

MEMORANDUM

To: Uniform Law Commissioners
From: Turney Berry and Mary Devine, Co-Chairs; Naomi Cahn, Reporter
Re: First Reading of Economic Rights of Unmarried Cohabitants Act
Date: July 22, 2020

This memorandum summarizes the background to the Economic Rights of Unmarried Cohabitants Act (“ERUCA” or the “Act”) and provides an overview of the major policy questions that have been tentatively resolved in this draft and others that are still unresolved.

The road to this first reading has been long. We look forward to receiving not only technical drafting suggestions, but also comments and suggestions on the Act generally as well as on specific sections and policy decisions reflected in the draft.

History of the Act

This project results from a proposal to form a study committee on the rights of unmarried cohabitants submitted by the Joint Editorial Board for Uniform Family Law (JEB-UFL) and the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) [not dated].¹ Approximately seventeen million people are cohabiting, and more adults today have cohabited than have married.² Almost 70% of the population finds it acceptable for intimate partners to live together.³ Despite these numbers, the proposal noted little uniformity in states’ legal approaches to the rights of cohabitants when their relationship ends.

State law across the United States varies widely on the treatment of unmarried cohabitants, both at separation and at death. In a few states, a couple can live together for many years, have children, and act in all ways as a married couple, but when the parties separate, one party may leave the relationship with no economic obligations or rights whatsoever based on the relationship.⁴ In the State of Washington, on the other hand, a couple in a “committed intimate relationship” will divide the property of the relationship essentially the same as would a married couple.⁵ Other states range between these two extremes, recognizing contractual claims between

¹ An explanation of the committee’s origins is available on the ULC [website](#).

² Nikki Graf, *Key Findings on Marriage and Cohabitation in the U.S.*, PEW RES. CTR. (Nov. 19, 2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/>; Benjamin Gurrentz, *Unmarried Partners More Diverse Than 20 Years Ago*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html>.

³ Liam Stack, *Unmarried Couples Gain in Numbers, but Survey Finds Married Ones May Be Happier*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/us/pew-research-marriage-cohabitation.html>.

⁴ For further information on the approaches of differing states, see Memorandum from Barbara Atwood to Study Committee on Economic Rights of Unmarried Cohabitants, Oct. 11, 2017 (available on ULC [website](#)).

⁵ E.g., *Matter of Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984); *In re Amburgey & Volk*, 440 P.3d 1069, 1073 (Wash. Ct. App. 2019) (“application of marriage principles by analogy applies only once the existence of a CIR [committed intimate relationship] has been established”).

the parties, and with case law showing an increasing willingness to recognize equitable rights arising out of long-term cohabitation. Courts may require that, to assert a claim, the plaintiff must have lived in a marital-type relationship with the defendant, or they may not require that the parties have cohabited; some states require a written contract, others will accept oral contracts.

Committee Deliberations and Initial Choices

The Drafting Committee first met by telephone in January of 2019. It began its work focusing on economic rights, not rights that unmarried cohabitants may have or wish to have that are not economic in nature, and on persons who are (or have been) cohabiting. The Committee's first meeting was by telephone in January 2019, and the Committee has met several times in person and by Zoom since then.

The draft Act has undergone numerous revisions as the Committee worked through the various issues. The Committee considered, and rejected, a provision that would have created rights and remedies by operation of law based upon the status of the parties (dubbed by the committee, Presumptive Equitable Partnerships ("PEP"s)). The concept was drawn from a number of sources, including the approach of the State of Washington to committed intimate relationships, the American Law Institute's Principles of Family Law Dissolution, and the laws of other countries, including, for example, the Canadian province of Alberta.⁶

PEP status would have been attained upon proper showing that the parties cohabited for some definite period (e.g., five years) or a lesser period if they shared child care responsibilities. The PEP would have been imposed by a court, regardless of the parties' intent or the existence of unjust enrichment. If a PEP were found, the cohabitants would have had many of the same rights and remedies as a married couple, such as division of property and intestacy protection.

Although there was some interest, the Committee worried that the PEP status would not be attractive to most states because it would be considered too similar to common law marriage (which is increasingly less attractive to states). Further, given the myriad reasons people choose cohabitation over marriage, there was concern that the PEP would not reflect the expectations of many, if not most, cohabitants. The decision to cohabit is often made to avoid precisely the result that the PEP would impose by operation of law, i.e., marriage-lite. As an alternative, the Committee considered an opt-in provision that would have allowed cohabitants to register their relationship with the state; that too was rejected. In the American jurisdictions that have such a system, few couples opt into the status.⁷

This draft deals only with cohabiting couples and does not apply to those in polyamorous relationships, on the one hand, or to couples who "merely" physically reside together. In the main, the draft deals only with unmarried cohabitants, i.e., cohabitants who are not married to

⁶ For further background, see Memo from Naomi Cahn to Gail Hagerty and Barbara Atwood, Oct. 14, 2017, prepared in conjunction with the Study Committee, and available on the ULC [website](#).

⁷ For example, Hawaii allows for "reciprocal beneficiaries." HAW. REV. STAT. ANN. § 572C-2 (West 2013). Colorado allows for "designated beneficiaries." COLO. REV. STAT. ANN. §§ 15-22-101; 15-22-112 (West 2009). Civil unions are available in Colorado, Hawaii, Illinois, and New Jersey. Domestic partnerships are available in California, the District of Columbia, Maine, Nevada, New Jersey, Oregon, Washington, and Wisconsin. See Memo from Naomi Cahn, *supra*.

each other. However, the Committee found itself needing to protect the rights of a spouse of an unmarried cohabitant.

The Committee focused on (i) maintaining the integrity of settled state law where possible, (ii) providing significant public benefit to the increasing numbers of unmarried cohabitants, (iii) minimizing the diversity of state law, and (iv) providing a targeted response to the most significant issues cohabitants face regarding their economic rights. This draft provides (i) legal recognition to the fair and reasonable expectations of cohabitants as may be found in their agreement(s), and (ii) affords remedies in those limited situations when the parties fail to protect themselves adequately, if it would be fundamentally unfair to do otherwise.

Summary

The basic approach of the Act is to specify precisely who is a cohabitant, recognize that cohabitants have certain legally enforceable rights under the Act in addition to any other right that might be available under other state law (see Sections 3 (d), (e), 5 (c)) and provide a framework for enforcement of those rights when necessary. The Act does *not* reinstate common law marriage. In fact, the assumption is that cohabitants affirmatively decide not to marry.

The Act covers only economic rights between cohabitants, and does not address claims against third parties, such as torts. “Economic rights” are defined as “rights and interests, promises and obligations relating to property; and necessary or desirable services and activities performed by one cohabitant for the benefit of the other or the relationship or the household (“domestic services”).

Although some courts have held otherwise, the Act ensures that cohabitants are not subject to additional requirements based solely on the nature of their relationship when bringing claims against one another (Section 6). Further, although some courts have stated otherwise, the Act recognizes that a cohabitation agreement does not contravene public policy simply because it is based on a nonmarital relationship and that such agreements may take various forms, both formal and informal. (Section 7). The Act emphasizes that “domestic services” have value and constitute consideration. In the absence of this Act, courts have often presumed that domestic services rendered during an intimate relationship are performed gratuitously.⁸ Courts are authorized to find that specific terms in an agreement are unenforceable based on unconscionability or other bases (Section 10). Equitable rights and remedies may also be available to a cohabitant, whether or not there is a formal or informal agreement (unless an agreement provides otherwise) to remedy unfairness or to prevent unjust enrichment (Secs. 11 and 12).

In general, cohabitant claims are subject to state law governing similar claims. There are some notable exceptions. An extraordinary remedy of “equitable division of property” acquired

⁸ *E.g.*, *In re Estate of Walsh*, 972 N.E.2d 248, 257 (Ill. App. Ct. 2012) (“[W]hen the claimant is not related to the decedent, the law presumes that the services were provided with the expectation that they would be paid for by the decedent. ... However, when the services were provided to the decedent by a family member, the presumption is that the family member provided the services gratuitously, without expectation of payment.”).

during the cohabitation is included in the Act. This remedy is available in limited circumstances when fairness requires and based on consideration of specific factors, which include the duration and length of the cohabitation and the cohabitants' allocation of financial and domestic services responsibilities (Section 12). The Act specifies when certain claims can be brought, although the statute of limitations applicable to similar claims would apply (Section 8). The Act also specifies burdens of proof (Section 9), which may be different from the burdens applicable to similar claims in state courts. The rationale for this decision is detailed in the Comment to Section 9.

Major Issues

The Committee would appreciate direction on any and all aspects of the Act, but particularly on these three major issues: 1) the definition of cohabitant, including the coverage and treatment of married cohabitants; 2) burdens of proof; and 3) remedies, particularly as to the new remedy of equitable division and remedies of cohabitants who are married to others. This portion of the memorandum draws attention to these primary questions facing the Committee at this time.

1. Cohabitants

- a. The defined term "cohabitant," found in Section 2 (1) and as further explained in Section 4, means someone who is more than a roommate and less than a spouse.
 - i. The cohabitant must be part of a couple (only two).
 - ii. The relationship cannot be casual: the couple must be *committed* (to each other and the relationship) and *function as a unit*.
 - iii. The relationship must have a romantic but not necessarily sexual component (*intimate*).
 - iv. The couple (subject to one limited exception⁹) should be eligible to marry each other if they so choose. In other words, the Act does not include relationships between individuals if either party is a minor, or their marriage to each other would be incestuous or otherwise in violation of legitimate state policy.
- b. Major issues for discussion:
 - i. The definition of "cohabitant" is complicated.

Is the definition of "cohabitant" sufficiently clear to ensure that it consists of one of only two people who live together and have a romantic, but not necessarily sexual, relationship, have intertwined lives and finances and that it excludes roommates, friends with benefits, and siblings?

⁹ As discussed later in this section, the draft recognizes a married individual as someone who can cohabit and who could be subject to and benefit from the provisions of the Act. However, the draft restricts the remedies which a married cohabitant can claim. See Section 12 (stating the unmarried partner has the full benefits of the Act).

- ii. The Act includes cohabitants who are married to third parties¹⁰ within the definition (“married cohabitants”).
 - 1. Married cohabitants are eligible to bring claims under the Act except with respect to the extraordinary remedy of equitable division of property, available under Section 12.
 - 2. Most states do not distinguish between cohabitants based on their marital status with respect to inter se legal claims.¹¹ The paradigmatic nonmarital cohabitant case, *Marvin v. Marvin*,¹² involved a cohabitant who was married for the first few years of the relationship. Note that many older cohabitants remain married due to family considerations (ill spouse/children/insurance) or for religious or other economic reasons.
 - 3. The Committee is concerned about the rights of the third-party spouse (the spouse married to the married cohabitant), and sought to address those rights in Section 13, concerning third-party creditors.
 - 4. Property acquired by a married cohabitant could be both marital property and property subject to a cohabitants contract or equitable claim. As the comments to Section 13 note, in community property states, a spouse owns a one-half share of any property earned by either party during the marriage, while in other states, any property earned by either spouse during the marriage can be distributed at divorce and may be available for inheritance at death. Nonetheless, claims of legitimate creditors against a married person are debts that must be satisfied before a spouse is entitled to a share. That is, a mortgage on a house means that the value of the house is less than the fair market value, and thus, both debt and fair market value can be distributed; a claim by a plumber must be satisfied, and thus the financial amount available to the non-cohabiting spouse is decreased.

As currently drafted, the unmarried cohabitant would be treated in probate as a creditor and thus entitled to a share in the gross estate in order to enforce rights recognized under the Act. The spouse, however, is limited to what is left in the net estate, after creditors have been paid. At divorce, the cohabiting spouse could be assigned debt as well as fair market value of assets.

¹⁰ The Act includes special rules for cohabitants who marry one another. *See* Section 8.

¹¹ Several observers indicated this in their emails to the committee. *E.g.*, email from Cathy Sakimura to co-chairs, Reporter, and Courtney Joslin, April 9, 2020.

¹² *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *see also In re Estate of Roccamonte*, 174 N.J. 381 (N.J. 2002) (involving a married decedent and nonmarital cohabitant of twenty-five years).

Is inclusion of married cohabitants the correct policy choice? If included, should any protections or more protections for that cohabitant's spouse be included? Is the prohibition on equitable division of assets in favor of a married cohabitant the proper policy choice?

- iii. The Act requires that cohabitants “live together as a couple.” The comments note that this excludes couples who live apart but remain committed and intermingled (“living apart together” or LATs). Although there is sparse research on the actual incidence of such couples, it appears that these may constitute as many as 10% of adults,¹³ and that older couples are more likely to be living in such relationships.¹⁴ The committee considered whether joint physical residence is necessary and desirable. It decided, in this first draft, to exclude committed couples who have physically separate residences. This means that couples in assisted living facilities, for example, who live on different floors would not be included.

Is the exclusion of living apart together couples the correct policy choice?

2. Section 9: Burdens of Proof

- a. Section 9 establishes a heightened burden of clear and convincing evidence for claims based on oral agreements and implied-in-fact agreements,¹⁵ and for the new equitable division remedy available under Section 12. Generally, in many states, the burden of proof on equitable claims or for breach of oral contract is preponderance of the evidence.¹⁶ The rationale for the higher burden of proof for these types of claims involving cohabitants is based in recognition that the Act creates new and possibly unprecedented rights and remedies for cohabitants – some very similar to the rights and remedies attendant to marriage - based upon what may be very informal relationships and agreements between those cohabitants. The intent of the heightened

¹³ Simon Duncan, *Why More Couples Are Choosing to Live Apart*, THE CONVERSATION (Jan. 3, 2020 at 4:40 AM), <https://theconversation.com/why-more-couples-are-choosing-to-live-apart-124532>.

¹⁴ *E.g.*, *Living Apart Together – A New Generation of Couples*, N.Y.U. DISPATCH (June 4, 2018), <https://wp.nyu.edu/dispatch/2018/06/04/living-apart-together-a-new-generation-of-couples/> (“[R]ecent studies are showing it is most popular among people aged 50 and older”).

¹⁵ 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 (1981).

¹⁶ *E.g.*, U.C.C. § 2-201:49 (Am. Law. Inst. & Unif. Law Comm’n 2019) (“The burden of proving the terms of the oral contract requires proof by a preponderance of the evidence.”); *but see* 17B C.J.S. Contracts § 932 (2020) (“In the case of an oral contract, the party relying on its existence must prove that the contract was clear and precise, and the party has a particularly heavy burden to establish objective signs of the parties’ intent to be bound.”).

burden is to incentivize courts to take a hard look at the evidence supporting these claims, particularly where the parties have not formalized their agreement.

b. Major issues for discussion:

- i. *Should the Act simply remain silent and defer to other state law on the burden of proof?*
- ii. *Or are cohabitants' claims sufficiently unique to justify a heightened burden of proof?*

3. Remedies and the Extraordinary Relief Available Under Section 12

a. Remedies.

- i. The Act allows a court to equitably distribute “assets acquired and liabilities incurred as a result of the efforts of either cohabitant during the cohabitation, without regard to legal title.”
- ii. Section 12 is derived from states’ definitions of marital or community property to be used in determining what property can be distributed at divorce.

b. Major issues for discussion:

- i. *should cohabitants who remain married to someone else be precluded from seeking equitable division?;*
- ii. *does the property to be divided include passive or active appreciation of assets and liabilities acquired prior to the cohabitation?;*
- iii. *should the property to be divided exclude assets acquired by inheritance or gift during the cohabitation, as would be true in most states with a marital property or community property system?; and*
- iv. *does Section 13 adequately protect the rights of third-party creditors who do not have knowledge of potential property rights established by Section 12 for the nonmarital partners?*