

To: ERUCA Drafting Committee
From: Andrea Boyack, ABA RPTE Section Advisor, Courtney Joslin, Observer, and Catherine Sakimura, Observer
Date: January 21, 2020

Dear Drafting Committee:

Thank you for allowing us to participate in this important project.

To assist with the next round of drafting, we have included here a proposal that seeks to implement what was discussed at the meeting on December 7 and 8, 2019.

At the meeting, we heard interest in continuing to consider an option that sets forth default protections for those cohabitants in sufficiently committed relationships. Some who were supportive of this concept raised concerns about the December 2019 draft's lack of guidance with respect to the remedies available to couples in these types of committed relationship.

The draft below seeks to address these concerns. It does so by setting forth a set of more specific default protections for such couples. Rather than drawing from marriage-based or marriage-like rights, this proposal instead draws from business partnership law.

We think business partnership law has a lot to offer here. Among other things, business partnership law serves as a good example of how, in other contexts, the law imposes rights and obligations on parties involved in a joint venture, even in the absence of formal agreement. Indeed, under the Uniform Partnership Act, a mutual endeavor can be treated as a business partnership even if the parties did not intend for it to be treated as a business partnership and even if they had no idea that such a legal regime existed or what those legal rules were. The critical question under the Uniform Partnership Act is whether the mutual endeavor was voluntary and consensual.¹ Where the law recognizes a business partnership, then the law of partnership provides a set of default rules that apply to that endeavor. The following proposals seeks to implement a similar approach for cohabitants.

Before setting forth the proposal, however, we also want to include information about the importance of including a set of default protections in this Uniform Act.

I. CURRENT STATE OF THE LAW

A. Current majority approach

Today, the majority approach in the states is to allow former unmarried participants to pursue contract and equitable claims, the same claims that are available to any other person. *See, e.g.,*

¹ Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 386 (2007).

D. Kelly Weisberg & Susan Frelich Appleton, MODERN FAMILY LAW 401 (6th ed. 2016) (“The majority follows *Marvin* in recognizing express and implied agreements as well as equitable remedies.”); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 Fam. L.Q. 309, 315 (2008) (“Today, *Marvin* represents, at least in the United States, the dominant approach to cohabitant claims.”). *See also* Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. Rev. 912, 987 (2019). This approach is based on the 1976 California Supreme Court decision in *Marvin v. Marvin*.

B. History of current rule

Prior to *Marvin*, many courts refused to allow unmarried cohabitants to pursue claims they otherwise would be entitled to pursue because, at the time, their cohabiting relationship was criminal behavior. Hence, some courts held that even contracts between unmarried cohabitants were unenforceable as a violation of state public policy. *See, e.g., Wallace v. Rappleye*, 103 Ill. 229, 249 (1882) (“An agreement in consideration of future illicit cohabitation between the plaintiffs is void.”). *See also* Restatement of Contracts, § 589 (1932) (“A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal.”).

Thus, the effect of the *Marvin* rule was *simply to remove the legal bar* that had prohibited former nonmarital partners from pursuing claims that would otherwise be available to them. Under *Marvin*, no rights are extended to the parties by virtue of their relationship.²

C. Application of *Marvin* in practice

What we know about this existing law is that it provides very limited and often inadequate protection to former nonmarital partners. First, as is true with married spouses, very few nonmarital partners enter into express agreements regarding property distribution upon dissolution. Accordingly, the fact that such agreements are enforceable under *Marvin* helps very few people.

With respect to other remedies available under *Marvin*, they too have offered little protection to former partners in practice. Columbia Law Professor Elizabeth Scott puts it this way: former nonmarital partners “have not had an impressive record of success in the post-*Marvin* period.”³ Professor Marsha Garrison puts it even more starkly: “[T]here are [few] reported appellate decisions upholding judgments in favor of *Marvin* plaintiffs, [and] there are more decisions affirming judgments against *Marvin* plaintiffs where the trial court found insufficient evidence of a cohabitation agreement or unjust enrichment.”⁴

² *See, e.g., Sands v. Menard*, 904 N.W.2d 789, 801 (Wis. 2017) (“That [the cohabitants] were romantic cohabitants is not central to the merits of [the plaintiff’s] unjust enrichment claim. For example, if [the defendant], instead, had a joint enterprise to accumulate wealth with his . . . next door neighbor . . . an unjust enrichment claim by that person would require the same proof as . . . required of [the female cohabitant]. *Watts* simply provided that cohabitation between unmarried romantic partners is *not a bar to an otherwise valid claim of unjust enrichment. It did not provide that the romantic relationship created the claim for relief.*” (emphasis added).

³ Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in *Reconceiving the Family: Critique on the American Law Institute’s Principles of the Law of Family Dissolution* 331, 349 (Robin Fretwell Wilson ed., 2006).

⁴ Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 Fam. L.Q. 309, 319 (2008).

Former nonmarital partners are likely to lose or receive only nominal recoveries even when the parties raised children together. “38% of all cohabiting couples” “had at least one biological child in the household.”⁵ Parties fare poorly under the existing rules, even when they lived together for very long periods of time. *See, e.g., Carney v. Hansell*, 831 A.2d 128, 130, 137 (N.J. Super. Ct. Ch. Div. 2003) (together 16 years, child in common).

While U.S. law in this area has remain stagnant, other countries around the world have moved towards extending default rights and protections to unmarried cohabitants. Countries that do so include: Canada, Australia, Sweden, Norway, Ireland, Scotland, Yugoslavia, Serbia, Croatia. *See, e.g., Anna Stepien-Sporek & Margaret Ryznar, The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75 (2016).

II. PROPOSED CHANGES

Definitions:

“Cohabitation Agreement” means the agreement, whether written, oral or implied, among the cohabitants concerning their economic rights, including any amendments to the cohabitation agreement. Cohabitants are bound by their cohabitation agreement whether or not the cohabitant executes any written expression of the cohabitation agreement. A cohabitation agreement is not subject to any statute of frauds.

Adapted from Delaware Uniform Partnership Act definition of “Partnership agreement”

“Economic rights” means a legally cognizable interest in, responsibility for, or liability with respect to all property, real, personal or mixed, tangible or intangible, or any interest therein, including without limitation financial obligations or assets.

Adapted from Delaware Uniform Partnership Act definition of “Property”

Section 201. Cohabitation Agreement, Generally.

(a) The economic rights of parties found to be cohabitants, pursuant to Section 202, are governed by the cohabitation agreement, which includes any written or oral expression of the cohabitation agreement between the parties as well as the terms of an implied-in-fact cohabitation agreement, as described in Section 203. If the parties have entered into an express cohabitation agreement and satisfy the requirements under Section 202 for an implied-in-fact cohabitation agreement and any express cohabitation agreement between the parties is inconsistent with any of the provisions of Section 203 controls, or if the cohabitants manifest an intent to have the express cohabitation agreement exclusively govern the economic rights between the parties, then the express cohabitation agreement shall govern. To the extent an express cohabitation agreement does not otherwise provide, Section 203 governs relations among the cohabitants who meet the requirements of Section 202.

⁵ FIONA ROSE-GREENLAND & PAMELA J. SMOCK, *Living Together Unmarried: What Do We Know About Cohabiting Families?*, in HANDBOOK OF MARRIAGE AND THE FAMILY 257 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013).

(b) (1) Notwithstanding the foregoing, a term in a cohabitation agreement is not enforceable to the extent that it: (A) adversely affects a child's right to support; or (B) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this Act.

(2) A term in a cohabitation agreement which defines the rights or duties of the parties regarding physical or legal custody, parenting time, access, visitation, or other custodial right or duty with respect to a child is not binding on the court.

(c) A cohabitation agreement may not restrict the power of a cohabitant to disassociate from the cohabitation or unduly penalize any such disassociation, nor may a cohabitation agreement establish a full indemnity for one of the cohabitants.

(d) It is the policy of this section to give maximum effect to the principle of freedom of contract and to the enforceability of cohabitation agreements.

(e) A person's capacity to contract is not affected by that person's intimate relationship status with any contract counterparty, and an agreement establishing economic rights between cohabitants is not void as against public policy. [This act does not impact state law prohibiting enforcement of contracts exclusively for sexual acts and services as void for public policy.]

(f) Consideration shall be presumptively present in any cohabitation agreement, whether or not cohabitation occurs prior to the commencement of cohabitation.

Subsections (a), (c), and (d) are adapted from Delaware Uniform Partnership Act § 15-201

Section 202. Existence of Implied-In-Fact Cohabitation Agreement. Persons are deemed cohabitants and are deemed to have entered into an implied-in-fact cohabitation agreement when they manifest the intention to combine as an economic, social, and domestic interdependent unit, as determined based on the totality of the circumstances, including the following factors:

[insert factors here]

Section 203. Implied Terms. To the extent that they have not expressly agreed to the contrary, cohabitants shall be deemed to have agreed to share and distribute their economic rights as follows:

(a) The "cohabitation period" shall commence at the start of the parties' cohabitation and terminate upon the termination of the cohabitation.

(b) Upon termination of the relationship, each cohabitant is entitled to and responsible for an equal share of the property and associated obligations acquired during the cohabitation period through the labor or efforts of either cohabitant, regardless of in whose name the property is titled, with such property valued as of the date of termination of the relationship, and to seek support.

(c) During the cohabitation period, each cohabitant has equal rights in the management and conduct of the household's business and affairs.

(d) The parties intent to form a joint household for mutual benefit and their relationship shall not be construed as one of employer and employee.

(e) Upon death of one cohabitant, the surviving cohabitant shall have the right to obtain the same distribution from the estate of the deceased cohabitant as would a spouse under the laws of the state, including but not limited to:

- (i) the intestate share of the estate, if the decedent cohabitant died without a will disposing of the entire estate; or
- (ii) the elective spousal share; or
- (iii) rights to community property.

(f) Upon termination of the cohabitant's relationship other than by death of one of the cohabitants, each cohabitant shall be liable to the other cohabitant for the cohabitant's share of any obligation incurred (i) in connection with maintaining the household, or (ii) to obtain a benefit for both cohabitants. Upon death of one cohabitant, the estate of a deceased cohabitant is liable for the cohabitant's share of obligation any obligation incurred (i) in connection with maintaining the household, or (ii) to obtain a benefit for both cohabitants.

Subsections (a), (b), (c), and (f) are adapted from Delaware Uniform Partnership Act §§ 15-401 & 402 and §§ 15-806 & 807