

To: ERUCA Drafting Committee
From: Courtney Joslin, Observer
Date: August 15, 2020
Re: Response to inquiry regarding general contract and equitable claims

Dear Drafting Committee:

In response to a follow-up inquiry from one of the ERUCA Drafting Committee Chairs regarding my August 4, 2020 Comments, I offer this suggested rewrite of the Act.

In an email dated August 12, 2020, Chair Berry asked me “how to describe who is covered by contract and who can have equitable claims under this act.” Contrary to the implication of the question, there is no need to identify who can bring standard contract and equitable claims because a key purpose of this Act is *simply to remove the bar* that once prohibited people from bringing *claims that they otherwise would have been entitled to bring* because they were in nonmarital relationships. Other than the new remedy provided in former Section 12/new Section 6 below, these are existing claims; they are claims everyone else can assert. There is no need in this Act to limit who can bring general contract and equitable claims. Moreover, doing so would *mark a step backward* in the law.

And, indeed, as I explained in my August 4, 2020 memo, trying to limit the class entitled to these already existing, generally available remedies based on the nature of the underlying relationship is inconsistent with the two key goals of this project, which are

- (1) to promote greater uniformity and predictability in this area of law;¹ and
- (2) to ensure that unmarried partners are not denied otherwise available remedies or subjected to additional burdens or barriers because of their status as unmarried partners.²

I was also asked for suggestions in response to the concerns raised by Barbara and others about how to make former Section 12/new Section 6 “work.” I share these “workability” concerns. I will continue to ponder these concerns, but in order to get something to the Drafting Committee as soon as possible regarding the policy issues I previously raised, I have not endeavored to address them in this memo. I hope to send suggestions about the “workability” of former Section 12/new Section 6 below in the near future.

Thanks for your consideration.

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¹ See, e.g., May 23, 2018 Memo from the Study Committee to the Executive Committee (identifying the “[n]eed for and benefits of uniformity in this subject matter area”).

² See, e.g., Jan. 24, 2020 ERUCA Draft, Prefatory Note (“This act is designed to cover economic rights and obligations that arise between cohabitants based on their relationship. *Its goal is to ensure that a person’s capacity to contract or to obtain an equitable remedy is not affected by that person’s intimate relationship status with any party.*” (emphasis added)).

SECTION 1. SHORT TITLE.

This [act] may be cited as the [Uniform] Economic Rights of Unmarried Partners Act.

SECTION 2. DEFINITIONS.

In this [act]:

(1) “Domestic services” means services and activities performed for the household. The term includes cooking, cleaning, shopping, household maintenance, doing errands, and caring for a nonmarital partner or a family member of a nonmarital partner.

(2) “Economic right” means an interest, duty, promise, or obligation of an individual in a nonmarital relationship relating to domestic services or property.

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

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

SECTION 3. SCOPE.

This [act] does not affect:

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

(2) a right, duty, or remedy of an individual in a nonmarital relationship under law of this state other than this [act], except to the extent inconsistent with this [act].

SECTION 4. GOVERNING LAW.

(1) Except as otherwise provided under Sections 5, 6, and 7, a claim to enforce an economic right is governed by the law of this state, including this state’s choice-of-law rules.

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

SECTION 5. EQUAL ACCESS TO CONTRACT AND EQUITABLE CLAIMS.

(a) An agreement between individuals in a nonmarital relationship:

(1) is not void as against public policy;

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

(3) may waive an economic right to which the individual might otherwise be entitled, including a right protected under Section 6; and

(4) a contribution of services, including domestic services, or property constitutes consideration.

(b) An individual in a nonmarital relationship may assert and a court may enforce an equitable claim, including a claim for unjust enrichment based on domestic services.

(c) Except as otherwise provided under Sections 6 and 7, 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 in a current or previous nonmarital relationship.

SECTION 6. EQUITABLE DIVISION FOR COMMITTED NONMARITAL PARTNERS.

(a) In this Section, “committed nonmarital partner” means each of two individuals who are not married to each other and live together as a couple in an intimate, committed relationship and function as an economic, social, and domestic unit, and whose marriage to each other would be recognized by this state if the committed nonmarital partners were to marry, except that if a

committed nonmarital partner is married to another individual, this Section applies to a claim between the committed nonmarital partners except as otherwise provided in subsections (c) and (d), unless the committed nonmarital partners' marriage to each other would not be recognized by this state for a reason other than the committed nonmarital partners' marriage.

(b) Except as otherwise provided in subsection (c) or in an enforceable agreement between the parties, a committed nonmarital partner may assert a claim for, and a court may order, fair and equitable division of assets acquired and liabilities incurred as a result of the efforts of either committed nonmarital partner during their nonmarital relationship, without regard to legal title.

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

(d) An unmarried committed nonmarital partner cohabiting with a married committed nonmarital partner may assert a claim under subsection (b) against the married committed nonmarital partner.

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

- (1) the duration and continuity of the nonmarital relationship;
- (2) the parties' allocation of financial responsibility for housing, food, clothing, health care, and other daily living expenses of the household;
- (3) the parties' allocation of responsibility for the performance of domestic services;
- (4) the parties' allocation of caretaking responsibility for a family member of either party;
- (5) the parties' intent to share with one another assets acquired or liabilities incurred during the nonmarital relationship;
- (6) whether the property being considered for division is subject to interests of a third party;
- (7) whether a committed nonmarital partner has wasted property or transferred property to a third party in an effort to defeat a right of the other committed nonmarital partner;
- (8) if a committed nonmarital partner is married, the rights and interest of the married partner's spouse; and
- (9) other factors the court considers relevant.

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

(g) A claim under this Section accrues upon termination of the nonmarital relationship between the committed nonmarital partners. "Termination of the nonmarital relationship" means the earliest of: (1) the death of a committed nonmarital partner; (2) the date the relationship between the committed nonmarital partners is irretrievably broken; or (3) the date the committed nonmarital partners marry each other.

SECTION 7. CLAIM ACCRUAL AND TOLLING BASED ON MARRIAGE.

(a) If individuals in a nonmarital relationship marry each other, the marriage:

- (1) terminates the accrual under this [act] of any additional rights between the parties;
- (2) tolls the statute of limitations on a claim for breach of an express contract or an implied in fact contract, an equitable claim, or a claim arising under Section 6 of this [act] until either individual dies or files for [separation,] dissolution[, or divorce; and

(b) In an action for [separation,] dissolution[, or divorce of the marriage, an individual can assert a claim against the other spouse for breach of an express contract or an implied in fact

contract, or equitable claim, or a claim arising under Section 6 of this [act] arising based on a nonmarital relationship that occurred prior to the marriage.

SECTION 8. LIMITATIONS ON RIGHTS AND REMEDIES

Neither this [act], nor a division of assets and liabilities under this [act], affects the right of a third party, including a good faith purchaser from, or secured creditor.

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