Memorandum
Economic Rights of Unmarried Cohabitants
January 15, 2021

We hope that you had enjoyable and healthy holidays and are delighted to welcome you to 2021! Attached is a new draft for your review and improvement on January 15.

Substitution of an Enhanced Equitable Remedy for Equitable Division. A cursory inspection will reveal the most significant change from the prior drafts: we have created an enhanced equitable remedy rather than the separate "equitable division" remedy we have considered previously. Section 7(a) allows an equitable claim between cohabitants to be brought based on the cohabitants' "contributions to the relationship," a term which is defined in Section 2(3).

"Contributions to the relationship" explicitly includes domestic services as well as other types of contributions that one cohabitant makes to the other cohabitant or to their relationship. We set out in Section 7(c) different factors that a court should consider in calculating the amount of the equitable remedy, including that a court is not limited to or restricted by the fair market value of any services rendered. The factors are adapted from the equitable division factors in previous drafts.

We have heard from the beginning concerns that equitable division appeared to some, although not to everyone, to be a status-based "marriage lite" remedy which might be unattractive to many legislators, and in many jurisdictions could jeopardize any consideration of the Act at all. In late November and December, a new concern was raised by the elder law bar. The Medicaid administrators in the various states can deny Medicaid status to someone who has (or is believed to have) the ability to access assets beyond stated limits. The elder lawyers believe that a separate remedy like equitable division would inspire many state authorities to deny Medicaid status to otherwise eligible individuals. This could occur whether or not the otherwise eligible cohabitant actually brought a claim for equitable division.

Against the pre-existing background of concerns, we concluded that fighting directly with an organized group of lobbying objectors like the elder lawyers would be unwise. We hope and believe that our proposed equitable remedy, as a traditional common law remedy, will not attract the same type of negative attention as we saw with equitable division.

We have a continuing concern that even the current version of the equitable remedy is so broad some will be concerned it might leave cohabitants in a better position than they would have been in had they married and divorced rather than cohabited. We considered providing that the equitable remedy would be capped so a cohabitant could, at best, receive no more than would have been awarded had the cohabitants been married with the relationship ended by death or divorce. However, we concluded that the divorce limitation would require a trial within a trial: when cohabitants split up and one makes equitable claims, the court would have to sort out not only those claims but also what the award to each party would have been in a hypothetical marriage and then divorce. We thought that was unworkable. Thus we have provided in this draft that the maximum equitable remedy is the amount available under the

intestate statutes, which is a knowable determination in each state. The alternative, we believe, is simply to remove any cap entirely, although we welcome some other cap that makes more sense.

Married Cohabitants, First Issue. We call your attention again to the oft-discussed question of the rights of one cohabitant when the other is married. As the Committee has discussed, the Act could exclude married cohabitants entirely. That would make the Act simpler but would it be fair to those excluded? Another approach would be to ignore the spouse of the married cohabitant. Married individuals may engage in all sorts of behaviors that jeopardize the economic well-being of the spouse; incurring obligations to a cohabitant would just be one more. In simple terms, one spouse may engage in a failed business venture and die leaving the other spouse penniless, or one spouse may cohabit with another and die with obligations to that cohabitant that substantially exhausts the marital estate. Should those cases be treated differently?

This draft carries forward a third approach. Section 10(b) provides that a surviving spouse's claim in probate is "superior to the rights of a cohabitant determined by court order or judgment." The net result is that a cohabitant might have no remedy in situations where a surviving spouse receives the residue of the estate under a will or the entire estate through intestacy. More generally, Section 3(c) provides that this Act does not affect obligations to support a child or a spouse of a cohabitant. One way of reading this provision is that the Act cannot provide remedies that would come ahead of a current legal obligation to a child or spouse. Another way of reading it would be that under no circumstances may a remedy under the Act impair a potential claim for support by a child or spouse. We need to consider which reading we mean and then revise the language if needed, as well as decide whether we are in agreement with the policy. To illustrate:

Imagine A and B are married. After 5 years of marriage, they part amicably, but never file for divorce. A begins living with C, and they have several children together. They begin a successful baking business that is titled jointly. A dies 40 years later. What rights should B have in the bakery business?

Suppose A dies with substantial assets plus the bakery business. Unfortunately, the once highly profitable bakery business has fallen on hard times, and C's contribution to the bakery business and the relationship is not satisfied by receipt of the business. Does B come ahead of C with respect to claims over the other assets, or does C come ahead of B? Does it matter what B has?

Does our answer depend on policy or enactability?

Married Cohabitants, Second Issue. Still speaking of marriage, Section 9 addresses the effect of the cohabitants' marriage (to each other) on the tolling of claims between them. We ask the Committee to consider the options set out in the text of the draft.

Option A tolls the statute of limitations for both contractual and equitable claims during the term of the marriage. Presumably, claims could be brought as late as the death of the first cohabitant.

Option B extinguishes all contractual and equitable claims upon marriage but notes that a valid premarital or marital agreement may deal with such claims.

Option C distinguishes between contractual claims, which are extinguished upon marriage, and equitable claims, which are preserved but must be brought shortly after the marriage. The thinking behind Option C is that some states today may not extinguish equitable claims upon marriage, so we would not want to do so, but, at the same time, preserving those claims "forever" may be undesirable.

Effective Date. This is Section 13. There is no perfect answer, but what do we believe is the most reasonable? Validate all agreements, even those entered into before the Act? Or only new ones? What about equitable claims? Should the two be treated in the same manner? The approach taken in the draft is to apply the Act to all agreements and to all equitable claims.

Miscellaneous Issues.

You will see that Section 2(2) adopts the term "Cohabitants' agreement" rather than "cohabitation agreement" because we believe the latter has baggage and meanings in different states that may be confusing. We do not define cohabitation and don't want to.

Our definition of "termination of cohabitation," specifically Section 2(9)(b), does not thrill us. We have left in "the date the cohabitants stop living together as a couple" because the phrasing parallels the definition of "cohabitant" and we have not seen or heard anything that is superior (at least that we remember).

Section 5 is the heart of the Act. Is "restricted or barred" the best terminology? We have experimented with a dozen or more formulations, none of which we think is better but are not satisfied with our current language.

Above, we dealt with tolling claims during the marriage of the cohabitants to one another. In Section 6(b) we set out when a claim for breach of an agreement occurs for all cohabitants. We could leave that to other state law but believe we want to make clear that a claim for breach of a cohabitants' agreement may be brought during the cohabitation as well as after. This may not be apparent unless it is in the black letter. Compare Section 7(b), which provides that a claim for equitable relief does not accrue until termination of the cohabitation.

Section 8 suggests to a state that it should assign claims either to a court of general jurisdiction or to the court that hears probate matters, not to a family court. Our thinking is that the Act provides for contractual and equitable claims which are not generally the sorts of claims primarily heard by a family court.

Thank you!

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