

The Uniform Cohabitants' Economic Remedies Act (2021)

by
Laura W. Morgan*

I. Introduction

How states handle the economic consequences of cohabitating romantic partners' dissolution varies from state to state, with no consistently expressed underlying legal philosophy. Nonetheless, the most common methods can be summarized as follows: express contract, implied contract, quasi-contract, partnership, complete prohibition, and two major status-based regimes: Washington state's meretricious relationship doctrine and domestic partnership.¹

* Laura W. Morgan owns and operates Family Law Consulting in Amherst, Massachusetts, providing research and writing to family law attorneys nationwide. The author wishes to thank Barbara Atwood and Naomi Cahn for their guidance and instruction.

¹ See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 4, 221 (2010); Bailey D. Barnes, *Contracts for Cohabiting Romantic Partners*, 75 ME. L. REV. 101, 109-11 (2023); Eleanor Brown, Naomi Cahn, & June Carbone, *The Price of Exit*, 99 WASH. U. L. REV. 1897, 1925-27 (2022); *Chapter 3: Restitution at Home: Unjust Compensation for Unmarried Cohabitants' Domestic Labor*, 133 HARV. L. REV. 2124, 2128-36 (2020); Ana Mitchell Córdova, *First Comes Love, Then Comes Marriage: Cohabitation as a Framework for Conflicts Between Community Property and Common Law Marriage*, 14 EST. PLAN. & COMMUNITY PROP. L.J. 293, 329-34 (2023); Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571 (2022); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 926-27 (2019); Emily J. Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. 627, 635-36 (2021).

The most recent comprehensive survey of the varying approaches to the economic consequences of cohabitation may be found in Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: The US Approach*, 44 HOUS. J. INT'L L. 191 (Spring 2022). In summing up the various approaches, the authors state: [S]tates . . . have developed inconsistent approaches. Many states recognize the potential existence of both express or implied contracts and include equitable claims, some states have imposed writing requirements on cohabitants' agreements, and a few states refuse to accept domestic or household services as lawful consideration, reasoning that

Briefly, in express contract states, cohabitating romantic couples can make express agreements dictating how their cohabitation will be managed at dissolution.² States will not, however, enforce any contract whose consideration is deemed to be a meretricious relationship.³

In implied contract states, the court may find an agreement, even though not expressly stated by the parties, where the conduct of the parties clearly indicates their intention to create a contract.⁴

Under the quasi-contract approach, a court may look to the conduct of the parties and find, even absent an implied contract, that equity requires an equitable distribution of property to be

such services are inextricably intertwined with the sexual relationship or are typically provided without expectation of compensation when a couple shares a home. Even in states that do recognize remedies for nonmarital cohabitants, courts may still be reluctant to award relief. In declining to recognize a cohabitant's claim, courts sometimes reference either the meretricious nature of the couple's relationship or a desire to preserve marriage. There is no predictable result when cohabitants dissolve their relationship or when one cohabitant dies.

Id. at 194-95. Atwood and Cahn identified the following remedies: contract, implied contract, equitable theories such as quantum meruit and constructive trust/unjust enrichment, and statutory provisions governing cohabitation. *Id.* at 197-213.

An additional method was put forth by the American Law Institute, which has not taken hold. For an overview of the ALI Principles regarding cohabitation dissolution, see David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1469-70 (2001).

² See Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 102-04 (2021) (“[A]ll jurisdictions except for two state that they recognize express contracts entered into by a nonmarital couple).

³ *E.g.*, *Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976) (en banc) (“a contract between nonmarital partners is unenforceable only [t]o the extent that it [e]xplicitly rests upon the immoral and illicit consideration of meretricious sexual services”). See generally Gavin M. Parr, Note, *What Is a “Meretricious Relationship”?: An Analysis of Cohabitant Property Rights Under Connell v. Francisco*, 74 WASH. L. REV. 1243 (1999) (outlining what constitutes a meretricious relationship for cohabitants and the role of sexual intimacy in these contractual situations).

⁴ *E.g.*, *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976); *Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987); *Estate of Henry v. Woods*, 77 N.E.3d 1200, 1204 (Ind. Ct. App. 2017).

employed in the case.⁵ The equitable principles relied on are unjust enrichment and restitution.

Under the partnership theory, the courts may focus strictly on the business relationship between the parties, i.e., the court will examine whether the romantic cohabitants were engaged in a joint venture for profit. If so, the court can find that a general partnership exists under the law of business associations and order a windup of the partnership, which involves dividing the partnership's property.⁶

Finally, some states take the stance that any contract between cohabitants violates public policy and is prohibited. "Because the state seeks to incentivize marriage over cohabitation, providing any contractual protections to cohabitants would violate public policy."⁷

The need for some coherence is becoming more pressing, as cases concerning remedies upon the dissolution of cohabitating partners' romantic relationship are becoming more common:

In 1980, Americans' rate of marriage was 10.6 per 1,000 population and 63.2 percent of the whole population. By 2018, the rate of marriage declined to 6.59 per 1,000, and 53.4 percent of U.S. adults were married, down from 8.9 per 1,000 population and 58.9 percent of the whole population in 1995. . . . In addition to a decline in the rate and percentage of adults in a marital relationship, the age at which first marriage is entered has gone from 22 years of age in 1980 to 27.8 years in 2018 and is still rising.

Over that same period, the share of unmarried partners living together in the United States rose from 3 to 7 percent, with the number

⁵ E.g., *Suggs v. Norris*, 364 S.E.2d 159 (N.C. Ct. App. 1988); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). In application, quasi-contract is indistinguishable from quantum meruit. Tammy L. Lewis, *Standing in the Shadows: Honoring the Contractual Obligations of Cohabitants for Support*, 15 U. PUGET SOUND L. REV. 171, 191-94 (1991); Barnes, *supra* note 1, at 109-10.

⁶ Barnes, *supra* note 1, at 110. See also Antognini, *supra* note 2, at 127-30 (noting that some courts are willing to uphold contracts related to property distribution between former romantic cohabitants only where the contract relates to property and not to the relationship itself).

⁷ Barnes, *supra* note 1, at 111. E.g., *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016) (reaffirming the position that, consistent with the legislature's abolition of common law marriage, unmarried cohabitants may not assert claims for property rights that are rooted in marriage-like relationships). See generally Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 164-96 (2005) (discussing the public policy of the promotion of marriage over cohabitation).

of unmarried partners living together nearly tripling from 6 million to 17 million. Moving in together has become an important transition in relationships in the United States. Studies show that about 70 percent of first marriages among women under the age of 36 began in premarital cohabitation lasting an average of 32 months before marriage.⁸

To provide coherence in this area, in 2016, the Joint Editorial Boards on Uniform Family Law and Trusts and Estates Law of the Uniform Law Commission recommended the creation of a study committee to explore the feasibility and appropriateness of a drafting project on the Economic Rights of Unmarried Cohabitants. As explained by Barbara Atwood and Naomi Cahn,⁹

⁸ Ronald W. Nelson, *Cohabitation and Premarital Agreements*, 46 *FAM. ADVOC.* 37 (Summer 2023). *See also* Barnes, *supra* note 1, at 103-04 (“One of the most prominent evolutions in American society and culture over the last several decades has been the pronounced reduction in the number of people getting married. Incredibly, from 2018 to 2020, the United States recorded the lowest marriage rates since the country has tracked that statistic. Despite the generation known as millennials entering “peak marriage” age, the marriage rate in 2018 was just 6.5 new marriages per 1,000 people. In 2019, that rate dropped to 6.1 new marriages per 1,000 people. Meanwhile, in 2020, the marriage rate nosedived to 5.1 new marriages per 1,000 people . . . At the same time, cohabitation among unmarried romantic couples is on the rise. Since the 1940s and 1950s, American society has experienced a reckoning in family relations. These changing views about how love should be expressed and ordered, combined with declining religious adherence and the dwindling marriage rate, indicate that cohabitation among unmarried romantic couples will increase rather than decrease or stabilize. This remarkable shift of a bedrock institution in the United States over the last several decades makes a change in the law necessary.”); Elizabeth Hodges, Comment, *Will You “Contractually” Marry Me?*, 23 *J. AM. ACAD. MATRIM. LAW.* 385, 386 (2010) (“While marriage is typically still seen as the best option when joining two lives, unmarried cohabitation is accepted now more than ever. It is estimated that over sixty percent of couples now cohabit prior to marriage as opposed to eleven percent in 1970.”); Margaret Ryznar & Anna Stepian-Sporek, *Cohabitation Worldwide Today*, 35 *GA. ST. U. L. REV.* 299, 300 (2019) (“Between 2000 and 2010 alone, there was a 41% increase in unmarried couple households. Unthinkable and even criminal for much of history, cohabitation has become a transition to marriage or even a substitute for it.”). The latest census revealed that in 2020, nearly nineteen million Americans are currently cohabiting with, but not married to, an intimate partner. Emily J. Stolzenberg, *Properties of Intimacy*, 80 *MD. L. REV.* 627 (2021), citing Table AD-3: *Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. CENSUS BUREAU (Dec. 2020), <https://www.census.gov/data/tables/time-series/demo/families/adults.html>.

⁹ Professor Atwood is a Uniform Law Commissioner who chairs the Joint Editorial Board on Uniform Family Law, the group that originally recom-

The Study Committee began working in 2017, and its initial recommendation for the appointment of a drafting committee included consideration of provisions that might include: (1) an “opt-in” status for unmarried cohabitants who wish to share rights and resources while they cohabit; (2) remedies in express or implied contract for unmarried cohabitants when the cohabitation ceases because of dissolution or death, in the absence of an “opt-in” agreement; and (3) a status-based remedy providing presumptive remedies for couples who cohabited for a defined period or raised children together. . . .

UCERA seeks to harmonize the varying state approaches by enunciating the basis for nonmarital cohabitants to pursue remedies against one another. In doing so, the Act actually serves two purposes: providing certainty and predictability in the law while protecting the expectations of nonmarital cohabitants. Most states have not codified their approaches to nonmarital cohabitation, and UCERA provides standard language for enactment.¹⁰

The drafting process exposed the basic underlying conceptual problem for any law that seeks to define the rights and remedies of cohabitants when the relationship is terminated: was the act to be based solely on contract and equity, an act with an opt-in menu of alternative benefits and obligations, or an act that included a status-based remedy? The first draft for Committee consideration included a bracketed article setting forth a status-based remedy of “presumptive equitable partnership.”¹¹ The framework proposed in the first draft listed factors to determine whether a relationship qualified, such as duration, consistency, and intent to be interdependent. The draft also provided that cohabitants could agree to avoid the application of the status-based remedy.¹²

The second draft considered by the Committee contained a similar status-based remedy, again bracketed, denominated “Interdependent Economic Unit.”¹³ The bracketing signified that the material was not considered critical to the Act’s uniformity in

mended a drafting project on cohabitants’ economic rights. She was an Observer on the Drafting Committee for the Uniform Cohabitants’ Economic Remedies Act. Professor Cahn was the Reporter for the Act.

¹⁰ Atwood & Cahn, *supra* note 1, at 213-14.

¹¹ See Article 4, Draft for December 6-7, 2019 Drafting Committee, Economic Rights of Unmarried Cohabitants, Committee Archive.

¹² *Id.* at § 401(c).

¹³ Article 4, Draft for February 7-8, 2020 Drafting Committee Meeting, Economic Rights of Unmarried Cohabitants, Committee Archive.

adoption. The Committee ultimately decided against including a status-based approach and to focus on improving the provisions regarding claims based on contract and equity, as reflected in the simplified third Committee draft.¹⁴

Once the Committee decided on this approach, the Committee continued to generate drafts on how to implement the approach in a meaningful way:

[O]ne draft recognized a cohabitant’s right to a “fair and equitable division of property” acquired during the cohabitation as a result of the efforts of either cohabitant, with factors to guide a court’s discretion. That approach raised questions about the legal basis for the equitable remedy. Towards the end of the drafting process, the Committee settled on a different framework and developed a concept of “contributions to the relationship” as the justification for equitable relief.¹⁵

Atwood and Cahn believe that the final Uniform Cohabitants’ Economic Remedies Act (UCERA)¹⁶ offers a statutory framework for cohabitants’ remedies that is consistent with the common law in most states but does more than provide a “re-statement.” By recognizing contractual and equitable claims arising from contributions to the cohabitants’ relationship, the Act rejects the minority view that such claims will either resurrect common law marriage or destroy the institution of marriage.¹⁷

II. The Uniform Cohabitants’ Economic Remedies Act as Adopted (2021)

A. *What Is a Cohabitant*

In defining who qualifies as a cohabitant, the Act requires that two individuals “live together as a couple.”¹⁸ The parties must be either adults or emancipated minors; a sexual relation-

¹⁴ Barbara Atwood & Naomi Cahn, *The Uniform Cohabitants’ Economic Remedies Act: Codifying and Strengthening Contract and Equity for Unmarried Partners*, ___ FAM. L.Q. ___ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4409696 (posted Apr. 7, 2023).

¹⁵ *Id.*

¹⁶ Nat’l Conf. of Comm’rs on Unif. State L., UNIF. COHABITANTS’ ECON. REMEDIES ACT, UNIF. L. COMM’N (<https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5>) (Aug. 1, 2023).

¹⁷ Atwood & Cahn, *supra* note 1, at 218-19.

¹⁸ UNIF. COHABITANTS ECON. REMEDIES ACT § 2(2).

ship is not necessary. Interestingly, the parties can also be married to third parties. This is a position in accord with most of the states that have considered the issue.¹⁹ The rights of absent spouses were provided for in a general section dealing with third party rights.

B. Contributions to the Relationship

As explained by Atwood and Cahn, an innovation of UCERA is the concept of “contributions to the relationship.”²⁰ The term means contributions that benefit one or both cohabitants or the relationship itself and includes financial contributions as well as services and caregiving. “Importantly, the value of a cohabitant’s contributions is not limited to market value but includes the subjective value to the other cohabitant and to the couple. The concept serves both as a basis for contractual and equitable relief and as a limitation on the scope of the Act.”²¹

Based on this concept, Section 3 of the Act provides that the Act’s remedies apply only to claims “concerning an interest, promise or obligation arising from contributions to the relationship. . . . In other words, cohabitants may have rights against one another arising from a shared lease or a professional practice that are unrelated to their cohabiting relationship and would be governed by other law.”²²

C. Cohabitants’ Claims for Relief

The underlying philosophy of the Act is that cohabitants should be treated the same as others in asserting contractual and equitable claims. This is stated directly in Section 4. “That Section makes clear that cohabitants’ claims shall not be barred because of a cohabiting or sexual relationship or because one cohabitant is married to someone else.”²³

¹⁹ See, e.g., *Crandell v. Resley*, 804 P.2d 272, 276 (Colo. App. 1990); *Cates v. Swain*, 215 So. 3d 492, 493-95 (Miss. 2013); *In re Estate of Roccamonte*, 787 A.2d 198, 200, 202 (N.J. Super. Ct. App. Div. 2001); *Baldassari v. Baldassari*, 420 A.2d 556, 558-59 (Pa. Super. Ct. 1980).

²⁰ Atwood & Cahn, *supra* note 14.

²¹ *Id.*

²² *Id.*

²³ *Id.*

1. *Contract Claims*

Section 6 of the Act provides the basis for contractual claims. Agreements may be oral, express, or implied-in-fact. Contributions to the relationship, whether monetary or non-monetary, are sufficient consideration. Contractual claims may be asserted during and after cohabitation.²⁴ Just as in the case of premarital, post-marital, or property settlement agreements, an agreement that adversely affects a child's right to support or limits a cohabitant's ability to pursue legal remedies as a victim of violence are void.²⁵

2. *Claims for Equitable Relief*

Section 7 of the Act provides that a cohabitant may bring an equitable action against the other cohabitant based on that important concept of "contributions to the relationship."²⁶ The Act does not create a *new* kind of claim in equity, but rather operates within the framework of unjust enrichment, constructive trust, and injunctive relief. Section 7 also provides that equitable claims accrue on termination of the cohabitation, whether by death, separation, or marriage between the cohabitants.²⁷ Section 7 lists factors for courts to consider in adjudicating such a claim, including the nature and value of the contributions, the duration of the cohabitation, reasonable reliance on representations or conduct of the other cohabitant, and intent.²⁸ UCERA requires a close examination of the circumstances of the parties' cohabitation in determining whether any division of property is appropriate.²⁹

D. *Third Party Claims*

Section 8 addresses the rights of third parties. Under Section 8, states may select from five options regarding the impact of a judgment obtained by a cohabitant on a third party, including an absent spouse. The options range at one end from giving the cohabitant the general status of a judgment creditor, to absolute protection of the rights of the absent spouse as against a cohabi-

²⁴ UNIF. COHABITANTS ECON. REMEDIES ACT § 6.

²⁵ *Id.* § 6(c).

²⁶ *Id.* § 7(b).

²⁷ *Id.*

²⁸ *Id.* § 7(c).

²⁹ *Id.*

tant's judgment, whether based on contract or equity, on the other end.³⁰ The alternatives give states needed flexibility to consider how to prioritize the interests of a third party spouse and the claim of a cohabitant.³¹

III. Conclusion

UCERA provides familiar remedies but with greater clarity than now exists. Although UCERA rejected status-based remedies, it strengthened the recognition of claims arising out of contract and equity. There is no reason that cohabitants should not have access to the same contractual and equitable relief as other individuals.³² In sum, UCERA provides a much needed firm, structural framework for cohabitants' contractual and equitable claims.

³⁰ *Id.* § 8(c).

³¹ See Kaiponanea T. Matsumura, *Beyond Polygamy*, 107 IOWA L. REV. 1903, 1917 (2022) (discussing different approaches to this question).

³² *Id.* § 3, comment 1.

