My reactions to today's meeting

1. I agree with John Langbein that folks don't agree to share assets when they first move in together – that is not what they are thinking about. My own experience in the LGBT+ community (personal experience and those of friends and attendees at the numerous conferences I used to do on property rights of unmarried cohabitants is this: the expectation upon moving in together is not about assets, but rather about the relationship – an expectation that it is real and will never end (except by death).
2. As to the factors in Section 12, I think reliance/change of position is a consideration. I would never have accepted my first legal job in Montgomery. AL but for the fact that I thought I was in a permanent relationship with that gal in Alabama. I would never have sold my home in Austin but for the fact that I thought I would be permanently residing with that new gal in Austin. And, even before that, I would never have moved from London to Liverpool but for the fact of what I thought was a permanent relationship with the gal who was re-entering medical school in Liverpool – you get the point – reliance and change in position based on the notion that the relationship was more permanent than it turned out to be strikes me as a factor. (I worry that expressing this could open up a back door to fault as a factor – but maybe that is OK as a factor in this context. The only fault is really the misrepresentation that the relationship is permanent when it really isn't. These hypos are examples of the case of one committed partner, which I think should be acknowledged so long as the expectation is based on reasonable expectations given the facts.)
3. The more extraordinary (and therefore hard to obtain) the remedy in Section 12 still worries me in the realm of taxation. Any property transferred from partner A to B, if appreciated in value, will cause a US v. Davis recognition of gain to the transferor. And I have a tax colleague who thinks this property upon receipt by the other party should be taxable income to that partner – so double tax (even though there is a revenue ruling in which the IRS say the recipient -- i.e., the person in Mrs. Davis's shoes -- is not taxable upon receipt).
4. As a property/tax/wills prof I focus on the gaining of equitable property rights in cases like these of unmarried cohabitants. When does the non-titled, non-earner, get these rights – during the cohabitation? Or only upon dissolution so that you can't even view the rights as vested before dissolution.
5. I also worry about the priority of claims. I have raised before the facts of the Olver case in Washington – 168 P3d 348 (2007) – I do view Washington as the preferred route – providing a status based remedy which the Uniform Commissioners have rejected – at the moment of death the female non-titled partner was vested in 50% of the acquired property – which means that property was not subject to third party claims against the male partner (in this case a tort claim that would have taken all his property). If there is any way to make this partner claim have some priority that would help in my view. Also many other countries (Canada, Scotland, European countries have status based remedies based on cohabitation.
6. There were questions raised by several commissioners about what evidence we have that people entering non-marital cohabitation living arrangements even think about rights in assets. We do have evidence based on numerous cases of actual contracts – usually entered into by higher earning folks – either those radical feminists who have been opposed to marriage—or same-sex couples for whom marriage was not an option. I think the point of this act is to protect the dependent partner in lower income groups – with a default rule that applies in the absence of a contract. So I'm not sure how extraordinary Section 12 should be viewed. 20 year relationship raising three children together and ended by death? Seems like common law marriage to me – and I would not be opposed to reviving that rule. I do think the ban on

common law marriage has gotten in the way of protecting dependent persons who would normally win on the common law marriage claim.

7. And, by the way. Mrs. Hewitt, in the Hewitt v Hewitt case from Illinois, rejecting Marvin claims, was really married. They had their first child while students at Grinnell (located in Iowa) and started telling folks then that they were married. Iowa recognizes common law marriage and so Illinois should have recognized their Iowa marriage. Bad lawyering in my view.

I have loved participating in this project as an observer. And I look forward to the final product – even though I obviously disagree with some of the positions taken, it does strike me as marginally helpful – at least to the Mrs. Hewitts of this world.

So thank you for your work.

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