

To: ULC Economic Rights of Unmarried Cohabitants Act Committee
From: Albertina Antognini, Associate Professor, University of Arizona, James E. Rogers College of Law (Observer)
Re: Economic Rights of Unmarried Cohabitants Act Draft (March 16, 2020)
Date: March 16, 2020

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Thank you to the Committee for drafting this comprehensive proposal for how to address unmarried cohabitants' economic rights. I very much appreciate having received the opportunity to join your meeting in San Francisco on February 7-8, and I have a few comments that I hope will be helpful as the Committee discusses this final draft Act.

The comments I include here are based on my research addressing how the law allocates property rights between individuals in a nonmarital relationship.¹ My comments on this draft specifically focus on the Act's decision to heighten the burden of proof for: oral and implied-in-fact contracts, and, most recently, equitable claims. I am deeply concerned with the Act's decision to change existing law by making it *more difficult* for cohabitants to make out claims on account of their nonmarital relationship. That is, claims available to individuals writ large under the civil preponderance of the evidence standard are now denied to individuals who cohabit. This move is especially troubling in light of the Act's goal to "affirm[] the capacity of each cohabitant to contract with and, upon termination of the relationship, claim a remedy against the other cohabitant without regard to any intimate relationship that exists between them." ERUCA Prefatory Note, p. 1.

Article 1

Section 107

The draft Act is explicit in taking steps to ensure that the mere fact of cohabitation does not diminish an individual's right to enter agreements. As such, I wholeheartedly support the declaration in subsection (a) that "a cohabitant may assert, and a court may enforce, a claim asserted by a cohabitant under this act on the same basis as an individual who is not a cohabitant." Moreover, "[t]he fact that the parties are in a cohabitant relationship is not a basis for precluding the claim or subjecting an individual to additional requirements."

¹ My comments are based on the following articles I have written (or am currently writing), as well as the work of the authors I rely on in those pieces: *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017), *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891 (2018), *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019), and *Nonmarital Contracts*, 73 STAN. L. REV. (forthcoming 2021).

Section 108(1)

Notwithstanding this stated goal, Section 108(1) of the draft Act increases the burden of proof to “clear and convincing evidence” for oral and implied-in-fact agreements entered into between individuals who are cohabiting. Instead of deferring to state laws that are already in place and that set out the burden of proof for oral and implied-in-fact contracts, the draft Act heightens the burden of proof for these agreements *because of* an individual’s cohabiting relationship. This fact becomes clear when we consider which individuals would be able to assert a contract claim under the lower, civil preponderance of the evidence, standard: any individual who is not alleging the existence of an agreement with his or her cohabitant. The Act is therefore treating individuals who cohabit differently from – and, specifically, worse than – individuals who are not cohabiting.

The Comments to the draft Act explain that this heightened burden of proof is necessary because “the act is creating new and in some cases unprecedented rights and remedies for cohabitants – rights and remedies that in some sense are similar to the rights and remedies attendant to marriage.” ERUCA p. 14. This assertion is incorrect. These are not rights attendant to marriage – they are simply rights to contract, available to individuals everywhere.

Equating the right to contract in a nonmarital relationship with the right to marry reproduces the flawed reasoning courts undertake in this area, which leads them to decline to uphold contracts between cohabitants. As I explain in my forthcoming piece, *Nonmarital Contracts*²:

Taking each case on its own terms may initially appear unproblematic – each decision presents acceptable reasons, either finding there was no consideration for the agreement, or that the agreement was one-sided, or that the contract was insufficiently proven. Stepping back and considering all of the decisions in tandem, however, reveals that the reasons courts provide for refusing to find a contract track the same reasons raised in the context of marriage – they find the services to inhere in the relationship, and decline to uphold contracts where the relationship could have actually been marital. . . . Importantly, the small number of cases that do uphold contracts support this same point – they tend to occur when the relationship could not have actually become a marriage, as in a same-sex relationship before acquiring the right to marry. [E]ven within the cabined context of intimate relationships, the right to contract is treated very differently depending on the court’s judgment of the relationship at stake, rather than on any inviolable principle of contract law.

² This piece investigates how express contracts – written and oral – have fared in court. See *Nonmarital Contracts*, 73 STAN. L. REV. (forthcoming 2021).

Courts thus limit cohabitants' right to contract on the basis of their relationship.³ The more similar the relationship is to marriage at a time when a couple could have married, the less likely a court is to find that a contract existed. The draft Act should not exacerbate this problematic mode of reasoning. Courts ought to evaluate the contract by relying on standard contract law questions – inquiring about the parties, the contracting process, and the agreement itself – rather than measuring the relationship against marriage in some way. Existing law is, however, better than the Act in one important way – it does not impose a higher burden of proof on these individuals by virtue of their relationship.

The Comments further implore courts “to take a hard look at the evidence supporting claims for these marriage-like rights and remedies where the parties have not formalized their agreement, and grant relief only when the evidence is clear that a cohabitant is entitled to these remedies.” ERUCA, p. 14. This concern is misplaced – as a matter of fact, courts routinely decline to enforce contracts between unmarried couples. It is already very difficult for individuals in cohabiting couples to make out a claim, even under the standard burden of proof, and even when the contract at issue is *in writing*. Courts tend to uphold agreements alleged only in cases involving same-sex couples pre-*Obergefell*, or where the contract can be interpreted to address only property, and not services. Thus, courts, applying what they state to be standard contract law, generally decline to uphold contracts between unmarried couples. Instead of eliminating hurdles for these individuals to have their agreements treated like any other, the Act imposes an additional one.

By heightening the burden of proof then, the Act reinforces the exceptional treatment of contracts that involve something other than tangible property. It also introduces an “additional requirement” in the form of a heightened burden of proof – on the basis of cohabitation – which the Act seeks to eliminate. ERUCA p. 12 (“the goal of the act is to treat cohabitants like other litigants in most cases” and so “the fact that an individual is a cohabitant is not a basis for precluding the claim or subjecting the individual to additional requirements, such as the requirement there be a basis apart from the cohabitation to pursue a claim”).

I therefore urge the Committee to reconsider its decision to impose a heightened standard of proof for oral and implied-in-fact contracts, which courts in any event have not adopted.

I am in the process of compiling an Appendix that includes all cases addressing either written or oral contracts in court. I am including below an **unfinished** Appendix with these cases. I am not claiming that these cases constitute the entire realm of express contract cases – they are only those I have found so far. I share them with the Committee in the event they may be helpful.

³ This is so even though the RESTATEMENT (SECOND) OF CONTRACTS repealed the provision of the earlier version that held that all bargains between unmarried individuals were illegal.

Section 108(2)

I was surprised to read, four days before the Committee's scheduled conversation, that the draft Act now includes a heightened standard of proof for equitable claims brought between cohabiting couples. In so doing, the Act indisputably changes the law as it stands in every jurisdiction. Rather than implement, or standardize, existing law, the Act is making it more difficult for cohabitants to prove their claims based in equity.

The arguments I raise in the prior section on agreements are equally applicable to this section on equity. The rights at issue here are not marriage-like rights, and it would be a mistake to conceptualize them this way. Rather, they are rights based on claims of, for example, unjust enrichment, which ought to be available to everyone on the same terms, regardless of whether they happen to be in a nonmarital relationship.

My research has explored the reasons why cohabitants have such a difficult time making out claims in court, including equitable claims. The parties raising such claims are often denied relief based on courts' importation of old marital rules into the nonmarital space, and on the imposition of judgments that negatively affect housework in particular. As I have previously written in *Nonmarital Coverture*:

Case after case in jurisdiction after jurisdiction falls into the same pattern of reasoning: services provided by the individual requesting property are understood to be part of the give-and-take of an intimate relationship. As such, courts either presume that services are provided gratuitously or they consider whatever value they may possess to have been properly recompensed during the course of the relationship. This reasoning remains consistent across the various doctrinal approaches courts employ. If they rely on a contractual basis, then courts assume that the consideration provided by "wifely" services is invalid or inseparable from the relationship itself. If they employ a restitution-informed analysis, then courts assume "wifely" labor is provided gratuitously and has no value that the plaintiff can recover.

The draft Act does a great job acknowledging these very problems, and the Comments explain that "the act is designed to emphasize that domestic services have value beyond the hourly payment for such services." ERUCA, p. 16. Unfortunately, the Act also creates a novel, and additional, hurdle for these claimants by requiring "clear and convincing evidence."

Given the reality that unmarried couples have no access to status-based rights (outside of Washington), heightening the burden of proof when they rely on generally available common law claims greatly restricts their ability to seek recourse in court. This is especially worrisome considering the Act's stated intent to "not create, alter, *diminish*, enlarge, or *otherwise affect* a cohabitant's rights or duties." ERUCA § 103(c), p. 6 (emphasis added).

APPENDICES

Appendix A: Nonmarital Contracts Between Different-Sex Partners

<i>NOT ENFORCED</i>			
<i>Case</i>	<i>Contract Type</i>	<i>Court Decision</i>	<i>Holding</i>
Wellmaker v. Roberts, 213 Ga. 740, 101 S.E.2d 712 (1958)	Oral	Not Enforced	Agreement was based on “illegal and immoral” consideration.
Hewitt v. Hewitt, 77 Ill. 2d 49, 31 Ill. Dec. 827, 394 N.E.2d 1204, 3 A.L.R.4th 1 (1979)	Oral	Not Enforced	Contract based on cohabitation is void, but may still contract for "independent matters."
Trimmer v. Van Bomel, 434 N.Y.S.2d 82 (1980)	Oral	Not Enforced	Vague contract terms are unenforceable.
Crawford v. Cantor, 82 A.D.2d 791	Oral	Not Enforced	Reconciliation did not toll statute of limitations.
Tenzer v. Tucker, 584 N.Y.S.2d 1006 (1992)	Oral	Not Enforced	Not a valid common law marriage and not within statutory protection.
Bergen v. Wood, 14 Cal. App. 4th 854 (1993)	Oral	Not Enforced	No consideration.
Devaney v. L’Esperance, 949 A.2d 743 (N.J. 2008)	Oral	Not Enforced	While cohabitation is not required for palimony claims, a marital-type relationship is.
Pizzo v. Goor, 857 N.Y.S.2d 526 (2008)	Oral	Not Enforced	Companionship is insufficient consideration.
Smith v. Carr, 2012 WL 3962904 (Sept. 12, 2012)	Oral & Written	Not Enforced	Lack of valid consideration. Services tied to sexual relationship.
Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012)	Written	Not Enforced	The existence of a romantic relationship between cohabitants voids the existence of consideration.
Barron v. Meredith, 2017 WL 772444, at 1 (Feb. 28, 2017)	Oral	Not Enforced	No consideration, mutual assent, or ascertainable terms. A party's decision to move residences, relinquish decision making autonomy, and leave the work force does not constitute consideration.
Rabinowitz v. Suvillaga, 2019 WL 386853 (Jan. 28, 2019)	Oral	Not Enforced	Illicit activities cannot serve as consideration.
<i>ENFORCED</i>			
<i>Case</i>	<i>Contract Type</i>	<i>Court Decision</i>	<i>Holding</i>
Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932)	Oral	Enforced	Unlawful cohabitation does not prevent the establishment of a lawful agreement.
Hughes v. Kay, 194 Or. 519, 242 P.2d 788 (1952)	Oral	Enforced	Oral agreement for partition of property enforced.
McHenry v. Smith, 45 Or. App. 813, 609 P.2d 855 (1980)	Oral	Enforced	Cohabiting individuals are allowed to secure economic arrangements for their cohabitation, as long as consideration is not "illicit."
Morone v. Morone, 50 N.Y.2d 481 (1980)	Oral	Enforced	Services are valid consideration for an oral contract.

Lee v. Slovak, 440 N.Y.S.2d 358 (1981)	Oral	Enforced	Oral agreement for a business partnership between parties enforced because they commingled funds, owned jointly deeded property, and engaged in joint business decision-making.
Knauer v. Knauer, 323 Pa. Super. 206, 470 A.2d 553 (1983)	Oral	Enforced	Mere cohabitation does not void an otherwise valid agreement for sharing wealth accumulated during relationship.
Wilcox v. Trautz, 427 Mass. 326, 693 N.E.2d 141 (1998)	Written	Enforced	Unmarried cohabitants may contract for property, finance, and other matters related to their relationship.
REMAND			
<i>Case</i>	<i>Contract Type</i>	<i>Court Decision</i>	<i>Holding</i>
Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976), appeal after remand, 281 Or. 303, 574 P.2d 644 (1978)	Oral	Remand	Agreement not void just because it contemplates the burdens and comforts associated with married life.
Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), appeal after remand, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (2d Dist. 1981)	Oral	Remand	Cohabitation is insufficient to invalidate the parties' agreement.
Cook v. Cook, 142 Ariz. 573, 691 P.2d 664 (1984)	Oral	Remand	Cohabitation and failed expectations of marriage do not prevent agreement enforceability.
Tannehill v. Finch, 188 Cal. App. 3d 224, 232 Cal. Rptr. 749 (4th Dist. 1986)	Oral	Remand	To enforce contractual agreement, plaintiff has the burden of establishing claim by clear and convincing evidence.
Boland v. Catalano, 521 A.2d 142 (Conn. 1987)	Oral	New Trial Ordered	Ordinary contract principles not suspended for cohabitants.
Watts v. Watts, 448 N.W.2d 292 (Wis. Ct. App. 1989)	Oral	Remand	Public policy does not inhibit a couple's ability to contract so long as that contract is supported by valid consideration, separate from the sexual relationship.
Donnell v. Stogel, 560 N.Y.S.2d 200 (1990)	Written	Reversed	Cohabitation contract does not promote adultery or divorce and is enforceable if valid consideration is present.
Goode v. Goode, 183 W. Va. 468, 396 S.E.2d 430 (1990)	Oral	Remand	A court may order a division of property if an express or implied contract is properly alleged.
Stevens v. Muse, 562 So. 2d 852 (Fla. Dist. Ct. App. 4th Dist. 1990)	Oral	Remand	Agreements between cohabitants not categorically unenforceable as a matter of public policy.
Combs v. Tibbitts, 148 P.3d 430 (Colo. Ct. App. 2006)	Written	Remand	Cohabiting couples may legally contract with each other so long as sexual relations are only incidental to the agreement.
Browning v. Poirier, 165 So.3d 663 (Fla. 2015)	Oral	Remand	Contract between cohabitants for lottery winnings is not subject to the statute of frauds.
Maddali v. Haverkamp, 2019 WL 1849302 (Apr. 24, 2019)	Oral	Remand	Where money, not love and affection, constitutes consideration, contracts between unmarried cohabitants are enforceable.

Appendix B: Nonmarital Contracts Between Same-Sex Partners

<i>NOT ENFORCED</i>			
<i>Case</i>	<i>Contract Type</i>	<i>Court Decision</i>	<i>Holding</i>
Jones v. Daly, 122 Cal. App. 3d 500 (1981)	Oral	Not Enforced	Services like homemaking, cooking, and housekeeping are inseparable from illicit sexual activities.
<i>ENFORCED</i>			
<i>Case</i>	<i>Contract Type</i>	<i>Court Decision</i>	<i>Holding</i>
Whorton v. Dillingham, 202 Cal. App. 3d 447 (1988)	Oral	Enforced	Consideration based on services like chauffeur and bodyguard are severable from sexual services.
Posik v. Layton, 695 So. 2d 759 (1997)	Written	Enforced	Adequate consideration for this "nuptial-like" agreement.
Silver v. Starrett, 674 N.Y.S.2d 915 (1998)	Written	Enforced	Consideration provided by each party does not need to be equal to be valid.
Gonzalez v. Green, 831 N.Y.S.2d 856 (2006)	Written	Enforced	Transfer of property constituted valid consideration.
McArthur v. Page, 2010 WL 1050661 (Feb. 11, 2010)	Oral	Enforced	Agreement is evidenced by parties' conduct.
Armao v. McKenney, 218 So. 3d 481 (Fla. 4th DCA 2017)	Oral	Enforced	Oral agreement to treat each other "just like a married couple" is enforceable.
<i>REMAND</i>			
<i>Case</i>	<i>Contract Type</i>	<i>Court Decision</i>	<i>Holding</i>
Small v. Harper, 638 S.W.2d 24 (Tex. App. Hous. 1st Dist. 1982)	Oral	Remand	Joint property ownership, work, and financial contributions support the possible existence and enforceability of an agreement.
Doe v. Burkland, 808 A.2d 1090 (R.I. 2002)	Oral	Remand	Services, earnings, and business consulting constitute valid consideration.