ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

March 20, 2020 Drafting Committee Web Conference

Copyright © 2020
By
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter’s notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

March 16, 2020
ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

MARY P. DEVINE Virginia, Co-Chair
CRAIG STOWERS Alaska, Co-Chair
DEBORAH E. BEHR Alaska
TURNLEY P. BERRY Kentucky
DAVID M. ENGLIUGH Missouri
GAIL HAGERTY North Dakota
HARRY J. HAYNSWORTH Minnesota
MELISSA HORTMAN Minnesota
JOHN H. LANGBEIN Connecticut
THOMAS MORRIS Colorado
HARVEY S. PERLMAN Nebraska
HOWARD J. SWIBEL Illinois
HARRY L. TINDALL Texas
CARL H. LISMAN Vermont, President
JOHN T. McGARVEY Kentucky, Division Chair

OTHER PARTICIPANTS

NAOMI CAHN District of Columbia, Reporter
LAURA MORGAN Massachusetts, American Bar Association Advisor
ANDREA J. BOYACK Kansas, American Bar Association Section Advisor
ELIZABETH LINDSAY-OCHOA Massachusetts, American Bar Association Section Advisor
MARK J. CUTRONA Delaware, Style Liaison
TIM SCHNABEL Illinois, Executive Director

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600

www.uniformlaws.org
# ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prefatory Note</td>
<td>1</td>
</tr>
<tr>
<td>SECTION 101. SHORT TITLE.</td>
<td>2</td>
</tr>
<tr>
<td>SECTION 102. DEFINITIONS</td>
<td>2</td>
</tr>
<tr>
<td>SECTION 103. SCOPE</td>
<td>6</td>
</tr>
<tr>
<td>*SECTION 104. EXCLUSION</td>
<td>7</td>
</tr>
<tr>
<td>SECTION 105. GOVERNING LAW</td>
<td>8</td>
</tr>
<tr>
<td>SECTION 106. COHABITATION AGREEMENTS</td>
<td>10</td>
</tr>
<tr>
<td>SECTION 107. CLAIMS TO ENFORCE ECONOMIC RIGHTS GENERALLY; SPECIAL</td>
<td>11</td>
</tr>
<tr>
<td>TOLLING; CUMULATIVE CLAIMS</td>
<td></td>
</tr>
<tr>
<td>SECTION 108. BURDEN OF PROOF; ORAL AND IMPLIED COHABITATION AGREEMENTS</td>
<td>13</td>
</tr>
<tr>
<td>SECTION 109. UNENFORCEABLE TERMS</td>
<td>15</td>
</tr>
<tr>
<td>*SECTION 110. EQUITABLE CLAIMS</td>
<td>16</td>
</tr>
<tr>
<td>*SECTION 111. EQUITABLE DIVISION OF PROPERTY</td>
<td>17</td>
</tr>
<tr>
<td>*SECTION 112. LIMITATIONS ON REMEDIES</td>
<td>18</td>
</tr>
<tr>
<td>SECTION 113. UNIFORMITY OF APPLICATION AND CONSTRUCTION</td>
<td>19</td>
</tr>
<tr>
<td>*SECTION 114. SAVINGS AND TRANSITIONAL PROVISIONS</td>
<td>19</td>
</tr>
<tr>
<td>[SECTION 115. REPEALS; CONFORMING AMENDMENTS.]</td>
<td>19</td>
</tr>
<tr>
<td>SECTION 116. EFFECTIVE DATE</td>
<td>19</td>
</tr>
</tbody>
</table>
Prefatory Note

The number of nonmarital cohabitants in the United States has increased substantially over the past half-century. Today, more than 17 million people are cohabiting. Approximately 7 percent of American adults are cohabiting. The number of older adults who cohabit is increasing. Four percent of 50-and-older people were cohabiting, while 14 percent of 25-to-34-year-olds were cohabiting. William E. Gibson, Far More 50+ Couples Shacking Up (May 8, 2017), https://www.aarp.org/home-family/friends-family/info-2017/older-couples-cohabitation.html.

The economic rights that derive from cohabitation differ greatly depending on the relationship and its recognition under state law. State law across the United States varies widely on the treatment of unmarried cohabitants, both at separation and at death. The Economic Rights of Unmarried Cohabitants Act (ERUCA) provides states with comprehensive and uniform guidance on questions concerning cohabitants’ economic interests and obligations (“economic rights”) based on their relationship.

Couples have cohabited outside of marriage for millennia. Cohabitants may share financial responsibilities during their cohabitation, or they may keep their finances separate. One cohabitant may move into a dwelling the other had acquired separately. They may acquire property together or they may not. Both may work, or one may work and the other takes care of the household. Upon their breakup or the death of one cohabitant, state courts have in some cases provided relief to a claimant seeking payment or a share of the property of the other cohabitant, but in many cases no relief is given.

The act affirms 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, subject to certain limitations. The legal rights of third parties, such as secured creditors or good faith purchasers, cannot be adversely impacted by a remedy granted under the act. Further, upon termination of the cohabitants’ relationship, a cohabitant may not claim a right or remedy greater than what the cohabitant would receive if the cohabitants had married. Finally, a cohabitant who is married to another individual may not assert a claim for relief under this act, but may be subject to a claim by the other cohabitant and may assert defenses to such a claim.
ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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 living together as a couple in an intimate, committed relationship who function as an economic, social, and domestic unit. The term does not include an individual who is married or whose marriage to the other individual would not be recognized under law of this state other than this [act], except as provided in Section 104.

NOTE TO COMMITTEE: We deleted the references to LATS (couples living apart together), “putative cohabitant” (a cohabitant who did not know a partner was married, see Uniform Marriage and Divorce Act Sec. 209), and emancipated minors.

We added “except as provided in Section 104” at the end to ensure that an unmarried cohabitant who cohabited with a married cohabitant would be protected. Section 104 precludes a married person from bringing a claim under the Act, while allowing the unmarried cohabitant in such a relationship to bring a claim. Please note this relates to a policy issue discussed in the Note to Committee following Section 103, below.

(2) “Cohabitation agreement” means the agreement between two cohabitants regarding the management, allocation, or disposition of their economic rights arising within the context of their relationship.

NOTE TO COMMITTEE: Note that the term “cohabitation agreement” has been used to ensure clarity with respect to the scope of the act. Accordingly, the act retains the definition of “cohabitation agreement.” We changed “cohabitants’ agreement” to “cohabitation agreement.”

We also eliminated the reference to “manifestation of assent” that was in the meeting draft and substituted “agreement” without intent to substantively change the meaning.

(3) “Domestic services” means services and activities performed by a cohabitant for the benefit of the other cohabitant or their relationship and includes cooking, cleaning, shopping,
household maintenance, doing errands for the household, caring for the other cohabitant or a
family member of the other cohabitant, or other similar activities.

NOTE TO COMMITTEE: The definition has been clarified. For example, the phrase
“caring for a child of the cohabitant or a family member of the cohabitant” was in the
meeting draft and is now simply “caring for the other cohabitant or a family member of
the other cohabitant.”

(4) “Economic right” means any interest, right, responsibility, duty, promise, or
obligation of a cohabitant relating to domestic services or property.

NOTE TO COMMITTEE: This definition has been tweaked to remove unnecessary
language regarding the now “tweaked” defined term “domestic services,” above. No
substantive change intended.

(5) “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.

(6) “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.

(7) “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.

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

(A) the death of one of the cohabitants;

*(B) the date that the cohabitants cease functioning as an economic, social, and
domestic unit; or

(C) the date the cohabitants marry each other.

NOTE TO COMMITTEE: The definition of “termination” has been tweaked from the
language provided in the Cathy/Courtney/Andrea proposal (“a complete and final break
as demonstrated by a party to cease acting as a cohabitant as defined by Section 102(1)”)
to the current language in an effort to clarify it.

We eliminated definitions for court, individual, and sign as unnecessary.

Comment

The definition of “cohabitant” specifies to whom the act applies. Because definitions have substantive impact, this definition tries to put in plain English the concept of a cohabitant. Not every cohabiting relationship will involve sexual conduct, but the intent of the act is to include only relationships which have a romantic component. The phrase “intimate committed relationship” conveys this aspect of the relationship.

A married person cannot be a cohabitant, and under Section 104, may not assert a claim under the act. The committee discussed at length whether to include married persons within coverage of the act. At one point, the Committee excluded all married persons but included protections for a “putative cohabitant” (i.e., one who didn’t know that the other was married). Because the act’s title and the charge to the drafting committee reference only “unmarried cohabitants,” we ultimately decided to exclude married cohabitants from the protections of the act, but allow rights and remedies to be asserted against them. A married person may have other remedies under existing law.

The second sentence excludes persons whose marriage to each other would be unlawful. It thus excludes a marriage to a minor that would not be lawful under the law of this state. It also excludes individuals who are in an incestuous cohabiting relationship or who are married. However, Section 104 allows a cohabitant to bring a claim against a married “cohabitant.”

The committee discussed whether, to qualify as a cohabitant, the individuals must live together or 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 & Fam. L. Q. 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, two people may live on separate floors in an assisted living facility, or two people may live in separate residences because of employment or imprisonment or a variety of other reasons. While these couples remain committed to one another and continue to function as a unit for many purposes, they are not covered by the act. The consensus of the committee was to limit application of the act to couples who reside together.

A “cohabitation agreement” requires mutual assent although not expressly stated in the definition. The cohabitation itself is sufficient consideration for the agreement. See Section 106 (b). An agreement may specify that the cohabitants will have no reciprocal rights or obligations. See Section 106 (d). The definition is broad enough to include agreements which are written or oral, express or implied.
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. Domestic services may include business development, business entertaining, and similar activities. E.g., Hills v. Superior Court (Munoz), No. B174068, 2004 WL 1657689, at *6 (Cal. Ct. App. July 26, 2004) (reasoning that female plaintiff’s assertions raised triable issues of fact, including that “she gave up her career and devoted herself to performing household and other domestic services for him so as to aid his business career”).

The definition of “economic right” is intentionally broad. We mean to include, for example, contributions of salary or other financial assets to the relationship. The term may also include payments after the cohabitation terminates, if an agreement so provides, but in few, if any, other circumstances.

It does not cover tort suits, such as loss of consortium or wrongful death or intentional infliction of emotional distress claims. The act defers to other state laws on such claims. 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 economic right repeats the concept of the benefit of “domestic services” in order to emphasize it.

“Termination of the cohabitants’ relationship” refers to death of a cohabitant, dissolution of the relationship, and the cohabitants’ marriage to one another. The date that the cohabitants “ceased functioning as an economic, social, and domestic unit” is highly fact specific. Serving a prison sentence or being on an overseas deployment, or working in another jurisdiction for an extended period of time, for example, does not, in and of itself, show that the cohabitants ceased functioning as an economic, social, and domestic unit.

Issues concerning commencement of the statute of limitations upon termination are addressed in Sections 105 and 107.

The act does not designate the appropriate tribunal to determine claims brought under the act. Cohabitants’ claims will involve elements of traditional contract claims, family law claims and probate claims.

Enacting states will need to decide on the appropriate tribunal(s) to hear these cases. The Committee believes that these claims differ significantly enough from commercial claims that upon dissolution of the cohabitation other than by death, the claims should be heard in the state court that handles family law matters. Upon termination by death, the tribunal that handles probate matters would be appropriate. 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.”).
Because the act does not designate a state court tribunal, there was no need to include a definition of “court” or “tribunal” as might be expected in a uniform act of this sort.

SECTION 103. SCOPE.

(a) This [act] applies to the recognition and enforcement of economic rights between two cohabitants that arise:

   (1) by virtue of a cohabitation agreement;

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

   (3) under circumstances in which equity otherwise requires a remedy.

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

(c) The [act] does not create, alter, diminish, enlarge, or otherwise affect a cohabitant’s rights or duties under law of this state other than this [act].

*(d) This [act] does not create, alter, diminish, enlarge, or otherwise affect rights accruing under law of this state other than this [act] in favor of the spouse of an individual who cohabits with another person.

NOTE TO COMMITTEE: The introductory language in subsections (b), (c), and (d) has all been conformed. The final clause in (d) has been modified to conform with changes we made to the definition of cohabitant.

With respect to Section 103(d), there is a policy choice on how to treat the claims of a cohabitant whose partner is married. Note that, for example, if a married cohabitant dies intestate, then in certain circumstances, according to the UPC, the surviving spouse receives the entire estate. The claims of an unmarried cohabitant against the decedent would affect the surviving spouse’s inheritance rights. In addition, there may be other situations in which the rights of the unmarried cohabitant affect the rights of a spouse. If a married cohabitant dies testate, leaving the residue to a surviving spouse, then any claim of the unmarried cohabitant will diminish the residue. The Committee needs to decide whether to protect the rights of the cohabitant or the spouse. As currently written, 103(d) precludes the unmarried cohabitant from recovering against a married “cohabitant” because of the spouse’s paramount interest, thus treating the claims of an unmarried cohabitant differently from other claims against a married cohabitant.

On the other hand, considering the principles underlying putative spousehood in
the Uniform Marriage & Divorce Act might result in a different policy choice, allowing various rights to the cohabitant. A putative spouse means one who has a good faith belief that the parties could be married to one another. See UMDA § 209, below.

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.

Comment

This section states the coverage of the act. The act is intended to give the courts broad discretion to “do equity” between cohabitants.

The act is not intended as a substitute for common law marriage.

The committee discussed at length whether to include married cohabitants within the purview of this act. Many married people cohabit. E.g., Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). The reasons are many, including the impracticality of divorce or the illness of the non-cohabiting spouse. Nonetheless, the charge to the committee referred only to unmarried cohabitants. There are many practical difficulties that arise in trying to address the rights of married cohabitants if there is a spouse.

*SECTION 104. EXCLUSION.

(a) An individual who is married to a third person and who is cohabiting with a cohabitant may not bring a claim under this [act] against the cohabitant for economic rights and remedies that accrued during the cohabitation and after the date of that individual’s marriage.

(b) An unmarried cohabitant cohabiting with a married individual may bring a claim under this [act] against the married individual if the married individual and the cohabitant could
have married if the individual were not married to a third person.

**NOTE TO COMMITTEE:** This section is based on language provided by Turney at the February meeting. The section has been changed from “...estopped from asserting a claim” to “...may not bring a claim” with no substantive change intended. We also added language to clarify that an individual who marries a third person may be able to assert claims based on a cohabitation that occurred prior to that marriage.

**Comment**

As noted earlier, the committee discussed at length whether and how to deal with married cohabitants. Nonetheless we were charged with drafting an *unmarried* cohabitant’s act. This section states with abundant clarity that a married cohabitant may not utilize the act to create or enforce rights that accrued during the person’s marriage. That person may still bring a claim for rights that accrued prior to the marriage.

The act does, however, allow the married individual’s nonmarital partner to bring a claim that accrued during the cohabitation, unless such a claim affects the rights of the married individual’s spouse. See Section 103(d).

**SECTION 105. GOVERNING LAW.**

(a) Claims to enforce economic rights pursuant to a cohabitation agreement or in equity under this [act] are governed by law of this state other than this [act] relating to contract or equitable claims generally, including the choice-of-law rules of this state, the applicable statutes of limitation, and the laws governing transfer or ownership of real property.

**NOTE TO COMMITTEE:** The act now defers to state law on the statute of limitations, replacing Section 104 (a) and (b) of the meeting draft and also regarding the transfer and ownership of real property as discussed during the meeting.

(b) A claim for relief by or against the estate of a deceased cohabitant is governed by law of this state other than this act including choice of law rules and is subject to the requirements of the [state probate code] [concerning creditor claims against a decedent’s estate, including the statutes of limitations, the manner of presenting a claim, the time within which a claim must be presented and provisions concerning the satisfaction of claims.]

**NOTE TO COMMITTEE:** Source Note: Section 108 of the meeting draft.
(c) The law of the jurisdiction which governs the validity, enforceability, interpretation and construction of a cohabitation agreement may be designated in the agreement, if the jurisdiction has a significant relationship to the agreement or either cohabitant, and the designated law is not contrary to fundamental public policy of this state.

**NOTE TO COMMITTEE:** Source Note: Section 106(a)1 of the meeting draft.

(d) The common law of this state and principles of equity supplement this [act].

**NOTE TO COMMITTEE:** Source Note: Section 105(b) of the meeting draft.

Section 105 combines related provisions found in various sections of the previous draft with no intended substantive changes. Subsection (b) will be affected by the policy choice concerning the rights of a spouse under Section 103(d) for a married decedent.

Comment

This act is designed to coordinate with, and not change, existing state law, except to the extent necessary to recognize that each cohabitant has some legally cognizable interests in the property of the other. With limited exceptions, state procedural law governing statutes of limitations, choice of law rules, transfers of property, probate proceedings, burdens of proof, etc. will control. The most significant exceptions are the provision for tolling of the statute of limitations if the cohabitants marry each other found in Section 107(d) and the burden of proof governing claims based on oral or implied in fact agreements, or claims in equity found in Section 108.

As with most other agreements, this act allows the parties to specify a governing law in their agreement, provided that law has a relationship to either the parties or their agreement, and it is not contrary to the enforcing state’s public policy.

The intent is for other state law to supplement the act unless clearly inconsistent with the act. Note, for example, that to the extent the act establishes burdens of proof for unjust enrichment, it may supersede a state’s common law.

Subsections (a) and (c) are 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 (d) recognizes that a jurisdiction’s law concerning unjust enrichment and other legal and equitable principles is otherwise applicable. This subsection 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.”

SECTION 106. COHABITATION AGREEMENTS.

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

**NOTE TO COMMITTEE:** Source Note: Section 201(a) of the meeting draft.

(b) Cohabitation is sufficient consideration for a cohabitation agreement.

**NOTE TO COMMITTEE:** Source Note: Replaces Section 201(b) of the meeting draft per agreement of the Committee. Section 106(b) no longer includes “regardless of any sexual component of the relationship” as that seems unnecessary.

(c) A cohabitation agreement may be in a record, oral, or implied-in-fact.

(d) A cohabitation agreement may waive, in whole or in part, the cohabitants’ economic rights under this [act].

**NOTE TO COMMITTEE:** Source Note: This is Section 403 of the meeting draft.

Comment

Subsection (a) is intended to abrogate court decisions that have held that cohabitation agreements are void as against public policy. See, e.g., Blumenthal v. Brewer, 69 N.E.3d 834, 854 (Ill. 2016)( rejecting constructive trust and restitution claims by long-term same-sex cohabitant where claims arose from marriage-like relationship; court notes that parties may enter into contracts independent of their cohabiting relationship, but recognition of claims based on cohabiting relationship would be inconsistent with legislature’s abolition of common law marriage, and creation of remedies must come from legislative branch); Gunderson v. Golden, 360 P.3d 353 (Idaho Ct. App. 2015) (rejecting claim for equitable distribution of property after 25-year cohabitation, based on public policy: “The elimination of common-law marriage, supported by an explicit public policy justification, commands our courts to refrain from enforcing contracts in contravention of clearly declared public policy and from legally recognizing cohabitational relationships in general.”).

Subsection (b) provides that cohabitation agreements are enforceable without consideration under subsection (b). This is based on a similar provision in the Uniform Premarital and Marital Agreements Act. See UPMMAA Sec. 6. However, note that marriage is deemed a substitute for consideration in that context, and that these agreements are therefore distinguishable. Nonetheless, the committee believed that courts should treat the cohabitation as
an adequate basis for finding consideration.

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).

Because some states refuse to recognize agreements between cohabitants due to the “meretricious nature of their relationship” and others may impose higher burdens on cohabitants, *Spafford v. Coats*, 118 Ill. App. 3d 566 (1983), this section clearly states that agreements between cohabitants setting forth their rights and obligations with regard to property or contributions of domestic services by either or both are valid and enforceable. See also Section 107 (a) and the comments following that section.

The act also specifically allows cohabitants to “opt out” of the protections afforded by the act, if they so desire. An effective “opt out” must be contained in a cohabitation agreement, and so may be written or oral, express or implied.

**SECTION 107. CLAIMS TO ENFORCE ECONOMIC RIGHTS GENERALLY; SPECIAL TOLLING; CUMULATIVE CLAIMS.**

(a) Except as otherwise provided in this [act], 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. The fact that the parties are in a cohabitant relationship is not a basis for precluding the claim or subjecting an individual to additional requirements.

**NOTE TO COMMITTEE:** This is drawn from the memo provided by Cathy/Courtney/Andrea at the February meeting and agreed to by the committee. They designated this provision as Sections 201 and 301, presumably because it would have replaced portions of 201 and 301 of the meeting draft. Their draft language was tweaked to reflect their intent to cover both types of claims (agreement and equitable); again, no substantive change intended.

(b) A claim for breach of a cohabitation agreement accrues upon breach and may be commenced during the period of cohabitation.

**NOTE TO COMMITTEE:** Source Note: This is Section 205(a) of the meeting draft.

(c) A claim for equitable relief under Sections 110 or 111 accrues upon termination of the cohabitation.
NOTE TO COMMITTEE: Source Note: Section 104(a)(2) of the meeting draft.

(d) If cohabitants marry each other, the marriage terminates the accrual of any additional rights between the cohabitants under this [act] and tolls the statute of limitations and extends the period for filing an equitable claim until either cohabitant files for dissolution or divorce, or dies.

NOTE TO COMMITTEE: Source Note: Section 104(c) of the meeting draft. The reference to dissolution in addition to divorce was added based upon Deborah Behr’s suggestion. In order to ensure that agreement-based and equitable claims are treated comparably, we added the language concerning extending the time period for filing an equitable claim.

(e) A cohabitant may assert a claim for relief based upon a cohabitation agreement and in equity in the same action.

NOTE TO COMMITTEE: Source Note: Section 109 from the meeting draft. This section contains provisions found in other sections in previous drafts without substantive change and adds (a) from the Courtney/Cathy/Andrea et al draft.

Comment

Because some states have imposed restrictions on cohabitants that are not otherwise imposed on litigants, the act includes subprovision (a).

With respect to the language concerning “additional requirements” that may be imposed on cohabitants in subsection (a), the goal of the act is to treat cohabitants like other litigants in most cases. Consequently, 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. For example, in Spafford v. Coats, 118 Ill. App. 3d 566 (1983), Donna Spafford filed a complaint against her former partner, Richard Coats, for the creation of a constructive trust, alleging that she purchased or paid the down payment from her own funds for various vehicles. Id. At 568. The problem, however, was that the vehicles purchased by Spafford were titled in Coats’s name because insurance premiums would be less. Id. Spafford and Coats cohabited for more than six years. Id. At 568-69. The appellate court held that the nature of their relationship did not preclude equitable relief because Spafford’s claims were “substantially independent” of the nonmarital relationship between the parties and not based on rights arising from their cohabitation, i.e., Spafford had actually paid for the motor vehicles herself. Id. At 572-73. Spafford’s claims “had an economic basis independent of the nonmarital, cohabiting relationship, [so] she was permitted to recover those independent contributions.” Blumenthal v. Brewer, 69 N.E.3d 834, 854 (Ill. 2016).

With respect to the “except as otherwise provided” language in subsection (a), this act
specifically addresses burdens of proof for differing types of contracts, and it prohibits certain claims involving married cohabitants, thus treating some claims by cohabitants in a different manner from other individuals.

The significance of subsection (b) is that it allows the agreement to be enforced upon breach, even if the cohabitation is ongoing.

The act does not include specific provisions for statutes of limitations. The time period, and except as stated here, the accrual provisions found in other state law will control. See Section 105, Governing law. The act also does not preclude either cohabitant from asserting an equitable defense limiting or enlarging the time for enforcement, such as laches or estoppel.

The act includes a very specific tolling provision to cover situations where the cohabitants marry after cohabiting. The act tolls the statute of limitations on the enforcement of any claims accruing during the cohabitation during a marriage that follows the cohabitation and allows consideration of such claims in any subsequent divorce or probate proceeding.

With respect to subsection (d), 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. Note that equitable distribution in most jurisdictions applies only to property acquired during the marriage; only in a minority of jurisdictions would premarital property be covered.

Note that the parties cannot agree that the cohabitation agreement will not terminate the accrual of additional rights under subsection (d) if the cohabitants marry.

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.

SECTION 108. BURDEN OF PROOF; ORAL AND IMPLIED COHABITATION AGREEMENTS. Notwithstanding the provisions of Section 105:

(1) an oral or implied-in-fact cohabitation agreement must be established by clear and convincing evidence; and

Note to Committee: Source Note: Section 204 from the meeting draft.
(2) a cohabitant must prove an equitable claim under Sections 110 and 111 and entitlement to relief by clear and convincing evidence.

**NOTE TO COMMITTEE:** Source Note: Section 303 from the meeting draft.

**Comment**

Under this act, cohabitants may acquire certain rights and remedies to obtain payment or a share of the cohabitants’ property acquired during the cohabitation. This will come as a surprise to many cohabitants, especially cohabitants who may have intentionally decided not to marry and not to become subject to state law regulating the distribution of property upon dissolution or divorce or death (for example, seniors who have lost previous spouses and find companions with whom they cohabit but who do not want to entangle their finances and property); or cohabitants who without any serious thought move in together and find themselves still living together some years later.

Section 108 establishes heightened burdens of proof for claims based on oral agreements, implied-in-fact-agreements, and equitable theories: the burden of proving these claims is clear and convincing evidence. The rationale for these heightened burdens is that 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 – and the drafting committee believes it is important that courts be incentivized 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.

When the parties to a written cohabitation agreement express their agreement in writing about their financial dealings and how they intend to treat the property they bring into or acquire during their cohabitation, the evidence of their intent is evident on the face of their agreement, and the usual burden of proof for civil actions – preponderance of the evidence – is sufficient. But when a cohabitant claims that the parties made an oral agreement, or that there was an implied agreement based on the parties’ conduct or language, or that the parties’ conduct and language resulted in unjust enrichment to the other cohabitant such that the property acquired during the cohabitation should be equitable divided, the evidence may not be so clear.

The Supreme Court has recognized that “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). “Increasing the standard of proof is one way to impress the factfinder with the importance of the decision.” Id. At 427 (emphasis added); see Dan L. Dobbs & Caprice L. Roberts, Law of Remedies: Damages-Equity-Restitution 399 (3d ed. 2018)(“the constructive trust plaintiff who proves her claim by clear and convincing evidence wins an in personam order that requires defendant to transfer legal rights and title of specific property or intangibles to plaintiff”).
There is also an element of promoting enactability by establishing a heightened burden of proof. Some of the rights and remedies provided by the act, if not the act as a whole, will be controversial. A heightened burden of proof will go a long way in assuring legislatures that only those cohabitants who can clearly and convincingly prove an oral or implied-in-fact agreement or an equitable basis for relief will be granted remedies under the act.

SECTION 109. UNENFORCEABLE TERMS.

(a) A term in a cohabitation agreement may be unenforceable if, in the context of the circumstances taken as a whole, enforcement of the term would result in substantial economic hardship for a cohabitant because of a material change in circumstances arising after the agreement was made.

NOTE TO COMMITTEE: Source Note: Section 207(a)(3).

(b) A term in a cohabitation agreement is not enforceable to the extent that it:

(1) 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] relating to domestic violence; or

NOTE TO COMMITTEE: Source Note: Section 207(b)

(2) affects a child’s right to support.

NOTE TO COMMITTEE: Source note added per committee agreement.

(c) The court shall decide questions of the enforceability of a term as a matter of law.

NOTE TO COMMITTEE: Source Note: Section 207(c) from the meeting draft.

Given that the act is intended to supplement existing state law, courts can still use the doctrines of unconscionability and illegality.

Most of this section is adapted from UPMAA Sections 9(f), (g), and 10 (set out below). Subsection (a), concerning “substantial hardship” is drawn from Section 9.

The domestic violence language is drawn from the UPMAA Section 10(b)(2). Subsection (c) is drawn from UPMAA Section 10(b)(1). Note that, as the UPMAA Comments to Section 10 provide, “parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not
have the power to remove the jurisdiction or duty of the courts to protect the best
interests of minor children. [This] applies also to step-children, to whatever extent the
state imposes child-support obligation on step-parents.”

UPMAA

[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 110. EQUITABLE CLAIMS. Except as otherwise provided in this [act],
an equitable claim by a cohabitant, including a claim based on domestic services, may be
asserted and enforced unless the claim is inconsistent with a term of a cohabitation agreement.

*NOTE TO COMMITTEE: This section will be impacted by the policy decision made
with respect to claims against a married “cohabitant” and the impact on the spouse. See
Section 103(d).

*Comment

This section and section 111 affirm the rights of cohabitants to seek equitable relief.

With respect to types of relief, injunctive relief, and particularly preliminary injunctive
relief, may be critical to preventing dissipation of assets.

The Restatement (Third) of Restitution notes:

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).

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).

**SECTION 111. EQUITABLE DIVISION OF PROPERTY.**

(a) Unless inconsistent with a term of a cohabitation agreement, a cohabitant may assert a
claim for fair and equitable division of the assets acquired and liabilities incurred as a result of
the efforts of either cohabitant during the cohabitation, without regard to legal title.

(b) In determining whether and how to order a fair and equitable division of the assets
and liabilities under subsection (a), the court shall consider the following factors:

*NOTE TO COMMITTEE: Source Notes: The following factors were drawn from the
Cathy/Courtney/Andrea draft language or submitted by Harry Tindall for consideration.
PLEASE review carefully and be prepared to discuss these and/or others for first reading
draft.*

1. (1) the duration and continuity of the cohabitation;
2. (2) the cohabitants’ allocation of financial responsibility for housing, food,
clothing, health care, and other daily living expenses for the household;

*NOTE TO COMMITTEE: We removed the reference to child support here in favor of
a broader reference to living expenses for the household, which could include other adult
family members.*

3. (3) the cohabitants’ allocation of responsibility for the performance of domestic
services;
4. (4) the cohabitants’ allocation of caretaking responsibilities for family members
of either;
5. (5) the cohabitants’ intent to share assets acquired or liabilities incurred during the
cohabitation.
(6) Whether the property being considered for division is subject to choate or inchoate interests of a third party;

(7) Whether a cohabitant has wasted property or transferred property to a third party in an effort to defeat rights of the other cohabitant; and.

(8) Other factors that the court considers relevant.

**NOTE TO COMMITTEE:** We have added a catch-all factor.

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

**NOTE TO COMMITTEE:** Source Note: Cathy/Courtney/Andrea et al section 302. + Harry Tindall.

As a policy issue with respect to this entire Section, the Joint Editorial Board for Uniform Real Property Acts noted concerns about credit provided based on one cohabitants’ ownership of property that might then be transferable pursuant to this Section. See Email to the Committee from R. Wilson Freyermuth, dated Feb. 6, 2020 (distributed Feb. 7 via email from Rachel Hewitt).

**Comment**

The remedy contemplated here is division of only those assets and liabilities acquired during the cohabitation.

Note that in addition to claims under this Section and other provisions of the act, a cohabitant may pursue remedies in contract or equity outside of the act. With respect to the property to be equitably divided, a court may want to refer to other state law regarding the treatment of marital (or community) and separate property under the states divorce or dissolution statutes for guidance. The term “other daily living expenses” in Section 111(b)(2) allows for consideration of responsibility for support for a child or other family member of the cohabitants. This is not intended to and will not affect how child support is calculated or ordered in the state.

**SECTION 112. LIMITATIONS ON REMEDIES.**

(a) This [act] shall not be applied to provide rights or remedies to a cohabitant that would be greater than what the cohabitant would receive upon divorce, dissolution, or death if the cohabitants were married.
NOTE TO COMMITTEE: This was added based on comments by Turney and others at the February meeting. Committee members are encouraged to think about the phrasing and policy.

*(b) Nothing in this [act] nor a division of assets or liabilities pursuant to this [act] affects the rights of third parties, including a good faith purchaser from, or secured creditor of, a cohabitant.

NOTE TO COMMITTEE: Source Note: Comm. Perlman’s language agreed to by the committee. We may need to reassess the language of subsection (b) after review of the act by the Joint Editorial Board for Uniform Real Property Acts.

SECTION 113. 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 114. SAVINGS AND TRANSITIONAL PROVISIONS. This [act] does not affect the validity or effect of a cohabitation agreement entered into before [the effective date of this [act]], and applies only to equitable claims that accrue after the effective date of this [act].

NOTE TO COMMITTEE: This is a new provision, and Committee members are encouraged to consider whether this policy appropriately addresses transition issues.

SECTION 115. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .]

SECTION 116. EFFECTIVE DATE. This [act] takes effect . . . .