Date: March 16, 2020

To: ERUC Drafting Committee

From: Barbara Atwood

Re: March 2020 Draft

Thank you for the opportunity to provide reactions to the current draft. You have done a great job of revising the draft in line with the February in-person meeting of the Drafting Committee. The Reporter's comments are extremely helpful. I'm glad that the Committee seemed to agree on the core principle that cohabitation in and of itself should not diminish an individual's rights under contract law or equity. My main concerns are with provisions that depart from that principle. I look forward to listening in on the conference call. Stay healthy, everyone!

Section 102(1): "Cohabitant" is defined to exclude an individual whose marriage "would not be recognized under law of this state other than this act." As you know, incest laws vary across the US. First cousins, in particular, are unable to marry in about half the states, but almost all states accept such marriages if entered into in a state where such marriages are valid – since first-cousin marriages are not deemed violative of fundamental public policy in most states. In the draft, if first cousins cohabit in State X – where their marriage would be permitted – and them move to State Y, where first-cousin marriages are prohibited, are they thereby excluded from the act? Similarly, adoptive siblings may be barred from marrying in some states and not in others. I suggest that relying on whether the marriage would be recognized under law of this state is too narrow. To be more consistent with the law of marriage recognition, we might say "…whose marriage to the other individual would be contrary to this state's fundamental public policy."

Section 102(4) and (5): Do these definitions taken together provide too narrow an approach? Economic right is anchored in domestic services or "property," and property, in turn, means anything subject to ownership. I'm thinking about situations where one cohabitant works while the other attends school to obtain a professional degree. Is an equitable claim for reimbursement by the working cohabitant against the degree-holder an "economic right," even though degrees are not property in the ordinary sense? Maybe I'm overthinking this!

Section 103(d): By providing absolute protection to the spouse of a cohabitant, the draft is giving cohabitants' claims a lesser status than all other claims against a divorcing spouse or an estate of a spouse. If a decedent enters a written contract that results in a debt owed by the spouse or the estate, the law generally permits the creditor to recover. In the context of divorce, the debtor spouse might owe reimbursement to the non-debtor spouse. Why shouldn't that general law apply equally to cohabitants' claims? Is the hostility toward cohabitants' claims the policy we want to promote? It also seems to conflict with Section 105(b).

Section 104(a): I simply don't understand the policy reflected in this subsection. Consider, for example, spouses who live separately in all respects but remain married in order to maintain

health insurance coverage for one of them (a common scenario). The wife enters into a long-term cohabitation during which she works for her cohabitant's business. Under the terms of an express agreement, her cohabitant promises to pay her when the business is sold. After the cohabitation ends and the business is sold for substantial profit, why should she be denied any remedy under this act?

As to the comment explaining that the charge of the committee was to draft "an unmarried cohabitant's act," I can assure you that the JEBUFL, in its joint proposal with the JEB for Trusts and Estates, understood the adjective "unmarried" to refer to the relationship between the cohabitants, not to a cohabitant's relationship with a third person.

Section 104(b): This is oddly phrased for a subsection in a section titled "Exclusion."

Section 106(b). Stating that cohabitation in itself is sufficient consideration is a change in the common law, as I understand it. As Professor Antognini has demonstrated in her research, courts often use failure of consideration as a reason for not enforcing cohabitant contracts. While courts may thus misuse the element of consideration, I am not convinced that simply declaring cohabitation to be sufficient consideration is the solution. As the Reporter's comment notes, courts analyzing premarital agreements have typically taken the approach that marriage provides the consideration, but cohabitation and marriage don't have the same legal meaning. Marriage triggers a multitude of consequences in law; cohabitation does not. Since we are not imposing a time requirement for cohabitation, declaring that the cohabitation itself is sufficient to support all cohabitant contracts simply doesn't make sense to me. For example, should a cohabitation of six months provide sufficient consideration for a contractual promise to support a cohabitant for life?

Section 107(a): Good policy. Minor point in second sentence – "The fact that the parties are <u>or were</u> in a cohabitant relationship…."

Section 107(d): In some states, the filing of a separation action also terminates the marital community. Perhaps "separation" could be added as a bracketed term. More substantively, this subsection seems to keep alive but suspend all contractual and equitable claims if cohabitants marry until they divorce or one of them dies. I definitely agree with the Reporter's comment that courts are beginning to consider premarital cohabitation in dividing up marital property, particularly where homemaking services have been rendered over a long premarital period. That is a good development, but the draft's language doesn't seem to get us there. It instead freezes a cohabitant's claims and lets them spring back into life at divorce or death. Is that what is intended? For example, assume cohabitants agree that they will keep separate all earnings and debt for as long as they live together. Assume their agreement doesn't mention marriage. They cohabit for two years, then marry, and during the marriage, one of the cohabitants acquires substantial wealth through her medical practice while the other cohabitant devotes herself to caring for the couple's children. At divorce after 10 years of marriage, what is the status of that cohabitation agreement? Might a different approach better reflect most people's understandings – that marriage *presumptively* ends contractual and equitable rights arising out of the cohabitation?

Section 108: As several of us noted at the drafting committee meeting, this heightened burden of proof goes against the general policy of the act. I thought that the Drafting Committee agreed not to impose a heightened burden of proof as to equitable claims. Apparently, you have changed your mind?

The policy that seems to be driving this is a desire to avoid frivolous or hard-to-prove claims. The heightened burden of proof, however, means that a thumb is on the scale favoring the party resisting enforcement of the contract (or enforcement of equitable remedies). If the desire of the committee is to strengthen marriage over cohabitation, this provision does the opposite. In other words, it makes it more likely that someone can escape enforcement of an oral or implied contract (or an equitable claim) in a cohabitation context, a framework that will favor the more economically powerful cohabitant. I understand the enactability argument – but I do think that the policy is misguided. I hope you reconsider this.

Section 110. I would insert the word "enforceable" before cohabitation agreement.

Section 111. Again, I would insert the word "enforceable" before cohabitation agreement. As to this section in general, I believe we need to come up with some more precise criteria for when this right of equitable division would be available. It is simply too vague to leave it to the court's discretion according to a list of unranked factors. Individuals – to the extent they try to understand the law – should have notice of when this equitable authority of courts would arise. For example, assume two individuals move in together and cohabit for three years. During that period, one cohabitant acquires significant property through a professional practice while the other works at a menial job. All property is titled in the wealthier cohabitant. At the end of the 3-year cohabitation, can the less economically powerful cohabitant trigger an equitable division of property titled in the other cohabitant's name? I know we want to avoid a clear "status-based" remedy, but this section gives courts blanket discretionary authority to divide up property acquired during the cohabitation – without being moored to any clearly-required showing.

Section 112. Courts won't particularly like this provision, since it will require them to go through a complete marital/community property analysis before making any award. In other words, you're requiring courts to ask "what would you have received had you been married?" That can get pretty complicated, particularly if people have moved around, not to mention the complexities that can arise in a state whose law permits courts to take into account marital fault.