

TO: Naomi Cahn
FROM: Laura Morgan
DATE: September 10, 2020
RE: Economic Rights of Unmarried Cohabitants

Naomi:

For what it's worth, the following are my thoughts/concerns about the current draft for discussion on September 12, 2020.

1. The definition of cohabitant, Section 2, Par. 1.

As you know, most, if not all, states terminate or modify alimony upon the "cohabitation" of the recipient, whether by statute or case law. E.g., Ala. Code § 30-2-55; Conn. Gen. Stat. Ann. § 46b-86(b); Ga. Code Ann. § 19-6-19(b); Mo. Ann. Stat. § 452.370; New Jersey Stat. Ann. 2A:34-23(n); Utah Code Ann. § 30-3-5(12); Va. Code Ann. § 20-109(A). See generally Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 Ariz. St. L.J. 1325, 1337 (2019); Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. Rev. 1, 21-22 (2017); Cynthia Lee Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 Fam. L.Q. 261 (2016).

I believe the definition of "cohabitation" under this Act should be the same as the definition of cohabitation under the above statutes/case law, i.e., the two should be co-extensive. What I don't want to happen is that an alimony recipient's alimony is terminated by a finding of "cohabitation", and then years later he/she is found NOT to be a cohabitant under this Act. (I would hazard that a finding of cohabitation for purposes of alimony would have no res judicata/collateral estoppel effect because of the difference in actions/parties.)

Is there a way to put this in the Act or the comments?

2. Section 7.

I am quite concerned about the opt-out. This Act under Section 12 establishes a default regime, as it were, of property rights for cohabitants which can be quite substantial depending on the circumstances of the case. Section 11 also establishes what could be substantial rights. Opting out should take more than a scribble on a napkin, or a nod and a wink. I don't think opting out of substantial rights should ever be implied in fact. (We would never allow parties to opt out of a marital property regime by an agreement that is not formal; the same should apply here.)

I would like further explanation of the opt-out/waiver of the rights under the Act. I fear, and I take full responsibility, that I don't understand the red-line deletions regarding this point.

3. Section 8, Paragraph 8, Termination of cohabitation.

I know how we have all struggled over this section. Would a simple solution be that termination of cohabitation is when the cohabitants no longer meet the requirements of cohabitation as defined in Section 1? If not, then should not the requirements of Section 8 be mirrored in the definition of cohabitation in Section 1?

4. Section 12.

As this is written, it is possible that a cohabitant would have more right to property than if he/she were married to the other party, because this Act fails to exclude all those kinds of property (other than gift and inheritance) that are excluded from division under various equitable distribution statutes.

I see that Section 13(a) tries to remedy this, but is this enough? I would like this beefed up.

Thank you for your time and attention to these few comments.