe less so. I don't think that's a reason to reject Article 4, but more a recognition that it is a limited tool. So what would be a better tool?

Why, the ability to register a relationship, of course. We talked a good deal during the meeting in Philadelphia about the possibility of creating such a registry, along the lines (maybe) of the Colorado Designated Beneficiary Law. I understand that, to the extent that law goes beyond cohabitants to allow registration of many different kinds of relationships, it is to that extent arguably beyond the remit of this Committee. But it seems to me that some kind of registration system is the best way to reduce the uncertainty inherent in the provisions of Articles 2, 3, and 4. I hope we can at least discuss whether it's worth trying to breathe life into this idea.

The only other comment I'd make is a specific one: I do think it's worth some time thinking about tort issues, especially as they arise between the cohabitants and third parties (such as loss of consortium). If we are thinking about including wrongful death, consider that almost no states allow unmarried cohabitants standing to recover damages currently. So allowing such recovery would be effectively to amend those statutes (or at least to create that issue).

Looking forward to Friday's meeting.

Sincerely,
John Culhane