

Memorandum
Economic Rights of Unmarried Cohabitants
March 19, 2021

We wish you a Happy Spring and are delighted to share with you the latest draft of our Act. We look forward to our drafting time next Friday and Saturday and thank you in advance for your close reading and good thinking.

As you read this draft, please consider the following.

1. Name.

In the absence of Kenneth Arrow to guide us, our process was as follows. We polled the following names with the following results:

Uniform Unmarried Cohabitants Act = 41%

Uniform Cohabitants' Economic Remedies Act = 23%

Uniform Cohabitant's Claims Act = 23%

Uniform Cohabitants' Contractual and Equitable Claims Act = 5%

Among the 10 commissioners who voted, there was a tie between Uniform Unmarried Cohabitants Act and Uniform Cohabitants Economic Remedies Act. We then polled the two commissioners who had voted for other names, and the one who had not voted originally. By a slender margin of one we arrived at Uniform Cohabitants' Economic Remedies Act.

Of limited relevance is that your co-chairs and reporter would have opted for Uniform Cohabitant's Claims Act to avoid "unmarried" – the act does cover married cohabitants – and because we question whether it is good form to emphasize remedies rather than claims. However, in view of the season, as it were, we thought it best to follow the vote.

2. Incestuous. Questions have been raised about the definition of cohabitant and the use of the term incestuous. A member of the T & E JEB noted that his mother and aunt lived together for many years, "as a couple" in all ways except sexual. Mother has recently died. Would aunt have rights under our act? If that result were not desired does "incestuous" really cut off those rights. Our inclination is that between "lived together as a couple" and "incestuous" a court would not sweep mother and sister into the act but please consider the question.

3. Definition of Economic Interest Deleted. We deleted the term "economic interest" in the definitions and replaced it in the three places in the act where it was used with more direct language based upon the now deleted definition and the definition of contributions to the relationship. See specifically Sections 2(2) and 3(a); note we also modified 4(a) to simply refer to claims under the act.

4. Potential 3(c) for Medicaid. Please consider if we should try to limit the grumpiness of state Medicaid and similar entities by adding this language as a 3(c) [thanks Suzy]:

(d) This [act] does not create, diminish, affect or enlarge a state or federal agency's claim or right of recovery under 42 USC Chapter 7, Subchapter XIX against a deceased cohabitant's estate, nor does it affect the determination of a transferor's eligibility under a state plan under 42 USC Chapter 7, Subchapter XIX.

Alternatively, we could add a Legislative Note or a comment with specific language for those states where the issue arises.

5. Right But Awkward – 4(a). We think 4(a) says what we want it to say, but no one will confuse it with felicitous prose. Suggestions welcome. We have teed it up for Style too.

6. 5(d) Is An Improvement We Hope. We have always excluded sexual services from being contributions to the relationship. However, the comment was made that a court might refuse to uphold a contract or equitable claim between two parties notwithstanding our act not because they cohabit but because – horrors – of their sexual relationship. Accordingly, we added 5(d) to address the issue.

7. Crime of Violence. In 6(c) we selected “crime of violence” as our operative phrase, with a legislative note as you will see. Crime seemed too broad, felony too limiting. We are open to suggestions.

8. Section 8 and Married Cohabitants. Sec. 8 raises issues we have discussed often but we are not at all certain that we are on the same page.

The first issue is balancing the interests of a spouse and a cohabitant during lifetime. You will recall the problems that arise because amounts awarded in divorce are not formulaic. We have received comments that we need to address the issue or we will generate uncertainty and controversy. Accordingly, you will see 8(b) contemplates notice to a third party spouse when a cohabitant makes a claim against a cohabiting spouse and is based on the notion that claims in divorce are largely equitable and thus can be balanced with the rights of the cohabitant.

The second issue is balancing the interests of a surviving spouse and cohabitant when the cohabitant spouse dies. This issue is both easier and more complicated than the first. Probate rights are more definite than those in divorce but there is less room for equitable maneuver. To that end please consider these simple examples which will focus our discussion on the approach we want to take. Once we know the approach, we will draft appropriate language.

Turney and Kendra are married, and Turney is cohabiting with Ginger. If Turney dies –

1. ***Spouse Eliminates All Cohabitant Claims***. Will Ginger have a claim **at all** under this Act? In other words, will the claims she would have had under this Act be barred because Turney was married to someone other than Ginger at his death?

2. ***Cohabitant's Claims Are Creditor Claims That Come Ahead of the Spouse.*** Will Ginger have claims under this Act in both contract and equity with Ginger's claims being treated as creditor claims to be paid prior to the claims of Kendra as Turney's surviving wife?

3. ***Cohabitant's Claims Cannot Reduce the Spouse's Elective Share.*** Will Ginger have claims under this Act in **both** contract and equity BUT **those claims** cannot reduce what Kendra would receive below what her elective share would have been without Ginger's claims?

3A. ***Cohabitant's Contract Claims Come Ahead of the Spouse But Equitable Claims Cannot Reduce the Spouse's Elective Share.*** Will Ginger have claims under this Act in **both** contract and equity BUT the claims **in equity** cannot reduce what Kendra would receive below what her elective share would have been without Ginger's claims?

4. ***Cohabitant's Claims Cannot Reduce the Spouse's Intestate Share.*** Will Ginger have claims under this Act in **both** contract and equity BUT **those claims** cannot reduce what Kendra would receive below what she would have received in intestacy without Ginger's claims?

4A. ***Cohabitant's Contract Claims Come Ahead of the Spouse But Equitable Claims Cannot Reduce the Spouse's Intestate Share.*** Will Ginger have claims under this Act in **both** contract and equity BUT the claims **in equity** cannot reduce what Kendra would receive below what she would have received in intestacy without Ginger's claims?

9. You will see that we have begun adding comments to this newest draft of the Act. We will not discuss the comments next week but we hope you will begin reading them, and we very much hope you will send your comments along to us. The comments are very important for all uniform acts but especially for those, like this one, that break new ground.

10. Next Friday we will start at the beginning of the Act, but we will skip the definitions and only review those as needed while we read the remaining provisions. As always, you are invited to send us thoughts and comments in advance.

Thank you!

Mary
Turney
Naomi