**SUBMISSION TO COMMITTEE ON SCOPE AND PROGRAM:**
**PROPOSAL FOR STUDY COMMITTEE TO EXPLORE FEASIBILITY OF UNIFORM LAW GOVERNING ECONOMIC RIGHTS OF UNMARRIED COHABITANTS**

**SUBMITTED BY:**

Submitted by the Joint Editorial Board for Uniform Family Law (JEB-UFL) and the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA).

**DESCRIPTION OF THE PROJECT**:

The JEB-UFL and the JEB-UTEA recommend the appointment of a study committee to explore the feasibility of a uniform act governing the economic rights of unmarried cohabitants. We believe that there is a strong case to be made for a study committee, in light of the record number of unmarried cohabitants in the United States, the continuing decline in marriage, and the need for greater clarity and predictability in the law governing cohabitants' economic rights, both at divorce and upon death.

The Census Bureau has reported that, in 2015, there were more than 8.3 million households with opposite-sex unmarried couples; 39.1% of these households included at least one biological child under age 18 of either partner.[1] The growing numbers of cohabitants are likely to be nonwhite, lower-income, and less-educated. See Richard Fry & D'Vera Cohn, Living Together: The Economics of Cohabitation, Pew Research Center Social and Demographic Trends (2011), available at http://www.pewsocialtrends.org/2011/06/27/living-together-the-economics-of-cohabitation/. See also June Carbone & Naomi Cahn, Marriage Markets: How Inequality is Remaking the American Family (Oxford University Press 2014). While these families are growing and marriage is declining, a bias against nonmarital families exists in a range of contexts. See Courtney G. Joslin, Marital Status Discrimination 2.0, 95 B.U. L. Rev. 805 (2015) (discussing bias in housing and employment); id., Leaving No (Nonmarital) Child Behind, 48 Fam. L. Q. 495 (2014) (discussing harm to children born to and raised by nonmarital families).

State law generally regulates relationship recognition. There are four statuses of relationship recognition: traditional marriage, now for opposite- and same-sex couples; alternatives to marriage through registration (civil unions, domestic partnerships, and reciprocal or designated beneficiaries); common law marriage (9 states); and cohabitation.

Cohabitation is generally defined as a living arrangement in which two individuals reside together in a long-term, emotionally and financially dependent relationship that resembles a marriage. The economic rights that derive from the cohabitation differ greatly depending on the relationship and its recognition under state law. State law across the United States varies widely

[1] U.S. Census Bureau, America's Families and Living Arrangements: 2015: Unmarried Couples, tbl. UC3.

on the treatment of unmarried cohabitants, both at separation and at death. Nevertheless, there are trends in the developing law that we believe could inform the drafting of a uniform law in this area.

**NEED FOR UNIFORMITY IN THE SUBJECT MATTER AREA:**

Currently there is no predictable result when cohabitants break up or when one cohabitant dies. Courts handle cases on a one-at-a-time basis, without a comprehensive statutory approach. Because we live in a mobile society, moreover, the problem of unpredictability is exacerbated. Unmarried cohabitants who understand how the law of State A would apply to their circumstances might be quite surprised when they move to State B and come under an entirely different framework. The existing divergence in state approaches does pose a question for enactability, but ever since Marvin v. Marvin, 134 Cal. Rptr. 815 (1976), the field has been dominated by judge-made law rather than by legislative frameworks. That evolving common law shows discernible trends, including an increasing willingness to depart from strict contract theory in analyzing cohabitants' rights. Significantly, courts often express the desire for legislative guidance in addressing cases involving cohabitants' rights. A study committee could explore whether a uniform act reflecting sound policy, rather than ad hoc judicial decision-making, could have broad legislative appeal.

Property disputes between individuals who live together without marriage or other legally recognized civil union, domestic partnership, or reciprocal beneficiary status are subject to disparate results depending on the state. In a few states, a couple can live together for many years, have children, and act in all ways as a married couple, but when the parties separate, one party may leave the relationship with no economic rights whatsoever. In the State of Washington, on the other hand, a couple in a "committed intimate relationship" will divide the property of the relationship essentially the same as would a married couple. Other states range between these two extremes, with case law showing an increasing willingness to recognize equitable rights arising out of long-term cohabitation. (Unmarried cohabiting couples, of course, do not receive state or federal law benefits and burdens given only to married couples, although in some states the status of registered civil union or domestic partnership is treated the same as marriage. Any uniform law product would not affect these governmental incidents.)

Recognizing the need for uniform and fair treatment for unmarried cohabitants, commentators have proposed various approaches. Professor Lawrence Waggoner, reporter for the Uniform Probate Code, recently recommended the adoption of a "uniform de facto marriage act." See Lawrence W. Waggoner, With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?, 41 (1 & 2) ACTEC L. J. (Jan. & Feb. 2016). Another recent proposal is for a uniform act that would create a framework for unmarried cohabitants to designate economic beneficiaries by agreement, such as the Colorado Designated Beneficiary Agreement Act, Colo. Rev. Stat. Ann. 15-22-101 to 112. See John G. Culhane, After Marriage Equality, What's Next for Relationship Recognition?, 60 S.D. L. Rev. 375 (2015). The American Law Institute's Principles of the Law of Family Dissolution proposed a

framework of economic rights based on cohabiting conduct and duration of the relationship rather than contract.

**SUMMARY/ANALYSIS OF EXISTING STATE LAW AND TRENDS CONCERNING THIS SUBJECT:**

The states differ significantly on how they handle property and support issues when a cohabitation ends, but almost all states have endorsed an express contract theory, with a few requiring written contracts. Almost half the states have been receptive to an equitable approach sometimes identified as "implied in fact contract." Equitable remedies such as quantum meruit or constructive trust have been accepted in numerous states. Also, Washington courts have relied on equitable principles to extend community property rights to cohabiting couples in a marital-like relationship. A small minority of states reject cohabitants' rights, often reasoning that any remedies for cohabitants should be established by legislative action, not by the judiciary. These courts tend to see the abolition of common law marriage as inconsistent with recognition of cohabitants' rights.

**Contract theory**

**Express written or oral agreements:** California and many other states allow cohabitants to enter into express written or oral agreements. See Marvin v. Marvin, 134 Cal. Rptr. 815 (1976).

**Joint venture or business partnerships:** Dee v. Rakower, 976 N.Y.S.2d 470 (App. Div. 2013) (allowing same-sex partner in 18-year relationship with two children to sue for breach of oral partnership/joint venture).

**Implied-in-fact contracts:** Alaska, Arizona, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Maryland, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and Wyoming.

**Written contract required:** Minn. Stat. 513.075; Tex. Bus. & Com. Code Ann 26.01; N.J. Stat. Ann. 25:1-5h (palimony agreement must be in writing); Posik v. Layton, 695 So.2d 759 (Fla. Dist. Ct. App. 1997) (nonmarital support agreement must be in writing).

**Remedies based on equity**

**Washington**: *See* Connell v. Francisco, 898 P.2d 831, 834-35 (Wash. 1995) (fairness requires extension of community property rights to cohabitants in marriage-like relationship). For a critique of this approach, see Marsha Garrison, Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation, 52 UCLA L. Rev. 815 (2005).

**Equitable remedies such as quantum meruit or constructive trust:** E.g., Mantiply v. Mantiply, 951 So.2d 638, 656 (Ala. 2006).

**Inherent equitable power of court:** Kansas, see Eaton v. Johnston, 681 P.2d 606 (Kan. 1984).

**No rights**: Georgia, Illinois, and Louisiana do not recognize contractual or equitable rights arising out of a cohabitation. See Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Blumenthal v. Brewer, ___ N.E.3d ___, 2016 Il 118781 (Ill. 2016); Long v. Marino, 441 S.E.2d 475 (Ga. App. 1994); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983). The Idaho Court of Appeals did not allow equitable division of property acquired during a 25-year cohabitation. Gunderson v. Golden, 360 P.3d 353 (Idaho Ct. App. 2015).

## COMPARATIVE-LAW PERSPECTIVES:

Some of the other countries in the Anglo-American common-law tradition—most notably, Australia and New Zealand— have adopted a de facto marriage approach:

Australia: see http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/separation-and-divorce/defacto-relationships/

New Zealand: see discussion in Nicola Peart & Prue Vines, *Intestate Succession in Australia and New Zealand*, in Kenneth Reid et al. eds., COMPARATIVE SUCCESSION LAW, VOL. 2: INTESTATE SUCCESSION (Oxford University Press 2015).

Additionally, the United Kingdom and Canada (other than Québec) recognize de facto marriage for some purposes.

## IMPACT OF FEDERAL LAWS AND REGULATIONS ON THIS PROPOSED SUBJECT:

At this point, there are no federal laws and regulations dealing with rights of cohabitants upon dissolution of the relationship. However, newly-issued Treasury Regulations make it clear that federal tax (and, presumably, other) benefits and obligations of marriage arise only if state law labels a relationship as a marriage. Treas. Reg. § 301.7701-18, added by T.D. 9785, 81 Fed. Reg. 171 (Sept. 2, 2016), provides: "the terms 'spouse,' 'husband,' and 'wife' [in federal tax statutes and regulations] mean an individual lawfully married to another individual . . . The term 'marriage' does not include registered domestic partnerships, civil unions, or other similar relationships recognized under state law that are not denominated as a marriage under that state's law . . . ." If enacted, Professor Waggoner's proposed "uniform de facto marriage act" (see page 2 and the appendix of this memorandum) would qualify for those federal benefits.

**IDENTITY OF ORGANIZATIONS OR PERSONS INTERESTED IN SUBJECT AREA.**

The Uniform Law Commission could partner with the member organizations of our JEBs (the American Academy of Matrimonial Lawyers, the Association of Family and Conciliation Courts, the American College of Trust and Estate Counsel, and the American Bar Association) as well as outside groups currently addressing reform of cohabitation law.

The Hague Conference on Private International Law has turned its attention to this question as well. A report recently noted that individuals cohabiting outside of marriage face numerous challenges when they leave the State where the unmarried cohabitation or registered partnership was formed and become subject to a foreign legal system that does not recognize their status. See Update on the Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage Including Registered Partnerships, March 2015, available at http://www.marinacastellaneta.it/blog/wp-content/uploads/2015/04/hague-conference.pdf.

**AVAILABILITY OF EXISTING RESEARCH AND/OR FINANCIAL SUPPORT:** N/A