

D R A F T
FOR DISCUSSION ONLY

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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March 16, 2020

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

2 **Prefatory Note**

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

10
11 The economic rights that derive from cohabitation differ greatly depending on the
12 relationship and its recognition under state law. State law across the United States varies widely
13 on the treatment of unmarried cohabitants, both at separation and at death. The Economic Rights
14 of Unmarried Cohabitants Act (ERUCA) provides states with comprehensive and uniform
15 guidance on questions concerning cohabitants’ economic interests and obligations (“economic
16 rights”) based on their relationship.

17
18 Couples have cohabited outside of marriage for millennia. Cohabitants may share
19 financial responsibilities during their cohabitation, or they may keep their finances separate. One
20 cohabitant may move into a dwelling the other had acquired separately. They may acquire
21 property together or they may not. Both may work, or one may work and the other takes care of
22 the household. Upon their breakup or the death of one cohabitant, state courts have in some
23 cases provided relief to a claimant seeking payment or a share of the property of the other
24 cohabitant, but in many cases no relief is given.

25
26 The act affirms the capacity of each cohabitant to contract with and, upon termination of
27 the relationship, claim a remedy against the other cohabitant without regard to any intimate
28 relationship that exists between them, subject to certain limitations. The legal rights of third
29 parties, such as secured creditors or good faith purchasers, cannot be adversely impacted by a
30 remedy granted under the act. Further, upon termination of the cohabitants’ relationship, a
31 cohabitant may not claim a right or remedy greater than what the cohabitant would receive if the
32 cohabitants had married. Finally, a cohabitant who is married to another individual may not
33 assert a claim for relief under this act, but may be subject to a claim by the other cohabitant and
34 may assert defenses to such a claim.

1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

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

4 **SECTION 102. DEFINITIONS.** In this [act]:

5 *(1) “Cohabitant” means one of two individuals living together as a couple in an
6 intimate, committed relationship who function as an economic, social, and domestic unit. The
7 term does not include an individual who is married or whose marriage to the other individual
8 would not be recognized under law of this state other than this [act], except as provided in
9 Section 104.

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

13
14 *We added “except as provided in Section 104” at the end to ensure that an
15 unmarried cohabitant who cohabited with a married cohabitant would be protected.
16 Section 104 precludes a married person from bringing a claim under the Act, while
17 allowing the unmarried cohabitant in such a relationship to bring a claim. Please note
18 this relates to a **policy** issue discussed in the Note to Committee following Section 103,
19 below.*

20
21 (2) “Cohabitation agreement” means the agreement between two cohabitants regarding
22 the management, allocation, or disposition_of their economic rights arising within the context of
23 their relationship.

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

28
29 *We also eliminated the reference to “manifestation of assent” that was in the meeting
30 draft and substituted “agreement” without intent to substantively change the meaning.*

31
32 (3) “Domestic services” means services and activities performed by a cohabitant for the
33 benefit of the other cohabitant or their relationship and includes cooking, cleaning, shopping,

1 household maintenance, doing errands for the household, caring for the other cohabitant or a
2 family member of the other cohabitant, or other similar activities.

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

7
8 (4) “Economic right” means any interest, right, responsibility, duty, promise, or
9 obligation of a cohabitant relating to domestic services or property.

10 *NOTE TO COMMITTEE: This definition has been tweaked to remove unnecessary*
11 *language regarding the now “tweaked” defined term “domestic services,” above. No*
12 *substantive change intended.*
13

14 (5) “Property” means anything that may be the subject of ownership or any interest in the
15 thing, whether real or personal, tangible or intangible, legal or equitable. The term includes
16 financial obligations and assets.

17 (6) “Record” means information that is inscribed on a tangible medium or that is stored in
18 an electronic or other medium and is retrievable in perceivable form.

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

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

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

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

26 (C) the date the cohabitants marry each other.

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

1 The definition of “domestic services” focuses on the actual provision of these services.
2 Payments made by one cohabitant for these services could be the subject of another claim under
3 this act. Domestic services may include business development, business entertaining, and similar
4 activities. E.g., *Hills v. Superior Court (Munoz)*, No. B174068, 2004 WL 1657689, at *6 (Cal.
5 Ct. App. July 26, 2004) (reasoning that female plaintiff’s assertions raised triable issues of fact,
6 including that “she gave up her career and devoted herself to performing household and other
7 domestic services for him so as to aid his business career”).

8
9 The definition of “economic right” is intentionally broad. We mean to include, for
10 example, contributions of salary or other financial assets to the relationship. The term may also
11 include payments after the cohabitation terminates, if an agreement so provides, but in few, if
12 any, other circumstances.

13
14 It does not cover tort suits, such as loss of consortium or wrongful death or intentional
15 infliction of emotional distress claims. The act defers to other state laws on such claims. With
16 respect to the value of domestic services, “economic right” means the value of any benefit
17 conferred as a result of the domestic services or the actual replacement value of the domestic
18 services. For example, domestic services may contribute to the other cohabitant’s ability to earn
19 money. *See* Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. Rev. 2139 (2019) (cases
20 routinely deny access to property in the context of a relationship that involved domestic
21 services). The definition of economic right repeats the concept of the benefit of “domestic
22 services” in order to emphasize it.

23
24 “Termination of the cohabitants’ relationship” refers to death of a cohabitant, dissolution
25 of the relationship, and the cohabitants’ marriage to one another. The date that the cohabitants
26 “ceased functioning as an economic, social, and domestic unit” is highly fact specific. Serving a
27 prison sentence or being on an overseas deployment, or working in another jurisdiction for an
28 extended period of time, for example, does not, in and of itself, show that the cohabitants ceased
29 functioning as an economic, social, and domestic unit.

30
31 Issues concerning commencement of the statute of limitations upon termination are
32 addressed in Sections 105 and 107.

33
34 The act does not designate the appropriate tribunal to determine claims brought under the
35 act. Cohabitants’ claims will involve elements of traditional contract claims, family law claims
36 and probate claims.

37
38 Enacting states will need to decide on the appropriate tribunal(s) to hear these cases. The
39 Committee believes that these claims differ significantly enough from commercial claims that
40 upon dissolution of the cohabitation other than by death, the claims should be hear in the state
41 court that handles family law matters. Upon termination by death, the tribunal that handles
42 probate matters would be appropriate. *Cf.*, *Matter of Estate of Cooney*, __ P.3d. __, 2019 WL
43 7161295 *3 (Mont. 2019)(“A probate court has authority to settle claims against the estate, such
44 as creditor claims.[] Enforcement of a contract to devise property is not a claim against the
45 estate. . . The probate court’s limited jurisdiction does not extend to adjudicating a breach of
46 contract claim.”).

1 Because the act does not designate a state court tribunal, there was no need to include a
2 definition of “court” or “tribunal” as might be expected in a uniform act of this sort.

3
4 **SECTION 103. SCOPE.**

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

7 (1) by virtue of a cohabitation agreement;

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

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

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

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

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

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

20
21 *With respect to Section 103(d), there is a **policy** choice on how to treat the claims
22 of a cohabitant whose partner is married. Note that, for example, if a married cohabitant
23 dies intestate, then in certain circumstances, according to the UPC, the surviving spouse
24 receives the entire estate. The claims of an unmarried cohabitant against the decedent
25 would affect the surviving spouse’s inheritance rights. In addition, there may be other
26 situations in which the rights of the unmarried cohabitant affect the rights of a spouse. If
27 a married cohabitant dies testate, leaving the residue to a surviving spouse, then any
28 claim of the unmarried cohabitant will diminish the residue. The Committee needs to
29 decide whether to protect the rights of the cohabitant or the spouse. As currently written,
30 103(d) precludes the unmarried cohabitant from recovering against a married
31 “cohabitant” because of the spouse’s paramount interest, thus treating the claims of an
32 unmarried cohabitant differently from other claims against a married cohabitant.*

33
34 *On the other hand, considering the principles underlying putative spousehood in*

1 *the Uniform Marriage & Divorce Act might result in a different policy choice, allowing*
2 *various rights to the cohabitant. A putative spouse means one who has a good faith*
3 *belief that the parties could be married to one another. See UMDA § 209, below.*
4

5 *Section 209 of the Uniform Marriage and Divorce Act provides:*

6 *[Putative Spouse];*

7 *Any person who has cohabited with another to whom he is not legally married in*
8 *the good faith belief that he was married to that person is a putative spouse until*
9 *knowledge of the fact that he is not legally married terminates his status and*
10 *prevents acquisition of further rights. A putative spouse acquires the rights*
11 *conferred upon a legal spouse, including the right to maintenance following*
12 *termination of his status, whether or not the marriage is prohibited (Section 207)*
13 *or declared invalid (Section 208). If there is a legal spouse or other putative*
14 *spouses, rights acquired by a putative spouse do not supersede the rights of the*
15 *legal spouse or those acquired by other putative spouses, but the court shall*
16 *apportion property, maintenance, and support rights among the claimants as*
17 *appropriate in the circumstances and in the interests of justice.*
18

19 **Comment**

20
21 This section states the coverage of the act. The act is intended to give the courts broad
22 discretion to “do equity” between cohabitants.

23
24 The act is not intended as a substitute for common law marriage.
25

26 The committee discussed at length whether to include married cohabitants within the
27 purview of this act. Many married people cohabit. *E.g., Marvin v. Marvin*, 557 P.2d 106 (Cal.
28 1976). The reasons are many, including the impracticality of divorce or the illness of the non-
29 cohabiting spouse. Nonetheless, the charge to the committee referred only to unmarried
30 cohabitants. There are many practical difficulties that arise in trying to address the rights of
31 married cohabitants if there is a spouse.
32

33 ***SECTION 104. EXCLUSION.**

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

37 (b) An unmarried cohabitant cohabiting with a married individual may bring a claim
38 under this [act] against the married individual if the married individual and the cohabitant could

1 have married if the individual were not married to a third person.

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

7
8
9

Comment

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

15
16
17
18

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).

19
20

SECTION 105. GOVERNING LAW.

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

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

28
29

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

34 *NOTE TO COMMITTEE: Source Note: Section 108 of the meeting draft.*

1 (c) The law of the jurisdiction which governs the validity, enforceability, interpretation
2 and construction of a cohabitation agreement may be designated in the agreement, if the
3 jurisdiction has a significant relationship to the agreement or either cohabitant, and the
4 designated law is not contrary to fundamental public policy of this state.

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

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

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

8
9 *Section 105 combines related provisions found in various sections of the previous*
10 *draft with no intended substantive changes. Subsection (b) will be affected by the **policy***
11 *choice concerning the rights of a spouse under Section 103(d) for a married decedent.*

12
13 **Comment**

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

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

25
26 The intent is for other state law to supplement the act unless clearly inconsistent with the
27 act. Note, for example, that to the extent the act establishes burdens of proof for unjust
28 enrichment, it may supersede a state's common law.

29 Subsections (a) and (c) are drawn from UPMAA Section 4:
30

31 *SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation,*
32 *and construction of a premarital agreement or marital agreement are determined:*
33 *(1) by the law of the jurisdiction designated in the agreement if the jurisdiction*
34 *has a significant relationship to the agreement or either party and the designated*
35 *law is not contrary to a fundamental public policy of this state; or*
36 *(2) absent an effective designation described in paragraph (1), by the law of this*
37 *state, including the choice-of-law rules of this state.*
38

1 Subsection (d) recognizes that a jurisdiction’s law concerning unjust enrichment and
2 other legal and equitable principles is otherwise applicable. This subsection is drawn from
3 Section 106 of the Uniform Trust Code (2018), which provides: “The common law of trusts and
4 principles of equity supplement this [Code], except to the extent modified by this [Code] or
5 another statute of this State.”
6

7 **SECTION 106. COHABITATION AGREEMENTS.**

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

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

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

11 *NOTE TO COMMITTEE: Source Note: Replaces Section 201(b) of the meeting*
12 *draft per agreement of the Committee. Section 106(b) no longer includes “regardless of*
13 *any sexual component of the relationship” as that seems unnecessary.*
14

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

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

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

19 **Comment**
20

21 Subsection (a) is intended to abrogate court decisions that have held that cohabitation
22 agreements are void as against public policy. *See, e.g., Blumenthal v. Brewer*, 69 N.E.3d 834,
23 854 (Ill. 2016) (rejecting constructive trust and restitution claims by long-term same-sex
24 cohabitant where claims arose from marriage-like relationship; court notes that parties may enter
25 into contracts independent of their cohabiting relationship, but recognition of claims based on
26 cohabiting relationship would be inconsistent with legislature’s abolition of common law
27 marriage, and creation of remedies must come from legislative branch); *Gunderson v. Golden*,
28 360 P.3d 353 (Idaho Ct. App. 2015) (rejecting claim for equitable distribution of property after
29 25-year cohabitation, based on public policy: “The elimination of common-law marriage,
30 supported by an explicit public policy justification, commands our courts to refrain from
31 enforcing contracts in contravention of clearly declared public policy and from legally
32 recognizing cohabitational relationships in general.”).
33

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

1 an adequate basis for finding consideration.

2
3 An implied-in-fact agreement differs from an express contract only “in the mode of
4 manifesting assent. Just as assent may be manifested by words or other conduct, sometimes
5 including silence, so intention to make a promise may be manifested in language or by
6 implication from other circumstances.” Restatement (Second) of Contracts § 4 cmt. (1981).
7 Because some states refuse to recognize agreements between cohabitants due to the
8 “meretricious nature of their relationship” and others may impose higher burdens on cohabitants,
9 *Spafford v. Coats*, 118 Ill. App. 3d 566 (1983), this section clearly states that agreements
10 between cohabitants setting forth their rights and obligations with regard to property or
11 contributions of domestic services by either or both are valid and enforceable. See also Section
12 107 (a) and the comments following that section.

13
14 The act also specifically allows cohabitants to “opt out” of the protections afforded by the
15 act, if they so desire. An effective “opt out” must be contained in a cohabitation agreement, and
16 so may be written or oral, express or implied.

17
18 **SECTION 107. CLAIMS TO ENFORCE ECONOMIC RIGHTS GENERALLY;**
19 **SPECIAL TOLLING; CUMULATIVE CLAIMS.**

20 (a) Except as otherwise provided in this [act], a cohabitant may assert, and a court may
21 enforce, a claim asserted by a cohabitant under this act on the same basis as an individual who is
22 not a cohabitant. The fact that the parties are in a cohabitant relationship is not a basis for
23 precluding the claim or subjecting an individual to additional requirements.

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

30
31 (b) A claim for breach of a cohabitation agreement accrues upon breach and may be
32 commenced during the period of cohabitation.

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

34
35 (c) A claim for equitable relief under Sections 110 or 111 accrues upon termination of the
36 cohabitation.

1 *NOTE TO COMMITTEE: Source Note: Section 104(a)(2) of the meeting draft.*

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

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

10
11 (e) A cohabitant may assert a claim for relief based upon a cohabitation agreement and in
12 equity in the same action.

13 *NOTE TO COMMITTEE: Source Note: Section 109 from the meeting draft.*

14 *This section contains provisions found in other sections in previous drafts without*
15 *substantive change and adds (a) from the Courtney/Cathy/Andrea et al draft.*

16
17 **Comment**

18
19 Because some states have imposed restrictions on cohabitants that are not otherwise
20 imposed on litigants, the act includes subprovision (a).

21
22 With respect to the language concerning “additional requirements” that may be imposed
23 on cohabitants in subsection (a), the goal of the act is to treat cohabitants like other litigants in
24 most cases. Consequently, the fact that an individual is a cohabitant is not a basis for precluding
25 the claim or subjecting the individual to additional requirements, such as the requirement there
26 be a basis apart from the cohabitation to pursue a claim. For example, in *Spafford v. Coats*, 118
27 Ill. App. 3d 566 (1983), Donna Spafford filed a complaint against her former partner, Richard
28 Coats, for the creation of a constructive trust, alleging that she purchased or paid the down
29 payment from her own funds for various vehicles. *Id.* At 568. The problem, however, was that
30 the vehicles purchased by Spafford were titled in Coats’s name because insurance premiums
31 would be less. *Id.* Spafford and Coats cohabited for more than six years. *Id.* At 568-69. The
32 appellate court held that the nature of their relationship did not preclude equitable relief because
33 Spafford’s claims were “substantially independent” of the nonmarital relationship between the
34 parties and not based on rights arising from their cohabitation, i.e., Spafford had actually paid for
35 the motor vehicles herself. *Id.* At 572-73. Spafford’s claims “had an economic basis independent
36 of the nonmarital, cohabiting relationship, [so] she was permitted to recover those independent
37 contributions.” *Blumenthal v. Brewer*, 69 N.E.3d 834, 854 (Ill. 2016).

38
39 With respect to the “except as otherwise provided” language in subsection (a), this act

1 specifically addresses burdens of proof for differing types of contracts, and it prohibits certain
2 claims involving married cohabitants, thus treating some claims by cohabitants in a different
3 manner from other individuals.
4

5 The significance of subsection (b) is that it allows the agreement to be enforced upon
6 breach, even if the cohabitation is ongoing.
7

8 The act does not include specific provisions for statutes of limitations. The time period,
9 and except as stated here, the accrual provisions found in other state law will control. See
10 Section 105, Governing law. The act also does not preclude either cohabitant from asserting an
11 equitable defense limiting or enlarging the time for enforcement, such as laches or estoppel.
12

13 The act includes a very specific tolling provision to cover situations where the
14 cohabitants marry after cohabiting. The act tolls the statute of limitations on the enforcement of
15 any claims accruing during the cohabitation during a marriage that follows the
16 cohabitation and allows consideration of such claims in any subsequent divorce or probate
17 proceeding.
18

19 With respect to subsection (d), courts increasingly take into account premarital
20 cohabitation in distributing property at divorce. *See, e.g., Matter of Munson*, 146 A.3d 153, 157-
21 58 (N.H. 2016)(permitting trial court to consider premarital cohabitation in dividing property at
22 divorce, and listing other states that do so, including Indiana, Montana, Michigan, and Oregon).
23 In light of this trend, the act permits agreements made during premarital cohabitation to be
24 considered at the end of a marriage. The act tolls the statute of limitations on the enforcement of
25 such agreements during a marriage that follows a cohabitation and allows consideration of the
26 agreement in any subsequent divorce or probate proceeding. Note that equitable distribution in
27 most jurisdictions applies only to property acquired during the marriage; only in a minority of
28 jurisdictions would premarital property be covered.
29

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

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

37 **SECTION 108. BURDEN OF PROOF; ORAL AND IMPLIED COHABITATION**

38 **AGREEMENTS.** Notwithstanding the provisions of Section 105:

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

41 *NOTE TO COMMITTEE: Source Note: Section 204 from the meeting draft.*

1 (2) a cohabitant must prove an equitable claim under Sections 110 and 111 and
2 entitlement to relief by clear and convincing evidence.

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

4 **Comment**
5

6 Under this act, cohabitants may acquire certain rights and remedies to obtain payment or
7 a share of the cohabitants' property acquired during the cohabitation. This will come as a
8 surprise to many cohabitants, especially cohabitants who may have intentionally decided not to
9 marry and not to become subject to state law regulating the distribution of property upon
10 dissolution or divorce or death (for example, seniors who have lost previous spouses and find
11 companions with whom they cohabit but who do not want to entangle their finances and
12 property); or cohabitants who without any serious thought move in together and find themselves
13 still living together some years later.
14

15 Section 108 establishes heightened burdens of proof for claims based on oral agreements,
16 implied-in-fact-agreements, and equitable theories: the burden of proving these claims is clear
17 and convincing evidence. The rationale for these heightened burdens is that the act is creating
18 new and in some cases unprecedented rights and remedies for cohabitants – rights and remedies
19 that in some sense are similar to the rights and remedies attendant to marriage – and the drafting
20 committee believes it is important that courts be incentivized to take a hard look at the evidence
21 supporting claims for these marriage-like rights and remedies where the parties have not
22 formalized their agreement, and grant relief only when the evidence is clear that a cohabitant is
23 entitled to these remedies.
24

25 When the parties to a written cohabitation agreement express their agreement in writing
26 about their financial dealings and how they intend to treat the property they bring into or acquire
27 during their cohabitation, the evidence of their intent is evident on the face of their agreement,
28 and the usual burden of proof for civil actions – preponderance of the evidence – is sufficient.
29 But when a cohabitant claims that the parties made an oral agreement, or that there was an
30 implied agreement based on the parties' conduct or language, or that the parties' conduct and
31 language resulted in unjust enrichment to the other cohabitant such that the property acquired
32 during the cohabitation should be equitable divided, the evidence may not be so clear.
33

34 The Supreme Court has recognized that “even if the particular standard-of-proof
35 catchwords do not always make a great difference in a particular case, adopting a standard of
36 proof is more than an empty semantic exercise.” *Addington v. Texas*, 441 U.S. 418, 425
37 (1979)(internal citations omitted). “*Increasing the standard of proof is one way to impress the*
38 *factfinder with the importance of the decision.*” *Id.* At 427 (emphasis added); see Dan L.
39 Dobbs & Caprice L. Roberts, *Law of Remedies: Damages-Equity-Restitution* 399 (3d ed.
40 2018)(“the constructive trust plaintiff who proves her claim by clear and convincing evidence
41 wins an in personam order that requires defendant to transfer legal rights and title of specific
42 property or intangibles to plaintiff”).
43

1 There is also an element of promoting enactability by establishing a heightened burden of
2 proof. Some of the rights and remedies provided by the act, if not the act as a whole, will be
3 controversial. A heightened burden of proof will go a long way in assuring legislatures that only
4 those cohabitants who can clearly and convincingly prove an oral or implied-in-fact agreement
5 or an equitable basis for relief will be granted remedies under the act.
6

7 **SECTION 109. UNENFORCEABLE TERMS.**

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

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

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

14 (1) limits or restricts a remedy available for one of the cohabitants who is a victim
15 of domestic violence, sexual assault, or stalking under law of this state other than this [act]
16 relating to domestic violence; or

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

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

19 *NOTE TO COMMITTEE: Source note added per committee agreement.*

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

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

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

24
25 *Most of this section is adapted from UPMAA Sections 9 (f), (g), and 10 (set out*
26 *below). Subsection (a), concerning “substantial hardship” is drawn from Section 9.*

27
28 *The domestic violence language is drawn from the UPMAA Section 10(b)(2).*
29 *Subsection (c) is drawn from UPMAA Section 10(b)(1). Note that, as the UPMAA*
30 *Comments to Section 10 provide, “parents and prospective parents do not have the*
31 *power to waive the rights of third parties (their current or future children), and do not*

1 have the power to remove the jurisdiction or duty of the courts to protect the best
2 interests of minor children. [This] applies also to step-children, to whatever extent the
3 state imposes child-support obligation on step-parents.”

4
5 UPMAA

6
7 [Section 9] (f) A court may refuse to enforce a term of a premarital agreement or
8 marital agreement if, in the context of the agreement taken as a whole[:] [(1)] the term
9 was unconscionable at the time of signing[:]; or (2) enforcement of the term would result
10 in substantial hardship for a party because of a material change in circumstances arising
11 after the agreement was signed].

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

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

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

18
19 *SECTION 110. **EQUITABLE CLAIMS.** Except as otherwise provided in this [act],

20 an equitable claim by a cohabitant, including a claim based on domestic services, may be

21 asserted and enforced unless the claim is inconsistent with a term of a cohabitation agreement.

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

25
26 **Comment**

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

28 There are some courts that have historically not accorded adequate weight to domestic
29 services. This act is designed to emphasize that domestic services have value beyond the hourly
30 payment for such services.

31
32 With respect to types of relief, injunctive relief, and particularly preliminary injunctive
33 relief, may be critical to preventing dissipation of assets.

34
35 The Restatement (Third) of Restitution notes:

36 *Courts in some jurisdictions refer to checklists of factors, such as the following, to*
37 *identify cases in which the receipt of a benefit gives rise to a liability in restitution:*

38 *To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1)*
39 *the plaintiff conferred a benefit upon the defendant; (2) the defendant had an*
40 *appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the*
41 *benefit under circumstances making it inequitable for the defendant to retain the benefit*

1 *without payment of its value.*

2
3 Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt (2011).

4
5 There are numerous ways to measure unjust enrichment. *See, e.g.,* Restatement (Third)
6 of Restitution and Unjust Enrichment § 49 (2011)(setting out six different methods for
7 measuring unjust enrichment).

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

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

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

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

18 (1) the duration and continuity of the cohabitation;

19 (2) the cohabitants' allocation of financial responsibility for housing, food,
20 clothing, health care, and other daily living expenses for the household;

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

24 (3) the cohabitants' allocation of responsibility for the performance of domestic
25 services;

26 (4) the cohabitants' allocation of caretaking responsibilities for family members
27 of either;

28 (5) the cohabitants' intent to share assets acquired or liabilities incurred during the
29 cohabitation.
30
31

1 (6) Whether the property being considered for division is subject to choate or
2 inchoate interests of a third party;

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

5 (8) Other factors that the court considers relevant.

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

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

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

11
12 *As a policy issue with respect to this entire Section, the Joint Editorial Board for*
13 *Uniform Real Property Acts noted concerns about credit provided based on one*
14 *cohabitants' ownership of property that might then be transferable pursuant to this*
15 *Section. See Email to the Committee from R. Wilson Freyermuth, dated Feb. 6, 2020*
16 *(distributed Feb. 7 via email from Rachel Hewitt).*

17
18 **Comment**

19
20 The remedy contemplated here is division of only those assets and liabilities acquired
21 during the cohabitation.

22
23 Note that in addition to claims under this Section and other provisions of the act, a
24 cohabitant may pursue remedies in contract or equity outside of the act. With respect to the
25 property to be equitably divided, a court may want to refer to other state law regarding the
26 treatment of marital (or community) and separate property under the states divorce or dissolution
27 statutes for guidance. The term “other daily living expenses” in Section 111(b)(2) allows for
28 consideration of responsibility for support for a child or other family member of the cohabitants.
29 This is not intended to and will not affect how child support is calculated or ordered in the state.

30
31 ***SECTION 112. LIMITATIONS ON REMEDIES.**

32 (a) This [act] shall not be applied to provide rights or remedies to a cohabitant that would
33 be greater than what the cohabitant would receive upon divorce, dissolution, or death if the
34 cohabitants were married.

1 *NOTE TO COMMITTEE: This was added based on comments by Turney and others*
2 *at the February meeting. Committee members are encouraged to think about the*
3 *phrasing and **policy**.*

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

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

10 **SECTION 113. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
11 applying and construing this uniform act, consideration must be given to the need to promote
12 uniformity of the law with respect to its subject matter among states that enact it.

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

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

18 **[SECTION 115. REPEALS; CONFORMING AMENDMENTS.**

19 (a)

20 (b)

21 (c)]

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