

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

ARTICLE 2. EQUITABLE DIVISION OF COHABITANTS' PROPERTY.

SECTION 2-101. DEFINITIONS. For purposes of this Article:

(a) "Cohabitant" means each of two individuals who are not married to each other and who, while functioning as an economic, social, and domestic unit, live together as a couple in an intimate, committed relationship and have done so for a substantially continuous period of at least [three] years commencing after each has reached the age of majority.

Note to Committee:

This definition limits the availability of equitable division to those persons specified.

Consider whether the definition, which is drawn from earlier drafts, should be modified or expanded. For instance, "share a life together as a couple" (drawn from the ALI) could replace "live together as a couple in an intimate, committed relationship." We have included a slightly modified list of the ALI factors used to determine whether persons share a life together as a couple in Appendix A for reference.

Note that we included a term of years. We did this not so much as a question of policy but because we thought it would assist with enactability if we could say that individuals had to be in a relationship for a certain period of time in order to bring a claim. The specified term of years begins to run only after each cohabitant has reached the age of majority. The draft does not address whether the court could look back to the period of cohabitation while a cohabitant was a minor: should that period be included within the cohabitation period?

Earlier drafts precluded a married cohabitant from bringing a claim under this article. Although precluding a claim would serve to punish an adulterous cohabitant, if the cohabitants have lived together for three years and otherwise qualify to bring a claim under this article, it seems inequitable to deprive the married cohabitant of bringing a claim. Indeed, if a married cohabitant cannot bring a claim, that denies the spouse of that cohabitant the benefits of the cohabiting relationship.

(b) "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein. The term [[does] or [does not]] include changes in the value of property acquired prior to the cohabitation[if the changes are due to the activity of either cohabitant].

1 *Note to Committee:*

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3 *The first sentence of subsection (b) is identical to the definition of property that we have*
4 *been using. The second sentence is included only for purposes of this article to ensure that a*
5 *state considers whether to include the passive or active appreciation of what many states would*
6 *consider to be separate property if the couples had been married.*
7

8 **SECTION 2-102. EQUITABLE DIVISION OF PROPERTY.**

9 (a) Except as otherwise provided in an agreement in a record between cohabitants, a
10 cohabitant may claim and a court may order equitable division of any property acquired and
11 liabilities incurred as a result of the efforts of either cohabitant during their cohabitation, without
12 regard to a cohabitant's legal title to the property or responsibility for the liability. Property
13 acquired by a cohabitant by inheritance or gift shall not be subject to division under this Article
14 unless gifted by the other cohabitant or covered by an agreement in a record.

15 *Note to Committee:*

16
17 *The last sentence excludes from division property acquired by gift or inheritance. Is this*
18 *the correct policy choice? Is it proper to limit the exclusion to gifts received from third parties?*
19

20 (b) In deciding how to effectuate an equitable division under subsection (a), the court
21 shall consider the following:

- 22 (1) the duration and continuity of the cohabitation;
- 23 (2) each cohabitant's provision of housing, food, clothing, health care, and other
24 daily living expenses of the household, and performance of domestic services;
- 25 (3) evidence of the cohabitants' intent to share with one another property acquired
26 or liabilities incurred during the cohabitation;
- 27 (4) whether the property and liabilities being considered for division are subject to
28 the rights and interests of a third party, including a cohabitant's spouse or children;
- 29 (5) whether a cohabitant has wasted property or transferred property to a third

1 party in an effort to defeat a right of the other cohabitant; and

2 (6) other factors the court considers relevant.

3 ***Note to Committee:***

4 *Are there other factors that might be relevant to division that should be included? For*
5 *example: the circumstances and factors that contributed to the break-up of the relationship?*
6 *The age, stage of life, or physical or mental condition of either party? The tax consequences*
7 *to/for either party? Should legal title be a factor? One possibility is moving down the language*
8 *from subsection (a) about property acquired by gift or inheritance so that it becomes a factor*
9 *rather than being treated as an absolute bar to the division of such property.*

10
11 (c) The court may not presume that any particular percentage division of property or
12 liabilities is equitable, but the rights and remedies under this Article granted to a cohabitant may
13 not be greater than the rights and remedies the cohabitant would have received on divorce,
14 dissolution, or death, if the cohabitants had married on the date the cohabitation began and
15 remained married until a cohabitant died or a cohabitant filed a claim under this Article.

16 (d) An incestuous relationship cannot be the basis of a cohabitant's claim under this
17 Article.

18 (e) A claim under this Article shall be brought in a [[court of general jurisdiction] or
19 [family law court]].

20 ***Note to Committee:***

21 *Should we specify or at least recommend the appropriate court? Does it matter whether*
22 *the claim for an equitable division is an inter vivos or probate claim?*
23

24 **SECTION 2-103. UNENFORCEABLE TERMS OF AN AGREEMENT**
25 **BETWEEN COHABITANTS.**

26 (a) A court may refuse to enforce an agreement between cohabitants affecting their rights
27 and obligations under Section 2-102, if, in the context of the agreement taken as a whole[;],]

28 [(1)] the term was unconscionable at the time the agreement was made [; or

(2) 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].

(b) A term in an agreement between cohabitants affecting the rights and obligations under this Article is not enforceable to the extent that it:

(1) operates to limit or restrict a remedy available for a cohabitant who, during the relationship, was a victim of domestic violence, sexual assault, or stalking under law of this state other than this [act] as a result of the actions of the other cohabitant; or

(2) adversely affects a child's right to support.

(c) Questions of unconscionability [or substantial economic hardship] under subsection (a) shall be decided by a court as a matter of law.

Note to Committee:

This section tracks the protections accorded to premarital and marital agreements. Should cohabitation agreements be subject to those additional protections as well as to additional requirements with respect to their validity? Could we delete this section and defer to state law to address all of the issues covered?

Other agreements between cohabitants and between other individuals are covered by state law other than this act.

SECTION 2-104. LIMITATIONS ON RIGHTS AND REMEDIES. A division of

property or liabilities under this Article shall not impair the rights of a good faith purchaser from, or secured creditor of, a cohabitant.

Note to Committee:

The rights of a spouse (and child) are one factor to be considered in the factors for effectuating a division under Section 2-102(b) and are not subject to the same protections as a good faith purchaser or secured creditor. Is that appropriate?

Appendix A

To make a determination whether the individuals qualify as cohabitants under Section 2-101(a), the following factors, drawn from the American Law Institute's Principles of Family Dissolution, may be relevant:

(1) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding the individuals' relationship;

(2) the extent to which the individuals intermingled their finances;

(3) the extent to which their relationship fostered the individuals' economic interdependence, or the economic dependence of one individual upon the other;

(4) the extent to which the individuals engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;

(5) the extent to which the relationship wrought change in the life of either or both individuals;

(6) the extent to which the individuals acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan;

(7) the extent to which the individuals' relationship was treated by the parties as qualitatively distinct from the relationship either individual had with any other individual;

(8) the emotional or physical intimacy of the individual relationship;

(9) the individuals' community reputation as a couple;

(10) the individuals' participation in a commitment ceremony or registration as a domestic partnership; and

(11) the parties' procreation of, adoption of, or joint assumption of parental functions, toward a child.

See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03 (2002).