To: ULC Economic Rights of Unmarried Cohabitants Act Committee
From: Albertina Antognini, Professor of Law, University of Arizona, James E. Rogers College of Law (Observer)
Re: Economic Rights of Unmarried Cohabitants Act Draft (August 5, 2020)
Date: August 4, 2020

I appreciate the opportunity to review the most recent draft of the Economic Rights of Unmarried Cohabitants Act and I commend the Committee for its efforts to ensure that domestic services receive proper valuation. As currently drafted, however, I believe the Act has some serious flaws. I will limit myself here to respond to two of the three questions raised in the Issues Memo, which are (1) the definition of cohabitant and (2) the burdens of proof.

This Memo takes seriously the Act's goal to "affirm[] 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." Prefatory Note, p. 1. This Memo is also guided by the Act's assertion that "a claim between two individuals shall not be precluded or be subjected to an additional procedural or substantive hurdle on account of the individuals being current or previous cohabitants." Section 6, p. 7. Finally, it seeks to implement the Act's aim to "coordinate with, and not change, existing state law, except to the extent necessary to recognize that each cohabitant has some legally cognizable interests in the property of the other." Section 5, Comments, p. 6.

Definition of Cohabitant

Section 2

The definition of "cohabitant" laid out in Section 2 introduces a threshold requirement before the Act applies at all. Section 2, p. 2. This requirement derogates from the Act's purpose to unify and standardize rights already available to individuals, including cohabitants, by imposing a novel pre-condition.

The Comments to Section 2 specify that the definition relies explicitly on how Washington State has defined the term. Section 2, Comments, p. 3. Washington is, however, an outlier in how it defines and treats cohabitants. In fact, Washington is the *only* state that has developed a consistent, status-based approach to nonmarital relationships that results in characterizing income and property acquired during the relationship "as income and property acquired during marriage." Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995) (en banc).[1] Given the marital-like remedy provided to couples in Washington, it might make sense to have a clearly and rigidly defined set of relationships

[1] Nevada similarly provides for equitable distribution "by analogy," but does not have the same distilled definition of a nonmarital relationship, nor as developed a body of case law, as Washington. *See* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 17-18 (2018).

that can successfully claim it. There is no reason to include such a requirement in an Act like this, whose aim is to ensure that the rights available to individuals writ large also apply to cohabitants, notwithstanding their cohabitation. The Act's definition would only make sense to have in Section 12 – and only Section 12 – as it provides for a more robust division of property based on the cohabiting relationship itself.

One of the main effects of retaining a threshold definition in the Act will be to move the target of the litigation to whether an individual is a "cohabitant" under Section 2. If the court decides the couple does not meet the definition's stringent requirements, then the general rules of the State will apply. Given the heightened burden of proof the Act currently imposes on certain contracts, many cohabitants will want to argue that they do not in fact fall under the Act. The result will be to have two different lines of cases that apply to cohabiting couples: one for those who satisfy the requirements of the Act and one for those who do not.

While some cases addressing nonmarital couples consider whether the relationship was sufficiently marital-like, the majority do not.[2] Courts focus instead on the specific claims raised; as such, leaving the definition of cohabitant unspecified does not appear to be a problem under current law.

PROPOSED RESOLUTION: I suggest deleting the definition of "cohabitant" from Section 2 and moving it to Section 12. For similar reasons, I would suggest deleting the definition of "cohabitation agreement" from the Act, as it is unnecessary and cumbersome. Whether an agreement was formed will be established where a cohabitant claims as much.

Section 4

Section 4 further impacts the definition of "cohabitant" under the Act insofar as it limits who can access its provisions to individuals whose marriage would be recognized by the State in which they live. Section 4(a), p. 5.

One unavoidable effect of this limit is to further harm vulnerable parties. For instance, it might exclude a minor from claiming property from his or her nonmarital partner, in a situation that might involve problematic power differentials, just because he or she would not have been able to marry.

The deeper problem with this definition, however, is the principle on which it relies, which is present throughout the Act – and that is failing to understand that cohabitation, or nonmarriage, is ***not a status***. That is, nothing in the Act bestows on cohabiting individuals an affirmative status (even Section 12, which comes closest, shies away from doing so). Given that cohabitation is not a status, neither the Act nor the enacting State ought to legislate public policy through the non-recognition

[2] *See* Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2183 (2019) ("In addressing nonmarital relationships, a small number of courts consider how marriage-like a nonmarital relationship is prior to distributing property.").

of the relationship. Nonmarriage is not the place to promote public policy considerations, which apply to marriage as a status explicitly regulated and recognized by the State.

This point raises the question of why marriage is used throughout the Act as the metric to establish claims between these couples. Currently, the Act imposes a limit on all claims brought by cohabitants by stating that "a cohabitant may not claim a right or remedy greater than what the cohabitant would receive if the cohabitants had married." Prefatory Note, p. 1. But what if two individuals contract for such rights? Will the Act limit the ability of autonomous individuals to contract *as they see fit*? It is unclear why marriage would function as a limit to a contract entered into between two individuals who happen to cohabit.

This reliance on marriage is also in direct tension with other assertions in the Act that describe cohabiting couples as "intentionally decid[ing] not to marry." Section 9, Comments, p. 11. If these cohabitants have intentionally opted out of marriage, then why would the Act require that marriage be the metric to measure their relationship?

PROPOSED RESOLUTION: I would remove all references to marriage in the Act – not only the references that limit the Act based on marriage, but also those that model themselves on marriage, like Section 10. One exception could be limiting recovery under Section 12, the most relationship-based claim available, to what the cohabitants would have received had they married.

Burdens of Proof

Section 7

I appreciate the Committee's attempts to correct the distorted analysis of contracts in the context of nonmarital relationships.[3] I worry, however, about the use of the term "benefit" in Section 7, and also previously in Section 2(3), along with the elaboration in the Comments that explain "the contribution of domestic services is consideration *so long as it was for the benefit of the other cohabitant or for the benefit of the relationship*." Section 7, Comments, p. 9 (emphasis added).

Specifying that domestic services must be for the benefit of the other individual or for the relationship is unnecessary. This requirement is not only redundant, but could also lead to unnecessary litigation over whether the domestic services rendered actually benefitted someone else or the relationship. In particular, the stipulation that domestic services provide a benefit has the potential of exacerbating the problematic reasoning already established by the case law that such services are part of the give and take of the relationship and thereby do not necessarily confer a benefit; such services could also be characterized as benefitting the individual undertaking that work, therefore rendering merely incidental the benefit experienced by anyone else.

[3] *See, e.g.*, Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. (forthcoming 2021) (arguing that courts uphold express contracts between nonmarital couples in a limited set of circumstances that mimic the limits imposed on contract by the status of marriage).

PROPOSED RESOLUTION: Domestic services should count as consideration, full stop. Expanding the discussion of what consideration is according to standard contract law would be helpful. The Restatement of Contracts defines consideration simply as a "bargained for" exchange. RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981). And, in situations "when one or both of the values exchanged are uncertain or difficult to measure," courts "ordinarily," will not "inquire into the adequacy of consideration." RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

Section 9

Section 9 takes the unprecedented step of distinguishing between written contracts and oral or implied in fact contracts, by heightening the burden of proof for the latter two claims. This goes against standard contract law doctrine and against how the majority of states have addressed contracts between cohabitants.

"A contract is express if stated either orally or in writing, and it is implied if its terms are not so stated." 17A AM. JUR. 2D CONTRACTS § 11. Moreover, "a contract implied in fact has the same legal effect as an express contract; it carries as much weight and is as binding as an express contract." *Id.* Yet this Act makes the decision to separate them into two distinct categories. Even in the specific context of cohabiting relationships, courts have generally not raised the burden of proof for contract claims. The Act does not need to correct courts' enthusiastic enforcement of all contracts that come before them: courts already decline to enforce many of the contracts that cohabitants claim. That is, under the current, non-heightened burden of proof, cohabitants are still not winning. Importantly, the majority of contract claims are not failing because they do not satisfy the burden of proof (meaning they are not spurious claims), but rather because courts struggle to apply contract law to nonmonetary contributions.[4]

The rationale provided for this heightened burden is that "this act creates new and possibly unprecedented rights and remedies for cohabitants – some very similar to the rights and remedies attendant to marriage." Section 9, Comments, p. 12. To be very clear, the right to contract is **not** a "new and possibly unprecedented right[]" – it is a right that every individual has, subject to the specific limits imposed by contract law.

It is especially troubling to read the Committee's rationale, based on its professed "belie[f] that courts should be incentivized to take a hard look at the evidence supporting these claims particularly where the parties have not formalized their agreement." Section 9, Comments, p. 12. This belief is based on a misunderstanding of contract law. First, an oral contract is a "formalized agreement," which the Act nonetheless subjects to a higher burden of proof. Second, implied-in-fact contracts "ha[ve] the same legal effect as an express contract." 17A AM. JUR. 2D CONTRACTS § 11. The Act

[4] Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. (forthcoming 2021) (showing how courts rely on contract law doctrines like consideration to decline to enforce contracts, which generally affect only nonfinancial contributions to the relationship).

thereby distorts the application of standard contract law doctrine in expressing its "belief." Tellingly, the Committee fails to cite to any contract law principle to support its imposition of a higher burden: instead, it relies on a citation to constructive trusts, an equitable remedy which lies within the court's discretion, unlike contract law which requires the court to determine whether a contract in fact existed between the parties.

Finally, the Committee also believes that it "will come as a surprise" to "*many* cohabitants," that their respective partners have "certain rights and remedies" at the conclusion of their relationships. Section 9, Comments, p. 11 (emphasis added). This is an empirical claim made without any support. In fact, data seem to support the opposite conclusion: "A colleague with experience at the Legal Assistance Foundation informed me that it was common--almost universal--for women coming into neighborhood legal aid offices to believe that if they lived with someone for seven years, they were legally married to that person."[5] But even if the Act's assertion were proven to be true, access to rights does not turn on whether the individual subject to those rights is surprised. Ours would be a very different legal system if mere ignorance of the law were reason enough to provide an individual with protections from that law.

PROPOSED RESOLUTION: Defer to already-existing State law with regards to the burden of proof on civil contracts. Given the paramount concern over enactability, relying on the State law already in place seems like a more attractive, and less confusing, option.

[5] *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711 (1996) (citing to further support for this proposition in footnote 6).