**Committee Memorandum**
**Full Act for Consideration on November 6 & 7**
November 2, 2020

***Introduction***

We look forward to seeing you later this week. **We plan to meet on Friday from 10 Central until approximately 11:45, and then return from 2:30-4:45 CT. Our plan will be much the same for Saturday, although we are always hopeful that we will finish up early.**

Attached to this Memo are two versions of the Act. Our first goal for the 6th and 7th is to reduce that number from two to one! Our second goal is to improve our selection by making some key decisions. We cleverly refer to the two versions as Version 1 and Version 2.

## *The **Big** Picture*

Version 1 of sections 3, 4, and 5 provides that all individuals may contract with one another and bring equitable claims against one another, regardless of whether they are cohabitants. Version 1 defaults to state law in almost all respects.

Version 2 of sections 3, 4, and 5 focuses only on cohabitants and their right to bring contract and equitable claims against one another even though they cohabit. Version 2 carries forward some familiar provisions found in earlier drafts of the act (e.g., "cohabitation agreement" "termination of cohabitation", no exclusivity of remedies under the act, when claims accrue to allow cohabitants to bring claims without having to move out.).

Both Version 1 and Version 2 allow Equitable Division under Sections 6, 7 and 8 for the same class of individuals (remember, once Equitable Division was in section 11, and once it was Article 2). In Version 1, the individuals are called simply "cohabitants." In Version 2 the term "cohabitants" means those in the special class covered by sections 3, 4, and 5, so we need another term for those who are eligible to claim Equitable Division under sections 6, 7, and 8. We settled on "qualified cohabitants." Regardless, Version 1 and Version provide Equitable Division rights to the same class of individuals.

This draft of Equitable Division incorporates many changes based on our discussions. We are hopeful we captured most of the points although in some instances there were simply differing directions, so we chose (maybe incorrectly of course).

### *Various Points We Call To Your Attention*

(Numbered for ease of reference)

1. Unemancipated minors and those in incestuous relationships are not included in the class which may claim Equitable Division. However, in Version 1 whether those individuals can

contract with one another or bring equitable remedies is left to other state law, but in Version 2 they are not included in our remedies (but, again, may have other state law rights).

2. To ensure that there is no confusion about remedies against deceased cohabitants we have we have included in the definition of cohabitant the personal representative for a deceased cohabitant (and certain agents for others).

3. We specifically exclude sexual services from the definition of domestic services.

4. We decided that "economic rights" is not quite as descriptive as "economic interests" and have therefore changed the defined term. (We are looking for a new title and acronym for the act- any suggestions?).

5. Accordingly, in defining those eligible for Equitable Division, we used the term "shared" economic interests. Is there a better word? For example, would "intermingled" economic interests be better?

6. Oral agreements may modify Equitable Division (just as the individuals/cohabitants may make oral agreements for purposes of sections 3, 4, and 5). However, waivers must be in a record.

7. We separate out property division and liability apportionment, which may help readability.

8. We specifically note that no Equitable Division is required nor that any particular division is required.

9. We include 12 factors for a court to consider, presumably for purposes of determining whether to make any Equitable Division and if so how much, although we have not said either specifically. We do not weight the factors in the act, but we have tried to put them in what we might think is an order of importance. For almost each one of the factors, at least one person has advocated greater status than a mere factor.

10. A suggestion was made that we change the intro to the factors in (6)(c) to read *that the court "shall consider such of the following factors as may be relevant,"* but we were concerned that might sound dictatorial to a court, so we didn't make the change.

11. We have heard some suggestion that courts should not consider Equitable Division until adjudicating all contract claims and claims for unjust enrichment between the cohabitants. We have not adopted that suggestion because we thought that would be the natural order and did not need to be rigidly specified. Instead, we have made the presence of such claims a factor. However, if we wanted to specifically direct consideration in order, then the language could look like this:

Section *6 (a). Unless inconsistent with an enforceable agreement entered into at any time between the cohabitants, and based on a finding that contract rights and equitable remedies otherwise available to the parties are [pick one: insufficient/inadequate/do not do justice] as between the parties a court may order . . .*

12. When may a claim for Equitable Division be brought? May the cohabitants continue to live together as a couple and bring an Equitable Division claim or must the cohabitancy have ended? As drafted, no termination is required (but under Version 2, termination is important for timing purposes and is defined). If a time period during which an Equitable Division claim should be brought were desirable, the language could read as follows:

*A claim under Section 6 must be brought within [1] year of the termination or, if termination is due to the death of a cohabitant, [the period applicable to filing of claims against the decedent's estate under law of this state other than this [act]].*

13. We have tried to be ultra-sensitive to the rights of a spouse of a cohabitant. In each Version the factors and rules governing Equitable Division reference the rights of a spouse and provide that a cohabitant cannot receive more than would a spouse (Section 6 (d)(7) and (e)). In Version 1, section 8 provides that spouses come before cohabitants claims in Equitable Divisions. In Version 2, spouses have priority over any claim by a cohabitant. Regardless of policy, we believe the committee believes, and we agree, that enactability is enhanced by this sensitivity.

14. In Section 6(f), we give bracketed suggestions to the state about which courts should consider Equitable Division claims: presumably family courts where available and courts of general jurisdiction where not. A claim by a deceased cohabitant fits into this structure.

15. What about a claim against a deceased cohabitant? We considered two possibilities.

One, a claim for Equitable Division could be processed in the family court (or court of general jurisdiction) and then brought to the probate court for enforcement. Presumably that is what would happen to contract claims and claims for unjust enrichment against a deceased cohabitant under sections 3, 4, and 5. To illustrate, suppose an agreement called for a cohabitant to maintain a life insurance policy payable to the other cohabitant; the cohabitant dies, and the surviving cohabitant discovers there was no insurance. The surviving cohabitant would demonstrate a breach in one court and then appear in the probate court with the claim. To preserve the right to bring the claim the surviving cohabitant would have filed a protective claim in probate court.

Two, Equitable Division claims could be considered directly by the probate court. (In principle, the act could direct even contracts and claims for unjust enrichment be brought in probate court if one cohabitant were deceased.) The "two step, two court" model more likely tracks the expertise of courts but clearly adds time, costs, and complexity to the whole process.

16. Section 7 contemplates that agreements between the cohabitants that affect Equitable Division rights are subject to some sort of special scrutiny. What is provided in this draft is based on earlier drafts and provides scrutiny akin to that of premarital and marital agreements. We are uncertain if such special scrutiny should be provided. If so, we are skeptical that it should be this language. Further, if we adopt Version 1, should we retain Section 7? If we adopt Version 2, should Section 7 apply to all agreements between cohabitants or only those affecting Equitable Division claims?

17. We have removed entirely the limitation that an agreement is not enforceable if it "operates to limit or restrict a remedy available for a cohabitant who, during the relationship, was a victim of domestic violence, sexual assault, or stalking as a result of the actions of the other cohabitant." While this is an important concept, this would seem to be an unconscionable term that could not be enforced by default state law.

18. Once you have read the two Versions you might also consider whether we ought to use the term "contract" or stick with "agreement" which we have done. That sort of discussion can be pursued in the Spring but if you have a strong reaction now that's great.

*Conclusion*

Although it ought to go without saying, we say again that none of what we have done is sacrosanct. We hope we are narrowing the issues and tightening the language but you will be the judge of that.

As noted above, we need to decide on Version 1 or Version 2. We expect – although we are often surprised – that this meeting will be the last session to discuss the choice between Version 1 and Version 2. That's not because it is not interesting, nor because it is not important, but because to govern is to choose. In principle, of course, we could let states choose which version to adopt. We are skeptical that states have any more wisdom on this particular point than we do and thus we are disinclined to consider that route. You are welcome to let us know in advance whether you like Version 1 or Version 2 but we will discuss them both regardless.

Thank you!

Mary Devine
Turney Berry
Naomi Cahn