

To: ERUCA Drafting Committee

From: Barbara Atwood

Re: Draft for web conference on April 7, 2020

My compliments to Naomi on the really helpful commentary in the draft and on tweaking the black letter to conform to policy positions reached in the last go-round. Here are some thoughts about a few provisions in the current draft.

1. Section 104(a): This provision excludes claims brought by a cohabitant if he or she couldn't marry the other cohabitant "under law of this state." The exclusions would apply to incestuous relationships and also underage marriage. As to incest, the most common question that arises today concerns first cousin marriages – banned in about half the states but recognized in almost all states if entered into in a state that permits such marriages. In other words, almost all states have concluded that such marriages do not violate fundamental public policy even if there is a statutory prohibition in the forum. If a cohabitation between first cousins begins in State A, where first cousin marriages are permitted, and ends in State B, where first cousin marriages are prohibited, would Section 104(a) make the act unavailable? Perhaps the commentary could suggest an approach that looks to a state's fundamental public policy.

As to underage marriages, would Section 104(a) exclude claims between cohabitants if the cohabitation began at a time when one or both individuals were minors but lasted through their attainment of majority? Perhaps we could say something like "This [act] does not apply to a claim brought by a cohabitant if a marriage between the cohabitants at the time of the assertion of the claim would not be recognized under law of this state..."

2. Section 105(a) seems to say ordinary contract law and equity principles apply, but the draft does change that background law at various points – so do we need a "Except as otherwise provided in this [act]"?
3. Section 106(b) provides a blanket rule that cohabitation is sufficient consideration for a cohabitation agreement. I believe this is a response to the case law in which courts apply excessive scrutiny to the element of consideration in cohabitation contracts and often conclude that consideration is inadequate or against public policy (where the sexual relationship seems to be an inseparable part of the agreement). This provision also more or less parallels the treatment of consideration in premarital agreements under the UPMAA. I think we may be going too far here. Marriage and cohabitation are not fungible for purposes of consideration, since the status of marriage carries all sorts of legal benefits and responsibilities. Also, in the context of premarital agreements, marriage is central to the parties' agreement. In contrast, cohabitation does not carry with it a set of default legal obligations and benefits, and

cohabitation agreements may or may not make the cohabitation the central bargaining chip. Homemaking services may be the consideration, and sometimes other kinds of benefits are provided in exchange for a promise. Since we don't require any set length of cohabitation, this provision seems to say that a cohabitation of any duration constitutes sufficient consideration for any kind of agreement, even a promise to transfer significant wealth. Is that what we intend? Would it be better to incorporate ordinary contract principles for cohabitation agreements, providing that the consideration for a cohabitation agreement is presumed to be adequate, without specifying that the cohabitation itself is the consideration and without making a blanket statement that it is sufficient? And do we need to say something somewhere about sexual services?

4. Should Section 110 mention unjust enrichment in the blackletter, to signal to the reader what we have in mind and to distinguish it from Section 111?
5. Section 111 is probably the most important section in the draft. It makes sense to me to impose limitations on this special remedy for cohabitants who are married to other people, but I'm wondering if Section 111(b) has it right. As it stands now, the married cohabitant can't get any benefit from the cohabitation, such as a promise of compensation for work performed – a benefit that actually might help the spouse in the wings. On the other hand, the unmarried cohabitant can assert a claim, such as a share of property acquired – a claim that might disadvantage the spouse in the wings. I don't have a solution (!), but I'm just pointing out the potential illogic of the provisions as they stand.

As to Section 111(c), I continue to think we need criteria – a clear definition of when this claim for equitable division arises – rather than a list of factors. Our definition of “cohabitant” actually contains some substantive elements that might work in this section more than in the other parts of the draft. For purposes of contract or ordinary equitable remedies, it doesn't matter if cohabitants “live together as a couple *in an intimate, committed relationship and function as an economic, social, and domestic unit.*” Cohabitants who live together but maintain total independence still can contract and still can have claims for unjust enrichment. But for our Section 111 remedy, we could require that the cohabitants meet the elements of that definition. In other words, we could limit that full definition to Section 111, calling it something like “committed cohabitant relationship,” and define “cohabitant” for the rest of the act simply as “one of two individuals who reside together as a couple.” Just a thought!