

Memorandum

To: Drafting Committee on Economic Rights of Unmarried Cohabitants
From: Mary Devine and Craig Stowers, Co-Chairs; Naomi Cahn, Reporter
Date: Nov. 13, 2019
Re: Draft to be considered at Dec. 6-7 Meeting of Drafting Committee

For the first time, we will be reviewing a draft together as a committee. There are many issues to be addressed. This memo provides an overview of what we have been doing since last we met and a preview of what we hope to accomplish at the meeting.

As we worked on the attached draft for your consideration, we tried to remain focused on the charge to the committee, while creating a broadly enactable solution to identified problems. As a reminder, the study committee, Scope, the Executive Committee, and members of this committee noted the following as the impetus for this project:

- The exponential increase in the rate of nonmarital cohabitation in the United States coupled with an equally significant increase in society's mobility
- A substantial lack of uniformity in those states (a majority) which accept that cohabitants have economic rights to enforce when their relationship ends
- The lack of predictable results or legal recognition of the cohabitants' intent or expectations when they break up and a dispute arises

At our last meeting, we discussed the need for the act in the context of the myriad situations in which disputes over economic rights might arise when unmarried people cohabit and move between states. To ensure broad acceptance and enactment, our final act should (i) maintain the integrity of settled state law, (ii) provide significant public benefit, (iii) minimize the diversity of state law, and (iv) provide a targeted response to the most significant issues raised. This draft is a starting point for our deliberations to achieve that goal.

We believe this draft presents a rational approach to some of the most significant issues we have been tasked with addressing. It also raises issues requiring discussion and resolution, no matter which approach(es) we finally adopt, and provides some direction on simple, logical, enactable solutions. We hope this leads to a final product which provides (i) legal recognition to the fair and reasonable expectations of cohabitants, and (ii) remedies in limited situations when the parties fail to protect themselves adequately because it would be fundamentally unfair to do otherwise.

As you read through the draft, please note the following intended deviations from ULC drafting conventions for purposes of this draft only. Where "Notes" appear in the draft, they are preliminary notes primarily addressed to you, the committee. These notes capture some of the ideas generated during the committee's or the drafters' prior discussions or help explain some of what we are trying to do. Section 103, which we expect will ultimately become the "Scope" provision of the final act, was drafted in current form to provide guiding principles for

consideration during the meeting. We plan to start the meeting on Friday with this Section and a discussion of these principles to help define the parameters of our deliberations.

Summary of the Draft

- Article 1 sets out general provisions, including definitions and a statute of limitations.
- Article 2 addresses both explicit and implied-in-fact agreements. It sets out different standards for showing the existence of each type of agreement.
- Article 3 addresses unjust enrichment, recognizing that such claims can exist between nonmarital cohabitants, albeit with a heightened burden of proof.
- Article 5 set out miscellaneous provisions.

In Article 4, we have included a bracketed provision that creates rights and remedies by operation of law, based upon the status of the parties. Article 4 recognizes Presumptive Equitable Partnerships (“PEP”s) that are established upon proper showing that the parties cohabited for some definite period (e.g., 5 years) or a lesser period if they shared child care responsibilities. The PEP defined in Article 4 would be imposed by a court, regardless of the parties’ intent (Article 2) or the existence of unjust enrichment (Article 3).

We want to alert you to several issues that the committee will want to discuss regarding PEPs. First, many people cohabit because they want to live together but affirmatively do not want to be married. We take it that such cohabitants also would not want to have the state impose a marriage-like legal status on them, with all the attendant legal rights and obligations that such status mandates. Relatedly, one rationale for this decision not to marry may be that these couples are not financially or emotionally ready to enter into the legal relationship of marriage. If enacted, would Article 4 impose a legal relationship on couples for which they are not prepared or otherwise do not wish to undertake? And if so, would it impose financial rights and responsibilities without regard to their circumstances and intent not to enter into any legal association?

Second, and perhaps of greater concern, the inclusion of Article 4 may have a major negative impact on the chances for enactability. For these reasons and due to the concerns voiced about this approach in our first meeting, Article 4 currently appears in brackets.

We look forward to our discussion on Article 4 and these (and other) issues.

Issues for Consideration

Other specific issues on which we would appreciate committee guidance are set out below.

1. The definition of cohabitant in Section 102(2) raises a series of policy issues:
 - *Age at which an individual is eligible to accrue rights as a cohabitant.* Can a cohabitant enter into an agreement, or become eligible for a PEP, prior to reaching the age of 18, assuming that the cohabitant would be permitted to marry under state law? Should the Act instead specify that a cohabitant must reach the

age of 18 in order for any claims to arise under the Act? For example, should the five-year period for a PEP begin only after either or both cohabitants reach the age of 18?

- *Eligibility to marry one another.* We have included protection for an “innocent” cohabitant, comparative to that available to a putative spouse. Some Commissioners have raised questions concerning whether the claims available under the act should, on the one hand, be available if one of the cohabitants was married, and, on the other hand, be available regardless of whether either party is married. As the note indicates, the Committee may need to consider adding provisions concerning putative cohabitants.

2. The definition of “termination of the cohabitants’ relationship” in Section 102(11) is adapted from the Uniform Partnership Act.

- Consider whether this definition is appropriate for any claim brought under the act. For example, one obvious situation concerns allocation of the burden of proof with respect to notice of intent to end the relationship. This may be a substantive issue, rather than a definitional issue.
- Note that there may also be concerns about deployed servicemembers, which need to be explored.

3. Section 104 addresses the impact of the cohabitants’ subsequent marriage to one another. Questions include:

- How does the subsequent marriage affect any claim that could be based on the cohabitation?
- Should the statute of limitations be tolled for the entire duration of the marriage?

4. Section 201 addresses sexual conduct as the “sole” consideration for the agreement. Does this need additional explanation?

5. Section 204 addresses the timing of an action for an agreement between cohabitants. Should the Act allow for enforcement of an agreement during the period of cohabitation?

6. Choice of law issues appear throughout the draft, such as Sections 102(2)(definition of “cohabitant”) and 207(a)(2)(determination of unconscionability). We look forward to guidance from the Committee on how to resolve these policy questions.

7. Should the Act include tort claims that could be brought between the cohabitants or between a cohabitant and a third party based on the cohabitation? This is relevant to the definition of “economic right” in Section 102(5) as well as the discussion of the Scope of the Act.

The meeting

We have only two days to address these issues and more, make decisions, and draft language. We recognize there will not be time to dive as deeply into all of the issues as we would like. As your co-chairs and reporter, we will do our utmost to ensure the discussion is productive.

Our agenda will thus include a focused general discussion of the scope and general direction of this first draft. We need to read line-by-line and make tentative decisions regarding Articles 1 through 3, which in our view are the core of the project. We need to have a robust discussion of the advisability of including Article 4, the presumed equitable partnership provision. Depending on where we end up on that concept, and if time permits, we need to read that article line-by-line.

Please come to the meeting having read and thought about the entire draft. Everyone will be given a chance to be heard on any issue necessary to facilitate our deliberations. Please prioritize the issues you wish to discuss. We all want to address the critical issues. Issues of lesser significance should be held in abeyance, and time permitting we promise to circle back to take them up later Saturday. Please try to avoid repetitive comments.

By Saturday afternoon, we expect the committee to reach consensus on the core articles sufficient to enable preparation of a second draft for our February 2020 meeting, all with a view to having a first reading draft ready by next summer.

Thank you in advance for your consideration and assistance in making the very best use of the limited time we will have when we meet in December.