

**To:** ERUC Drafting Committee

**From:** Mary Devine and Craig Stowers, Co-Chairs; Naomi Cahn, Reporter

**Date:** January 16, 2019

**Re:** Possible issues to address in drafting a model or uniform law applicable at the termination of the cohabitation relationship due to separation of the parties or to the death of a party.

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This memo sets out potential issues for the Drafting Committee to consider as it moves forward in the drafting process. Once we have defined the issues, we can discuss moving forward with drafting at our March meeting.

1. **“Time” issues:** The Committee could consider separate provisions that establish: rights during a relationship; rights at dissolution through separation; and rights at dissolution through death.
2. **Definition of Economic Rights:** The Committee is charged with drafting an act that addresses “economic rights.” One issue is defining the scope of the economic rights to be considered at each of the different times.
  - A. Possibilities include:
    - i. Property (any type that would be considered marital/community property if they were married)
    - ii. Support rights (“palimony”), with continuing payments for some period after the relationship terminates
    - iii. Employee benefits (e.g., health care insurance, retirement accounts, etc.)
    - iv. State and local benefits (e.g., state tax benefits, rent control, etc.)
    - v. Tort suits
    - vi. Quasi-joint debts (e.g., one partner on a lease)
    - vii. Homestead and related rights granted to a surviving spouse (under state law at death)
    - viii. Other?
  - B. Possibilities do not include:
    - i. Health care decision-making
    - ii. Hospital and jail visiting
    - iii. Evidentiary privilege
    - iv. Federal benefits (tax, Social Security, military, etc.)
    - v. The establishment of common law marriage
3. **Coverage:** The Committee could consider whether the proposed act would apply only to intimate partners or should apply more broadly.
  - A. If the statute applies only to intimate partners, then:
    - i. is cohabitation required, given the increasing number of “living apart together” (LAT) couples?
    - ii. Must both parties be single, or can one partner be married to a third party?

- iii. Can one have relationships covered by the act with more than one person at the same time?
  - B. If the statute applies more broadly, then issues concern what limits should be included on:
    - i. The type of relationship between the parties (e.g., a legally-recognized family, such as siblings or parent-child, or intimate partnership)
    - ii. The number of people to be included.
- 4. **Explicit and implicit agreements:** The Committee could consider the status of explicit and implied agreements entered into between cohabiting parties.
  - A. One possibility would be to validate both forms of agreements through the following type of statutory provision: If the parties have entered into an express or implied agreement concerning the economic terms of their relationship, including property interests and future support, the nonmarital cohabitation itself shall not be a ground for refusing to enforce the contract.
  - B. Other options concern whether the act should validate only written agreements or whether contractual intent can be shown in other manners.
- 5. **Restitutionary Claims:** The Committee could consider the possibility of recognizing restitutionary claims. For example, if one unmarried cohabitant “owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.” Restatement (Third) of Restitution and Unjust Enrichment § 28 (2011). Remedies might include a constructive trust, such that ownership would be shared or transferred.
- 6. **Other claims in the absence of an agreement:** The Committee could consider presumptions with respect to the remedies available when there has been no agreement between cohabiting parties.
  - A. One possibility might be a presumption that property acquired by either partner during cohabitation is intended to be shared by the cohabitants if the cohabitation lasted for a defined period and the parties shared resources during the cohabitation.
  - B. Alternatively, a presumption might be recognized to benefit a custodial parent if the cohabitants had a child together and cared for that child during the cohabitation.
  - C. If the Committee decided to draft such a presumption, it could then consider situations in which the presumption could be rebutted.
    - i. For example, a presumption of shared ownership in property acquired during the cohabitation could be rebutted by various showings, including clear indications of contrary intent, either oral or written or by conduct, such as expressions of intent to preserve assets for children of a prior relationship.
    - ii. The act could spell out types of evidence that would be sufficient to rebut the presumption.
  - D. The Committee might consider whether the same presumption[s] should apply at separation and at death, or whether different presumptions should control each situation.
- 7. **Opt-in framework:** The Committee could consider whether an opt-in framework for defined economic rights might be appropriate, analyzing the pros and cons of such a possibility.
  - A. Such a framework might take the form of a civil union/domestic partnership statute, which imposes a distinct rights and responsibilities.

- B. Another possibility is a designated beneficiary statute, which allows the parties to opt into a menu of potential, customizable, and non-reciprocal options. For example, one party could decide to confer property rights, while the other might decide not to do so.
  - C. Another possibility is a state-sanctioned procedure for recording nonmarital agreements.
8. **Existing Doctrines:** The Committee would need to consider ways to ensure that the proposed act would not disrupt existing equitable doctrines and could include a provision that the law of contracts and principles of equity would supplement the act, except to the extent displaced by the act or another statute.
9. **Conflict of Laws & Statute of Limitations**
- A. The Committee could address the conflict of law issues raised in today's mobile society by formulating draft choice of law provisions in order to provide predictability and certainty for cohabitants from state to state. For example, states might be required to recognize and enforce cohabitation agreements entered into in another state or the rights and duties acquired by virtue of a couple's registration with a domestic partnership system of another state, unless contrary to a fundamental public policy of the forum state.
  - B. The Committee might consider including a statute of limitations to prevent stale claims.
10. **Potential additional observers**
11. **Other issues**