ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
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ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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# ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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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.
ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the [Uniform] Economic Rights of Unmarried Cohabitants Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Cohabitant” means one of two individuals who live together as a couple, or live apart together, in an intimate, committed relationship and function as an economic, social, and domestic unit. The term:

(A) includes an individual who is not married during the period of cohabitation but cohabited with an individual who is married during the period of cohabitation only if the unmarried individual did not know or have reason to know that the other individual was married; and

(B) does not include:

(i) an individual who is married during the period of cohabitation except for purposes of enforcing rights and remedies under this [act] in favor of an unmarried individual who unknowingly cohabited with a married individual;

(ii) an individual whose marriage to the other individual would not be recognized under law of this state other than this [act]; and

(iii) an unemancipated minor who otherwise would be a cohabitant under this [act] when the cohabitation began.

(2) “Cohabitants’ agreement” means the manifestation of assent between two cohabitants regarding their reciprocal economic interests and rights arising within the context of their
(3) “Court” means a tribunal having jurisdiction under the laws of this state over [divorce, family, or probate matters].

(4) “Domestic services” includes cooking; cleaning; shopping; household maintenance; doing errands for the household; caretaking, including caring for a child of a cohabitant or for the other cohabitant or a family member of the cohabitant; or other similar activities. The term does not include sexual conduct.

(5) “Economic right” means any express or implied interest, right, responsibility, duty, promise, or obligation of a cohabitant relating to:

(A) the value of the benefit conferred by domestic services rendered by one cohabitant for the benefit of the other or both cohabitants; or

(B) property or an interest in property.

(6) “Individual” means a natural person of any age.

(7) “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 financial obligations and assets.

(8) “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.

(9) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(10) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(11) “Termination of the cohabitants’ relationship” means either:

(A) the death of one of the cohabitants; or

(B) the time at which a cohabitant knows or has reason to know of the other cohabitant’s intent to end their relationship.

Note:

The definition of “cohabitant” specifies to whom the act applies.

The parties cannot be in a common law or other lawful marriage at any point during their relationship, subject to the exception stated in Subsection 102(1)(A).

Subsection 102(1)(A) is based on the concept of putative spousehood recognized in the Uniform Marriage and Divorce Act (UMDA). A putative spouse means one who has a good faith belief that the parties could be married to one another. See UMDA § 209, below. There may be situations involving a married cohabitant and an “innocent” cohabitant who does not know of the other cohabitant’s marriage. This definition protects the rights of the innocent cohabitant. While this provision may affect the rights of the innocent spouse, its goal is to ensure that equity between the cohabitants is done.

Section 209 of the Uniform Marriage and Divorce Act provides:

[Putative Spouse]:

Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited (Section 207) or declared invalid (Section 208). If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

To qualify as a cohabitant, the individuals need not live together but can be part of a “living apart together” (“LAT”) couple. This is an increasingly common relationship. See, e.g., Cynthia Grant Bowman, Living Apart Together As A "Family Form" Among Persons of Retirement Age: The Appropriate Family Law Response, 52 Fam. L.Q. 1 (2018)(exploring the phenomenon of LAT couples among Baby Boomers); How Should the Law Treat Couples Who
Live Apart Together?, 29 Child & Family Law Quarterly 335 (2017) (discussing living apart together couples and suggesting that LAT couples should have certain legal rights, focusing on those designed to promote caretaking, not economic interdependence). For example, the cohabitants may be separated because one or both is stationed by the military in different places, or it may be two people live on separate floors in an assisted living facility, or two people who live in separate residences because of employment or imprisonment or a variety of other reasons. These couples nonetheless remain committed to one another and continue to function as a unit for many purposes.

A “cohabitants’ agreement” requires mutual assent and consideration. Although not expressly stated in the definition, an agreement may specify that the cohabitants will have no reciprocal rights or obligations. See, e.g., Section 403.

The definition of “court” is drawn from Section 102(6) of the Uniform Child Custody Jurisdiction and Enforcement Act. We recognize that in some states, divorce and probate actions are tried by a jury and, in others, tried by a judge. Also, in some states divorce and other family law matters are heard in different courts. While ultimately states will need to decide on the appropriate tribunals to hear cases brought under this act, this draft includes language intended to provide direction. Because cohabitant claims differ from those in commercial cases, we believe the appropriate court upon dissolution of the cohabitation should generally be the state court that handles family law matters, not contracts. Cf., Matter of Estate of Cooney, __ P.3d. __, 2019 WL 7161295 *3 (Mont. 2019) (“A probate court has authority to settle claims against the estate, such as creditor claims.[] Enforcement of a contract to devise property is not a claim against the estate. . . The probate court’s limited jurisdiction does not extend to adjudicating a breach of contract claim”).

Each state should determine which courts will have jurisdiction. The state may want to designate the family law court (if any) to hear claims between cohabitants upon breach or dissolution of their relationship and the probate court, if any, to hear claims concerning cohabitants at death.

The definition of “domestic services” focuses on the actual provision of these services. Payments made by one cohabitant for these services could be the subject of another claim under this act.

The definition of “economic right” is broad enough to include the possibility of liability for ongoing payments between cohabitants or former cohabitants. This may include payments after the cohabitation terminates, if an agreement so provides, but in few, if any, other circumstances. It does not cover tort suits. With respect to the value of domestic services, “economic right” means the value of any benefit conferred as a result of the domestic services or the actual replacement value of the domestic services. For example, domestic services may contribute to the other cohabitant’s ability to earn money. See Albertina Antognini, Nonmarital Coverture, 99 B.U. L. Rev. 2139 (2019) (cases routinely deny access to property in the context of a relationship that involved domestic services).
The definition of “termination of the cohabitants’ relationship” is adapted from Section 801 of the Uniform Partnership Act, which states: “A partnership is dissolved, and its business must be wound up, upon the occurrence of any of the following: (1) in a partnership at will, the partnership knows or has notice of a person’s express will to withdraw as a partner...”

Termination refers to both death of a cohabitant and dissolution of the relationship. Termination is an objective standard as to when the cohabitant knows or has reason to know of the other cohabitant’s intent to end their relationship. Serving a prison sentence, for example, does not, in and of itself, terminate the cohabitation. Issues concerning commencement of the statute of limitations upon termination are addressed in Section 104. Most breach of contract suits or similar property recovery causes of action survive death. David Horton, *Indescendibility*, 102 Cal. L. Rev. 543, 557 (2014).

**SECTION 103. SCOPE.**

(a) This [act] applies:

(1) to the recognition and enforcement of economic rights between two cohabitants that arise by virtue of agreements between two cohabitants regarding their economic rights and remedies;

(2) under circumstances where one cohabitant has been unjustly enriched; or

(3) under circumstances in which equity and justice otherwise require a remedy.

(b) This [act] does not alter, diminish, or enlarge the application of the doctrine of common law marriage as may be recognized or prohibited by this state.

(c) Except as specifically provided in this [act], the [act] does not create, affect, enlarge, or diminish a cohabitant’s rights or duties under law of this state other than this [act].

(d) Except as specifically provided in this [act], nothing in this [act] may otherwise be construed or applied to create, affect, enlarge, or diminish rights accruing under law of this state other than this act in favor of the spouse of an individual who would be a cohabitant if not married.

**Note:** This Section restates the coverage of the Act. It provides an overview of the goals of this act.
SECTION 104. LIMITATION OF ACTION.

(a) The statute of limitations applicable to an action asserting a claim for relief is:
   (1) One year after breach where there has been a breach of the cohabitants’ agreement; or
   (2) One year after termination where there has been a termination of the cohabitants’ relationship other than by death.

(b) The statute of limitations applicable to an action asserting a claim for relief based upon termination of the cohabitants’ relationship due to the death of one cohabitant is governed by the [state probate code].

(c) If cohabitants marry each other, the marriage terminates the accrual of any additional rights between cohabitants under this [act] and tolls the statute of limitations until either cohabitant files for divorce or dies.

Note:
The act does not preclude either cohabitant from asserting an equitable defense limiting or enlarging the time for enforcement, such as laches or estoppel.

Courts increasingly take into account premarital cohabitation in distributing property at divorce. See, e.g., Matter of Munson, 146 A.3d 153, 157-58 (N.H. 2016)(permitting trial court to consider premarital cohabitation in dividing property at divorce, and listing other states that do so, including Indiana, Montana, Michigan, and Oregon). In light of this trend, the act permits agreements made during premarital cohabitation to be considered at the end of a marriage. The act tolls the statute of limitations on the enforcement of such agreements during a marriage that follows a cohabitation and allows consideration of the agreement in any subsequent divorce or probate proceeding.

SECTION 105. RULES OF CONSTRUCTION.

(a) This [act] must be broadly construed to ensure the predictable and just disposition of the economic rights of cohabitants.

(b) The common law of this state and principles of equity supplement this [act], except to
the extent specifically modified by this [act] or by law of this state other than this [act].

Note: This act is intended to give the courts broad discretion to "do equity" as between the parties. Subsection (b) permits a court to apply a jurisdiction’s law concerning unjust enrichment and other legal and equitable principles and is drawn from Section 106 of the Uniform Trust Code (2018), which provides: “The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”

Note, for example, that to the extent the act establishes burdens of proof for unjust enrichment, it may supersede a state’s common law.

SECTION 106. GOVERNING LAW.

(a) The validity, enforceability, interpretation, and construction of an agreement is determined by:

(1) the law of the jurisdiction designated in a cohabitants’ agreement, if the jurisdiction has a significant relationship to the agreement or either cohabitant and the designated law is not contrary to a fundamental public policy of this state; or

(2) absent an effective designation, the law of this state, including the choice-of-law rules of this state.

(b) In all other cases, a claim brought under this [act] is governed by law of this state other than this [act], including the choice-of-law rules of this state.

Note: This is drawn from UPMAA Section 4:

SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

(1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or

(2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

Subsection (a) relates to agreements, while subsection (b) applies to all other claims.
SECTION 107. ECONOMIC RIGHTS FOLLOWING EMANCIPATION OR MAJORITY. An unemancipated minor may become a cohabitant following emancipation or on reaching the age of majority, but only with respect to the economic rights accruing during the period of cohabitation following emancipation or on reaching the age of majority.

SECTION 108. CLAIMS AGAINST THE ESTATE OF A DECEASED COHABITANT. In addition to the requirements of this [act], a surviving cohabitant who asserts a claim for relief under this [act] against the estate of a deceased cohabitant is subject to the requirements of the [state probate code] [concerning creditor claims against a decedent's estate, including the statute of limitations, the manner of presenting a claim, the time within which a claim must be presented, and provisions concerning the satisfaction of claims].

SECTION 109. CUMULATIVE CLAIMS. A cohabitant may assert claims under [[Articles 2 and 3] [Articles 2, 3, and 4]], but a court may not order relief that is duplicative.

Note: This section makes clear that cohabitants can make alternative and cumulative claims under this act.

[ARTICLE] 2

AGREEMENT BETWEEN COHABITANTS

SECTION 201. AGREEMENT VALIDITY.

(a) A cohabitants’ agreement is not void as against public policy.

(b) A cohabitants’ agreement for which sexual conduct provides the sole consideration is void under this act.

Note: Subsection (b) recognizes that sexual conduct is likely to be part of the cohabitation. However, the act does not void the agreement unless sexual conduct is the sole consideration.

SECTION 202. EXPRESS AGREEMENT. An express cohabitants’ agreement may be in a record or oral.
SECTION 203. IMPLIED-IN-FACT AGREEMENT. A court may find an implied-in-fact cohabitants’ agreement manifested through the cohabitants’ language, conduct, or silence.

Note: An implied-in-fact agreement differs from an express contract only “in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances.” Restatement (Second) of Contracts § 4 cmt. (1981).

SECTION 204. BURDEN OF PROOF.

(a) An express, written cohabitants’ agreement that is signed by the cohabitant against whom enforcement is sought must be shown by a preponderance of the evidence. A cohabitants’ agreement that is contained in a record must be shown by a preponderance of the evidence.

(b) The existence of the following must be shown by clear and convincing evidence:

(1) a written cohabitants’ agreement which is unsigned or signed only by the cohabitant seeking to enforce the agreement, an express oral agreement, or an implied-in-fact agreement; and

(2) a term of an agreement under paragraph (b)(1) that is sought to be enforced.

(c) The burden of proof is on a cohabitant seeking to enforce the cohabitants’ agreement or the terms of that agreement.

Note: As the Supreme Court has recognized, “even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a “standard of proof is more than an empty semantic exercise.” Addington v. Texas, 441 U.S. 418, 425 (1979)(internal citations omitted). This standard ensures that trial courts carefully consider the existence of any form of contract. “Increasing the burden of proof is one way to impress the factfinder with the importance of the decision.” Id. at 427.

Note that UCC § 2-201 requires only that a writing be “signed by the party against whom enforcement is sought or by his authorized agent or broker.” Consequently, there is a lower burden of proof when the agreement is signed by the party against whom enforcement is sought.

An express oral agreement in Section 204(b)(1) is one that is not contained in a record.
SECTION 205. COMMENCEMENT OF ACTION. An action to enforce a
cohabitants’ agreement may be commenced on breach of the agreement or after the termination
of the cohabitants’ relationship.

Note: The significance of this section is that the agreement can be enforced upon breach,
even if the cohabitation is ongoing. Section 104 sets out the applicable statute of limitations.

SECTION 206. VOIDABLE AGREEMENT. A cohabitants’ agreement is voidable if
a cohabitant against whom enforcement is sought proves the cohabitant’s consent to the
agreement was involuntary or the result of duress or fraud.

Note: This section is adapted from UPMAA Section 9(a), which states “A premarital
agreement or marital agreement is unenforceable if a party against whom enforcement is sought
proves: (1) the party’s consent to the agreement was involuntary or the result of duress.” Note
that “[t]ypical instances of voidable contracts are those where one party was an infant, or where
the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other
promise justifies the aggrieved party in putting an end to the contract. Usually the power to avoid
is confined to one party to the contract.” Restatement (Second) of Contracts § 7 cmt. b. (1981).

SECTION 207. UNENFORCEABLE TERMS.

(a) A court may refuse to enforce a term of a cohabitants’ agreement if, in the context of
the circumstances taken as a whole, any of the following apply:

(1) the term was unconscionable at the time the agreement was entered into;

(2) the term is illegal in the state where the agreement is sought to be enforced or

in the state where the agreement was made; or

(3) enforcement of the term would result in substantial hardship for a cohabitant
because of a material change in circumstances arising after the agreement was entered into.

(b) A term in a cohabitants’ agreement is not enforceable to the extent that it limits or
restricts a remedy available for one of the cohabitants who is a victim of [domestic violence,
sexual assault, or stalking] under law of this state other than this [act].

(c) The court shall decide questions of the enforceability of a term as a matter of law.
Note: This section is drawn from UPMAA Sections 9 (f), (g), and 10, which provide as follows:

[Section 9] (f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole: (1) the term was unconscionable at the time of signing; or (2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.

(g) The court shall decide a question of unconscionability [or substantial hardship] under subsection (f) as a matter of law.

[Section 10] (b) A term in a premarital agreement or marital agreement is not enforceable to the extent that it . . .

(2) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act] . . .

SECTION 208. REMEDIES.

(a) The court may award a cohabitant damages and equitable relief, including preliminary and final injunctive relief.

(b) The court may allocate attorneys' fees and costs, including interim fees and costs, according to law of this state other than this [act] governing fees and costs in [a family law [or probate] proceeding], unless the cohabitants' agreement provides otherwise.

Note: The Restatement of Contracts recognizes the following types of interests:

- (a) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
- (b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
- (c) his “restitution interest,” which is his interest in having restored to him any benefit that he has conferred on the other party.

Restatement (Second) of Contracts § 344 (1981).

Injunctive relief, and particularly preliminary injunctive relief, may be critical to preventing dissipation of assets.

With respect to the enforceability of an agreement concerning provisions to be made at death, an express contract, for example, may be covered by UPC Section 2-514 (iii): that permits “a writing signed by the decedent evidencing the contract.” If there is no writing and a court has found an implied-in-fact agreement term concerning provisions to be made for the surviving
partner at death, that term may be enforceable.

[ARTICLE] 3

EQUITABLE CLAIMS AND REMEDIES

SECTION 301. EQUITABLE CLAIMS. Unless inconsistent with an enforceable cohabitants’ agreement under [Article] 2, a cohabitant may assert a claim for equitable relief against the other cohabitant.

Note: Equitable relief includes, for example, constructive trust or injunctive relief.

SECTION 302. UNJUST ENRICHMENT. To establish a claim for unjust enrichment, a cohabitant must prove all of the following:

(1) the cohabitant has provided the other cohabitant with a benefit, which may include the performance of domestic services;

(2) the other cohabitant knew or had reason to know that the benefit had been conferred;

and

(3) the other cohabitant accepted or retained the benefit under circumstances such that it would be inequitable for that cohabitant to retain the benefit without payment for its value.

Note: This language is drawn from the Restatement (Third) of Restitution. Courts in some jurisdictions refer to checklists of factors, such as the following, to identify cases in which the receipt of a benefit gives rise to a liability in restitution:

To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value.

Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt (2011).

SECTION 303. BURDEN OF PROOF. A cohabitant must prove an equitable claim, including unjust enrichment, and entitlement to relief, by clear and convincing evidence.
SECTION 304. REMEDIES.

(a) A court may order preliminary or final injunctive relief as provided by law of this state other than this [act].

(b) A court may award a cohabitant damages necessary to prevent unjust enrichment.

(c) A court may award other equitable relief necessary to achieve a just and equitable result.

(d) In exceptional circumstances, where the relief provided under subsections (a) through (c) is not sufficient to achieve substantial equity, the court may award a cohabitant supplemental relief, including an order that divides assets acquired and liabilities incurred during the period of cohabitation. For a supplemental award under this subsection, a cohabitant must prove the following:

(1) an award under subsections (a) through (c) would not fully and fairly remedy the unjust enrichment or other inequity arising out of the cohabitation and a supplemental award is required to achieve a just and equitable result; and

(2) the cohabitant seeking the supplemental remedy was economically dependent on the other cohabitant during the period of cohabitation of at least [10] years.

Note: There are numerous ways to measure unjust enrichment. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 49 (2011)(setting out six different methods for measuring unjust enrichment). For subsection (d), the burden of proof is specified in Section 303.

[[ARTICLE] 4

INTERDEPENDENT ECONOMIC UNIT

SECTION 401. DEFINITION. In this [article], “interdependent economic unit” means
two individuals who have been cohabitants for:

(1) a period of at least [10] years; or

(2) a period of at least [2] years if, during that period, the cohabitants shared caretaking responsibility for a child or other family member who lived with them.

Note: The definition of cohabitant under Section 102(1) includes cohabitants who live apart together.

SECTION 402. BURDEN OF PROOF. A cohabitant must prove the existence of an interdependent economic unit by clear and convincing evidence.

SECTION 403. AGREEMENT THAT THERE WILL BE NO INTERDEPENDENT ECONOMIC UNIT. A cohabitants’ agreement may provide that the cohabitants’ relationship does not constitute an interdependent economic unit.

Note: Article 2 addresses the validity of cohabitants’ agreements. This section covers all agreements recognized under Article 2.

SECTION 404. REMEDIES.

(a) Unless inconsistent with an enforceable cohabitants’ agreement under Article 2, if the court finds the cohabitants have established an interdependent economic unit, the court may order a fair and equitable distribution of the assets acquired and liabilities incurred during the cohabitation, without regard to legal title.

(b) In ordering a fair and equitable division of the assets and liabilities under subsection (a), the court shall consider the following factors:

(1) the duration and continuity of the cohabitation;

(2) the cohabitants’ allocation of financial responsibility for housing, food, clothing, health care, child support, and other daily living expenses;

(3) the cohabitants’ allocation of responsibility for the performance of domestic
services; and

(4) the cohabitants’ allocation of responsibility for caretaking responsibilities for a child or family member who resided with them.

(c) There is no presumption that any particular percentage of division of assets or liabilities is equitable.

Note: The remedy contemplated under this Article and in Article 3 is a division of assets and liabilities acquired during the cohabitation.

[ARTICLE] 5

MISCELLANEOUS PROVISIONS

SECTION 501. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 502. RELATION TO ELECTRONIC SIGNATURES INGLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 503. REPEALS; CONFORMING AMENDMENTS.

(a) . . .

(b) . . .

(c) . . .]

SECTION 504. EFFECTIVE DATE. This [act] takes effect . . .