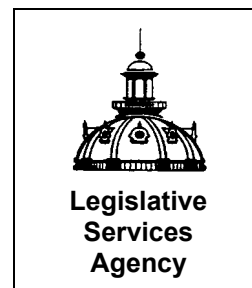


LEGISLATIVE GUIDE TO MARRIAGE LAW



Note to Reader:

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December 2005

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I. Introduction.

In the United States civil marriages are entered into either ceremonially, by means of compliance of the parties with state statutory requirements for marriage, or nonceremonially by the parties satisfying the requirements of a common law marriage. A marriage contracted validly, whether by complying with statutory requirements or the requirements of a common law marriage, confers the identical rights, responsibilities, and privileges on the parties.

The purpose of this Legislative Guide is to provide an overview of marriage as a civil contract imbued with a public interest, and of common law marriage and statutory marriage provisions. The Guide also provides a brief summary of recent developments in marriage law.

II. Marriage Overview.

A. Institutional Importance of Marriage, Benefits Conferred.

The United States Supreme Court has noted that "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"¹ that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause,"² and has stated the following about marriage:

*It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.*³

Marriage also has importance under the law because marriage confers a variety of rights, privileges, and obligations that are unique to the institution of marriage. "In short, the marriage laws transform a private agreement into a source of significant public benefits and protections."⁴ In 2004, the Government Accounting Office examined the United States Code to determine the federal rights, responsibilities, and privileges that were provided to married couples. The study identified a minimum of 1,138 statutes in which marital status was a factor. On the state and federal levels, these rights, privileges, and obligations affect areas including family law, taxation, health care law, probate, torts, government benefits and programs, private sector benefits, labor law, real estate, bankruptcy, immigration, and criminal law.⁵ In *Baker v. State*, the Vermont Supreme Court listed the numerous and significant benefits and protections incident to the marriage license.⁶ In *Goodridge v. Dept. of Public Health*,⁷ the Supreme Judicial Court of Massachusetts also listed the variety of benefits that flow from marriage, and noted that "the benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death."⁸

¹ *Loving v. Virginia*, 388 U.S. 1, 12 (1967), quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

² *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

³ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁴ *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999).

⁵ The American Bar Association Section of Family Law Working Group on Same-Sex Marriages and Non-marital Unions, A White Paper: An Analysis of the Law Regarding Same-sex Marriage, Civil Unions, and Domestic Partnerships, www.abanet.org/family/whitepaper, 16-17 (2004).

⁶ *Baker* at 883-84.

⁷ 798 N.E.2d 941 (Mass. 2003).

⁸ *Id.* at 955.



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B. Marriage as a State Concern.

Marriage in the United States is defined by the laws of each of the 50 states. It is well-established that "there is no federal law of domestic relations, which is primarily a matter of state concern."⁹

*Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. . . .*¹⁰

*States enjoy exclusive authority over family law . . . because of the fundamental role of localism in the federal design. The theory of localism presented here rests on the view that the law of domestic relations necessarily promotes a shared moral vision of the good family life Legal decision-makers confront fundamental questions concerning the meaning of parenthood, the best custodial placements for children, the rights and obligations of marriage, the financial terms of divorce, and the standards governing foster care and adoption. In answering such questions, state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children.*¹¹

C. Marriage as a Fundamental Right, Constitutional Protection.

While states may impose marriage regulations, because marriage is a fundamental right,¹² these regulations are subject to constitutional limitations and those regulations that significantly interfere with the exercise of marriage are subject to strict scrutiny.

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed (citation omitted).

. . . .

*When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.*¹³

D. Marriage as a Public Contract.

From the state's perspective, marriage is a contractual relationship between two parties that vests the parties with a new legal status. Unlike other contracts, however, the new status created by the marriage contract cannot be terminated at will by the parties, but only as provided by the law of the state, thereby making the state a third party to any marriage.

⁹ De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).

¹⁰ Maynard at 205.

¹¹ Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1790 (1995).

¹² See Loving at 12, Griswold v. Connecticut, 381 U.S. 479, 495-96, 499 (1965), and Carey v. Population Services International, 431 U.S. 678, 685 (1977).

¹³ Zablocki at 386-88.



It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.¹⁴

E. Comity and Full Faith and Credit.

Because marriage laws vary by state, and because society is mobile, the states must have means by which to determine whether to recognize a marriage entered into in a foreign jurisdiction, while affording the parties certainty and predictability. In doing so, a state must weigh the policies of the forum and foreign state, the states' connections to the parties involved, and the justified expectations of the parties.

Because marriage is a long continuing relationship, there normally is a need that its existence be subject to regulation by one law without occasion for repeated redetermination of the validity. Human mobility ought not to jeopardize the reasonable expectations of those relying on an assumed family pattern.¹⁵

The common law concept of comity governs the enforcement and effect of foreign judgments and statutes. This is the concept whereby a court of one state or jurisdiction gives effect to the laws and judicial decisions of another as a matter of deference and respect, not as a matter of obligation. However, the effect given to such foreign judgments and laws is limited by the public policy of the forum state.

While it is well recognized that the statutes of another state have no extraterritorial force, yet rights acquired thereunder will always, in comity, be enforced, if not against the public policy of the laws of the state where redress is sought.¹⁶

Additionally, the Full Faith and Credit Clause of the United States Constitution was adopted as a unifying force for the states. "The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ."¹⁷ The Full Faith and Credit Clause provides that:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.¹⁸

¹⁴ Maynard at 211-12.

¹⁵ Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L. Rev. 921, 963 (April 1998) quoting Eugene F. Scoles & Peter Hay, Conflict of Laws § 3.2 at 432 (2d ed. 1992).

¹⁶ Kingery v. Donnell, 268 N.W. 617, 619-20 (Iowa 1936), quoting Caine v. St. Louis, San Francisco R. Co., 95 So. 876, 877.

¹⁷ Morris v. Jones, 329 U.S. 545, 553 (1947).

¹⁸ U.S. Const. art. IV, § 1.



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In interpreting the application of the Full Faith and Credit Clause to state statutes, as opposed to judgments, the United States Supreme Court has noted that:

It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy (citations omitted).

In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is more apparent

[T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight

*It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause*¹⁹

In determining the governmental interest and determining its weight with regard to interstate recognition of marriages that contravene the forum state's statutes, states utilize choice of law theories, which, with regard to marriage, stem from the common law principle that a marriage valid where celebrated is valid everywhere. This notion supports the public policy that favors predictability, certainty, and uniformity in protecting the expectations of the parties.

*The general rule which exists with an "overwhelming tendency" in the United States is to prefer validation of marriages. Under this rule, marriages will be found to be valid if there is any reasonable basis for doing so "The validation rule confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state."*²⁰

However, exceptions to this general rule have been established and if the state determines that it will not recognize the marriage of the foreign jurisdiction, the determination is usually based on the concept of marriage evasion, i.e., the concept that the parties have circumvented a state's prohibitions relating to marriage by entering into a marriage in another state, or is based on being contrary to the public policy of the forum state.²¹

¹⁹ Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 546-48 (1935).

²⁰ Barbara J. Cox, Same-Sex Marriage and the Public Policy Exception in Choice-of-law: Does it Really Exist?, 16 QLR 61, 65-66 citing William M. Richman & William L. Reynolds, Understanding Conflict of Laws S 116 (a) (2d ed. 1993).

²¹ Barbara J. Cox, Interstate Validation of Marriages and Civil Unions, Human Rights Magazine, Vol. 30, No. 3, Summer 2003, <http://www.abanet.org/irr/hr/summer03/interstate.html>.



III. Common Law Marriage.

A. What Is Common Law Marriage?

Common law marriage is a relationship which is not solemnized in a ceremonial manner, but requires the following:

*[A] positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations.*²²

The four elements of common law marriage historically have been a combination of capacity to enter into a marital contract, present agreement to be married, cohabitation for which no specific length of time is required, and the parties holding themselves out as husband and wife so that they have a reputation as being married in the community.²³

B. Origination of Common Law Marriage in Europe and England.

Common law marriage in the United States is based on the informal marriage practices of Europe prior to the Reformation.²⁴ As with marriage regulation in general, common law marriage provisions reflect the fusion of mainly Roman, Germanic, and Christian influences.²⁵ In ancient Roman times and in the Middle Ages prior to the expansion of Christianity, marriage was a private contract between families, without benefit of intervention by the church or officials of the state.²⁶ Generally, the practices followed in entering a marriage included a betrothal in which consent was provided and families exchanged pledges and promises, and a wedding ceremony in which the bride was handed over to the groom. Marriages were entered into through the combined effect of the agreement of the parties, recognition among the community of the parties as husband and wife, and cohabitation of the parties.²⁷

*It had not been the custom or practice under either Roman, ancient Germanic, or medieval secular law to require any form of licensing, registration, or public ceremony to legally recognize a marriage*²⁸

The requirements and prohibitions established by law and custom relative to marriage, including those related to age of the parties, marital status of the parties, impediments to marriage such as the degrees of consanguinity and affinity within which marriage was prohibited, and the type and amount of property exchanged under the marital contract, varied over time. The essential element of a valid marriage, i.e., the condition that made the marriage contract binding, also evolved over time.

During Roman times, consent was the condition essential to a valid marriage. At first this consent was required of the families involved. Later mutual consent was required of

²² Black's Law Dictionary 277 (6th ed. 1990).

²³ Cynthia Grant Bowman, A Feminist Proposal to Bring Back Common Law Marriage, 75 Or. L. Rev. 709, 712-713 (1996).

²⁴ Id. at 718.

²⁵ Frances Geis & Joseph Geis, Marriage and the Family in the Middle Ages, at 16 (1987).

²⁶ Id. at 20-21.

²⁷ Bowman at 718.

²⁸ Jeanne L. Schroeder, Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence, 75 Iowa L. Rev. 1135, 1174 (1990).



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the principals, as signified by the Roman maxim, "Marriage is by consent only."²⁹ "Roman marriage custom was in advance of many of its contemporaries in requiring the consent of both principals as a condition of a valid marriage, a rule expressed in the legal formula *Nuptias consensus non concubitus facit* (consent, not intercourse, makes marriage)."³⁰ "The marriage begins with the nuptials or actual wedded life, which gives expression to the *consensus nuptialis*, or mutual will of the parties to be husband and wife"³¹

In the early Middle Ages, among the barbarian or Germanic peoples that arrived in the areas populated by the Roman Empire, the condition necessary to a valid marriage was consummation of the marriage, which was signified by a morning gift paid to the bride the day after the marriage.³²

With the spread of Christianity and through the later Middle Ages, the Roman Catholic Church and the canon law promulgated by the church gained influence in determining the validity of marriage and were gradually insinuated into the marriage ceremony. Initially, the church accepted the private betrothal and wedding rites of the Romans and Germanic peoples and allowed them to continue, merely urging the church's followers to seek a priest's blessing for their marriage.³³ Between the 11th and 12th centuries, the church had gained exclusive jurisdiction over issues related to marriage in Europe and England and had the power to determine the validity of marriages. By the end of the 12th century, the church had developed a comprehensive canon law of marriage which became the secular theory of marriage.³⁴ Between the 10th and 13th centuries, the church continued to make more fervent demands that its followers be married in a church ceremony and provided for censure of those who did not comply. This was probably an attempt to both provide more of a religious tone to the institution and to provide for publicity of the marriage to avoid the problems attributable to clandestine marriages.³⁵ However, even as the church increased its demands regarding marriage formalities, because marriage was viewed as a sacrament by the church and subject to natural law, the church was reticent to declare private marriages invalid or void.³⁶

In developing its concept of what constituted a valid marriage, the church's canon legal scholars advanced various theories that attempted to incorporate the concepts of marriage validity of the Romans and the Germanic peoples. Gratian, an influential early canon legal scholar, advanced the theory that freely given individual consent followed by coitus was necessary for a valid marriage.³⁷ Following Gratian in approximately 1152 A.D., Peter Lombard, a professor at the University of Paris and later bishop of Paris, advanced an alternate theory. His theory distinguished between vows exchanged in the future tense and those exchanged in the present tense. Consent of the parties in the form of a betrothal agreement that constituted words of the future was too tentative; it was only a promise to

²⁹ W. Goodsell, *A History of Marriage and the Family*, at 135-36 (1934).

³⁰ Geis at 21.

³¹ 1 G. Howard, *A History of Matrimonial Institutions*, at 292 (1904).

³² Geis at 55.

³³ Howard at 293 and Goodsell at 173.

³⁴ Schroeder at 1173.

³⁵ Howard at 309-10.

³⁶ Id. at 334-39.

³⁷ Schroeder at 1175.



marry sometime in the future. Instead he suggested that present consent or words of the present be required as a condition of a valid marriage.³⁸

By the 13th century ecclesiastical legal scholars reached a compromise as to what constituted a valid marriage:

[I]t was eventually agreed that neither familial consent, feudal consent, priestly blessing, nor any formal ceremony was required for a valid and enforceable marriage. A marriage could be formed either by present individual consent, with or without coitus, or future individual consent (i.e., betrothal) followed by coitus.³⁹

From the 13th to the 16th centuries, even as the church increasingly required more formalization and publicizing of and intervention in marriages, the church continued to recognize private, informal marriages as valid, based on their sacramental, divinely ordained nature.⁴⁰ However, any marriage contracted without the church's intervention, although binding, was "illegal" in the eyes of the church and subject to ecclesiastical penalties such as severe penance.⁴¹ The continued recognition of informal, private, or "clandestine" marriages, however, was problematic:

Clandestine marriages . . . became so frequent from the thirteenth to the sixteenth century as to constitute well-nigh a public scandal, since they not infrequently led to grave social wrongs. A man thus married could and did easily throw off the responsibilities he had assumed at marriage, and in consequence his wife and children might become public charges.⁴²

Men and women (or boys and girls) who contracted unions in words of the present tense were held to be as indissolubly bound together as if the marriage had occurred within the church before witnesses, had been duly recorded and had been consummated by physical union. Of course a marriage thus loosely contracted, with witnesses few or none, could be easily disavowed. Dishonorable men had no difficulty in finding persons to declare in the proper ecclesiastical court that they had never really espoused the woman, but had only formed an illicit relationship with her Endless difficulties arose with respect to abandoned wives and children, and the Bishops' courts of the fifteenth and the first half of the sixteenth century were kept busy adjudicating such matrimonial cases.⁴³

In 1545, in response to the continuing concern relating to clandestine marriages and in response to the Protestant assertions of ecclesiastical corruption and that marriage should be a temporal, civil matter, the church called a council at Trent, the 19th ecumenical council of the Roman Catholic Church.⁴⁴ Concluding in 1563, the Council of Trent decreed that marriages previously contracted by verbal consent alone and without parental consent would be held valid, but in the future all marriages not celebrated in the presence of a priest

³⁸ Geis at 137-39.

³⁹ Schroeder at 1175.

⁴⁰ David E. Engdahl, *The Secularization of English Marriage Law*, 16 U. Kan. L. Rev. 505, 507 (1968).

⁴¹ Goodsell at 223.

⁴² *Id.*

⁴³ *Id.* at 261.

⁴⁴ *Id.* at 260 and "The Council of Trent", http://www.forerunner.com/chalcedon/X0020_15._Council_of_Trent.html.



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and witnesses would be null and void.⁴⁵ This, in essence, abolished informal, private marriage on the European continent.

In England, after the Act of Supremacy in 1534 and England's break with the Roman Catholic Church, England no longer recognized the canon law of the Roman Catholic Church.⁴⁶ Therefore, at the time of the Council of Trent, because the English Reformation had already taken place, the results of the Council of Trent did not apply to England. The Church of England, and the ecclesiastics who had jurisdiction to determine the validity of marriage, while generally requiring formal marriages, continued to allow marriages per verba de praesenti.

The canons of the Church of England, like those of the Catholic Church, created a distinction between a valid marriage which was legally binding on the parties and an "illegal" marriage which, because it was not solemnized through the intervention of the church, was subject to ecclesiastical penalties. In addition, even though the Church of England recognized these marriages as valid, the lay or temporal courts under the civil law did not bestow full marital rights on the parties to such marriages, perhaps to impede the growth of clandestine marriages. The lay courts required publicity of the marriage in order to endow the parties with certain marital rights. "The widow could not receive her dower unless it had been publicly assigned at the nuptials before the church door Marriages contracted elsewhere may be valid enough, but only at the church door can a bride be endowed."⁴⁷ "Marriages per verba de praesenti were not complete for all purposes. At best, such informal unions merely made the children legitimate. The informal union bestowed no civil rights upon the parties, such as the right of a wife to claim dower or of the husband to claim curtesy."⁴⁸

For a short period of time, from 1653 until 1658, when Oliver Cromwell was Lord Protector of England, the English Puritans did pass a Civil Marriage Act prohibiting ecclesiastical marriages and requiring a civil celebration. Additionally, under this Act, all matters and controversies relating to marriage were to be referred to the civil authorities. Even though the Puritans brought this idea to America, in England this Act was repealed in 1660 and England thereafter again provided for ecclesiastical marriages until the 19th century.⁴⁹ It was not until 1753 that Parliament enacted the Clandestine Marriage Bill, or Lord Hardwicke's Act, that required publication of banns (public notice of a marriage contract and impending celebration of the marriage) or the securing of a license, performance of the ceremony by a clergyman of the Anglican Church, and the presence of witnesses at the ceremony for a valid marriage. All marriages not contracted within the requirements were null and void.⁵⁰ However, "The English Marriage Act of 1753, by its

⁴⁵ Goodsell at 262.

⁴⁶ Hon. John B. Crowley, *Is the Honeymoon Over for Common-law Marriage: A Consideration of the Continued Viability of the Common-law Marriage Doctrine*, 29 *Cumberland L Rev.* 399, 401 n. 8 (1998-1999).

⁴⁷ Howard at 354-56.

⁴⁸ Graham Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 *St. Louis U. L.J.* 30, 39 (1960). This distinction would have an effect on recognition of informal marriages in the English colonies in the United States. See *Denison v. Denison*, 35 Md. 361 (1872) and *In re Roberts Estate*, 133 P.2d 492, 494 (Wyo. 1943), at n.60, in which the courts argued that England never recognized common law marriages unless the marriage was publicly solemnized and that therefore, the common law in the United States that does not require public solemnization is derived from Roman law and canon law, not from English common law.

⁴⁹ Goodsell at 269.

⁵⁰ *Id.* at 334.



terms did not apply to the American colonies since it excluded marriages solemnized beyond the seas.⁵¹

C. Adoption of Common Law Marriage in the United States.

During the 16th through the 18th centuries, the extent of the adoption of common law marriage as part of the transfer of English common law to the American colonies varied. Because informal cohabitation existed in the American colonies, some of the colonies recognized common law marriage, while others required compliance with certain formalities.⁵² In general, the colonies adopted English common law "only so far as it could be made to fit and adjust itself to our local circumstances and peculiar institutions."⁵³

For example, in the Massachusetts Bay Colony, the dissenters from the Church of England objected to the regulation of marriage by canon law, and as early as 1639 adopted statutes and regulations governing marriage in that colony. Once these laws were passed, requiring a formal ceremony, licensing or registration, and designating the officiant, common law marriage was no longer available. Other colonies that followed this path included Connecticut, Delaware, Maryland,⁵⁴ North Carolina, Vermont, and Virginia.⁵⁵ In contrast to this, New York, Georgia, Pennsylvania, Rhode Island, South Carolina, and New Jersey chose to accept informal marriages.⁵⁶

A number of explanations have been presented regarding the acceptance or rejection of common law marriage in the territories and states settled beyond the original colonies. One theory is that frontier conditions, sparse settlements, distance from a location for recording the marriage, and lack of access to legal officiants explain the acceptance of the informal common law marriage tradition by the states.

*It is only natural that under such primitive conditions our early settlers would devise some means of making marriage possible and clothing the form with respectability. The means selected was for parties contemplating a union openly to avow their intentions and begin living together as husband and wife.*⁵⁷

In Louisiana, where the common law was never adopted, common law marriage was never accepted. Territories and states with Spanish, Mexican, Native American, or other influences reflected these influences in their acceptance or rejection of common law marriage in the particular state.⁵⁸

⁵¹ Kirkpatrick at 34.

⁵² Kathryn S. Vaughn, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 *Houston L. Rev.* 1131, 1134 (1991).

⁵³ *Denison v. Denison*, 35 Md. 361 (1872) (part 10 of opinion).

⁵⁴ See *Denison* (parts 10 and 11 of opinion), in which the Court of Appeals of Maryland noted that marriage contracts per verba de praesenti or per verba de futuro cum copula, until sanctioned by the ecclesiastical courts, did not confer the civil rights incident to a marriage. Because Maryland had no tribunal, such as the ecclesiastical courts, to enforce the solemnization of these types of marriages, these marriages were incomplete and could not confer legitimacy on issue or the rights of property on the parties. Therefore, under Maryland law, a marriage for the purposes of the civil rights incident to marriage required some type of ceremony or celebration. Even though the statute did not specifically nullify common law marriage, it was still interpreted as mandatory; otherwise, it would contravene the spirit and policy of the statute.

⁵⁵ *Bowman* at 720 n.43.

⁵⁶ *Id.* at 722.

⁵⁷ Kirkpatrick at 45-46. Kirkpatrick goes on to note that "This no doubt explains why some jurisdictions in the United States have included cohabitation or the open assumption of marital obligations and duties as elements of a common-law marriage."

⁵⁸ *Bowman* at 725-31. See, e.g., *Hallet v. Collins*, 51 U.S. 174, 181-82 (1850), in which the United States Supreme Court in an appeal from the Circuit Court of the United States for the Southern District of Alabama held that a marriage made without the presence of a priest was valid in Alabama while it was still a Spanish colony because while Spain had accepted the pronouncements of the Council



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Early case law presents explanations for acceptance or rejection of common law marriage in the United States and established the precedent for states' responses thereafter. The majority of jurisdictions in the United States initially followed the holding of *Fenton v. Reed* and recognized common law marriages.⁵⁹ A minority of jurisdictions followed *Inhabitants of Milford v. Inhabitants of Worcester*, and did not recognize common law marriage as valid.⁶⁰ In the United States Supreme Court's first attempt to determine the validity of common law marriage, the Court was equally divided.⁶¹ In a later case, *Meister v. Moore*,⁶² the United States Supreme Court held that marriage was a common

of Trent for its European dominions, it had not done so for its American dominions. Therefore, the law applicable to Alabama was the law that predated the Council of Trent for the colonies which required only consent to constitute a valid marriage.

⁵⁹ 4 Johns 52 (N.Y. 1809). In *Fenton*, the Supreme Court of New York reviewed a case in which a woman was seeking a pension from an organization of which her deceased alleged husband was a member. The court held that the woman had a valid common law marriage with this man. The court noted that even though no solemnization had taken place, proof of an actual marriage was not necessary. A marriage could be proven by inferring a marriage from cohabitation of the parties, reputation, acknowledgment of the parties, reception of the family, and other circumstances. A marriage made per verba de praesenti amounts to an actual marriage and is as valid as a marriage in facie ecclesiae.

⁶⁰ 7 Mass. 48 (1810). In *Milford*, the Supreme Judicial Court of Massachusetts reviewed an action for assumpsit, for the maintenance of a family of paupers. The man had legal settlement in Worcester, and if the couple had a valid marriage, the woman and their children would have the same legal settlement as the man, and Worcester would be liable for their maintenance. The issue was whether the couple had a valid marriage. The couple had come together at a tavern, and a justice of the peace happened to be there. The couple produced a certificate demonstrating that their intentions to marry had been published and asked the justice of the peace to marry them. He refused, but they continued to exchange vows before the people gathered there. The court examined the law to determine if this exchange resulted in a lawful marriage. The court noted that since the time their ancestors left England, lawful marriage was required to be celebrated before a clergyman. When their ancestors arrived "smarting under the arbitrary censures of the ecclesiastical courts," they did not want to provide the clergy with civil powers, and the early ordinance regulating marriage therefore provided that only a magistrate or other appointed person could solemnize marriages. Additional regulations for marriage were subsequently enacted. *Id.* at 52. The court noted that when laws of a state have not prescribed such regulations for the celebration of a marriage, then the mere mutual agreement to marry by competent parties would be a good marriage. However, when a government has established regulations for the celebration of marriage, then these must be followed to constitute a valid marriage.

See also *Furth v. Furth*, 133 S.W. 1037 (Ark. 1911), but see *Huard v. McTeigh*, 232 P. 658, 661-62 (Ore. 1925), in which the Supreme Court of Oregon noted that the decisions in the United States relating to common law marriage were in "hopeless conflict" and that even though the Oregon statute did not explicitly abrogate common law marriage, this was "carrying the rule of statutory construction too far" and the statutes of the state which regulated the manner of entering into a marriage superseded the common law rule; and *In re Roberts' Estate*, 133 P.2d 492 (Wyo. 1943), in which the Wyoming Supreme Court noted that this was a case of first impression regarding the validity of common law marriage in the state and that the law in the United States on the subject of common law marriage was in chaos. The Court disagreed with the holding in *Fenton*, which held that no formal ceremony was necessary at common law to a valid marriage. Instead, the Court noted that in England the parties to a marriage entered per verba de praesenti could be compelled to solemnize the marriage by ecclesiastical authorities, which enforceability equated to execution of a contract. Without this execution, the contract was only partly performed and was more like early Roman law which provided for informal marriages, concubinage, and easy divorce. Notwithstanding the status of the common law in England, if the colonists did not have regulations in place relating to marriage to take the place of a religious ceremony, they would at least have adopted a ceremony with which they were familiar, which might have been according to the Church of England, of a particular group or denomination, or according to Cromwell's law, but in all cases there would have been a public ceremony. *Id.* at 493-500. The Court then reviewed Wyoming's own statute and determined that even though it did not expressly nullify common law marriage, neither the statute nor public policy would justify holding common law marriage valid. *Id.* at 500-503.

⁶¹ *Lessee of Jewell v. Jewell*, 42 U.S. 219 (1843). In *Jewell*, an action for ejectment, brought on writ of error to the United States Supreme Court, one of the legal issues brought was who was the lawful wife of the deceased, who died intestate and was seised of the premises in question. The instructions given to the jury were objected to as they provided that a contract of marriage made per verba de praesenti without cohabitation or per verba de futuro followed by consummation amounted to a valid marriage and was as equally binding as if made in facie ecclesiae. The Supreme Court noted that the instructions involved the question as to what constituted marriage under the laws of Georgia and South Carolina. The Supreme Court stated that: "[t]he question has, of course, no concern with the nature and character of the union of man and wife in a religious point of view. But regarding it (as a court of justice must do) merely as a civil contract, and deciding in what form it ought to have been celebrated in order to give the parties the legal rights of property which belong to the husband or the wife, and to render the issue legitimate, the Circuit Court held, and so instructed the jury, that if they believed that, before any sexual connexion between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent. And that if the contract be made per verba de praesenti, and remains without cohabitation; or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and that it is equally binding as if made in facie ecclesiae. Upon the point thus decided, this court is equally divided; and no opinion can therefore be given." *Id.* at 233-34.

⁶² 96 U.S. 76 (1877). In *Meister*, the Supreme Court of the United States held that a contract per verba de praesenti constituted a common law marriage, and that in order to abrogate the existence of common law marriage, a statute would have to explicitly express this, and not be merely directory. In this case, the parties were married in Michigan, but did not comply with the statute that required



right and that statutes regulating marriage would be interpreted as merely directory unless the statute explicitly provided words of nullity of common law marriage.

D. The Decline of Common Law Marriage in the United States.

As states began to abolish common law marriage beginning in approximately 1875, the reasoning related to: (1) urbanization and industrialization which eliminated problems of access to civil authorities; (2) increased wealth in private hands, leading to concerns of protecting inheritances from fraudulent claims and transmission of wealth to legitimate heirs; (3) protecting the institution of marriage; (4) racism, eugenics, and class bias; and (5) administrative and judicial efficiency concerns.⁶³

E. Current Status of Common Law Marriage in the United States and the District of Columbia.

The statutory and common law marriage chart in the appendix demonstrates the response of the states and the District of Columbia to the issue of the existence of common law marriage.

1. States That Do Not Recognize Common Law Marriages Contracted by Their Citizens in Their Own State.

In general, the states that have abolished common law marriage have followed *Meister* and explicitly abrogated common law marriage by statute (Arizona, California, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Pennsylvania, South Dakota, and Wisconsin). It should be noted that all of the states that abrogated common law marriage by statute did so prospectively from a date certain. In some cases, such as in the case of Pennsylvania, which applies to only common law marriages contracted after January 1, 2005, valid common law marriages could still be held to exist in those states.

In the remainder of the states that do not recognize common law marriages, the courts have either disagreed with *Meister* and interpreted their statute as mandatory without the statute explicitly abrogating common law marriage, or have determined that common law marriage was never recognized in the state (Alaska, Arkansas, Connecticut, Delaware, Hawaii, Louisiana, Maine, Maryland, Massachusetts, New Mexico, North Carolina, North Dakota, Oregon, Tennessee [although Tennessee does provide for estoppel to deny marriage], Vermont, Virginia, Washington, West Virginia, and Wyoming).

solemnization by a minister or magistrate. They lived and cohabited together as man and wife and had a child. The Court noted that a contract per verba de praesenti constitutes marriage at common law and that a statute may take away a common law right, but that this must be plainly expressed. Statutes which establish regulations for marriage may be construed as merely directory, unless they contain express words of nullity. The Court stated that "the statutes are held merely directory; because marriage is a thing of common right, because it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law." *Id.* at 81. The Court concluded that the Michigan statute in question did not declare marriages void if they did not involve the presence of a minister or magistrate and did not deny validity to marriages that were good at common law. The Court also noted that subsequent to this case being heard by the state court, the Michigan Supreme Court had ruled in another case relating to a marriage in a foreign country that a marriage celebrated in a manner which did not meet the statutory regulations but which did provide for the parties agreeing in the present tense to be husband and wife, followed by cohabitation, would, on proof of these facts, constitute a valid marriage. See *Hutchins v. Kimmell*, 31 Mich. 126 (1875). The Supreme Court therefore accepted this as the law of Michigan, reversed the judgment, and ordered a new trial so that evidence of the common law marriage could be presented.

⁶³ Bowman at 731-50.



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2. States That Recognize Common Law Marriages Contracted by Their Citizens in Their Own State.

The states that currently recognize common law marriages are Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire (only for inheritance purposes after death of one of the parties), Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia.

F. Iowa and Common Law Marriage.

1. The Recognition of Common Law Marriage in Iowa.

Common law marriage in Iowa has been recognized for over a century.⁶⁴ However, no public policy exists in Iowa favoring common law marriage.⁶⁵ As in other states, the Iowa Supreme Court has interpreted the statutes regulating marriage, in keeping with *Meister*, to be merely directory such that a marriage contracted in violation of the statutory provisions, such as common law marriage, does not invalidate a marriage, even if there are penalties for those who do not comply with the statutory requirements.⁶⁶ The Iowa Supreme Court also noted in *In re Stopps' Estate* that:

We have too long recognized the common-law marriage status in Iowa to change it by judicial decision. If we should accept applicants' invitation either to hold it never existed here, or to overrule our previous decisions recognizing and making it effective, we should thereby with one blow not only strike down many property rights heretofore thought determined and vested, but illegitimize many children whose status has previously been secure. There is a sound reason for adhering generally to settled principles of law. They should not be overturned lightly, nor unless they appear patently unsound and liable to cause mischief if uncorrected. The people should be able to know what the law is, and to order their affairs accordingly. We cannot abandon the rule of stare decisis except for far more impelling reasons than we find here. If the law as it has been settled by the courts and understood, not only by the legal profession but by the public generally, is to be changed, it is a task for the legislature.⁶⁷

In *In re Stopps' Estate* the Iowa Supreme Court also noted with regard to the mere directory nature of marriage statutes that it agreed with the rule in 35 Am.Jur., Marriage, § 33, that "[t]his construction 'is generally based on the view that a common-law marriage is good, although not in conformity to the statutory requirements, unless the statute contains express words of nullity.'" Therefore, the legislative intent to abrogate common law marriage in Iowa would not be presumed, but must be clearly expressed by the legislature.⁶⁸

⁶⁴ In re Estate of Fisher, 176 N.W.2d 801, 804 (Iowa 1970).

⁶⁵ In re Marriage of Reed, 226 N.W.2d 795, 796 (Iowa 1975).

⁶⁶ In re Stopps' Estate, 57 N.W.2d 221, 224 (Iowa 1953).

⁶⁷ Id. at 223.

⁶⁸ Id. at 224.

2. Common Law Marriage — Elements, Burden of Proof, Standard of Proof, Evidence.

a. **Elements.** The three elements that must exist to create a common law marriage in Iowa are:

- i. Intent and agreement in praesenti to be married by both parties.
- ii. Continuous cohabitation.
- iii. Public declaration or "holding out" to the public that the parties are husband and wife.⁶⁹

b. **Present Intent.** The element of present intent and agreement to be married reflects the nature of marriage as a civil contract that requires the consent of the parties.⁷⁰ The Iowa Supreme Court has stated the following:

*[M]arriage under our law is a contract — a civil contract. But it is sui generis, and is regarded in law as something more, particularly when consummated. It is a contract in which the public — the state — has an interest, and when consummated creates a status which no other contract does. The state has a peculiar interest in such contracts*⁷¹

This element of present intent, however, does not require an express agreement to be fulfilled:

*[I]t is essential to show an agreement between the parties in praesenti to become husband and wife in order to establish a common-law marriage, but this does not mean that such proof must establish an express agreement resulting in contract, or that such result may not be circumstances from which an agreement in praesenti may be inferred.*⁷²

If a written or oral agreement to be husband and wife does exist, without also the existence of the present intent to assume that relationship, such agreement does not constitute common law marriage, especially when the agreement is entered into for other purposes.⁷³ The Iowa Supreme Court has recognized that a contract per verba de futuro, which implies marriage of the parties at a later time, does not establish a common law marriage without other circumstances. However, in *In re Estate of Fisher*, the Iowa Supreme Court noted that even though the parties had been planning a ceremonial marriage in the future, their existing relationship prior to the death of one of the parties, based upon the total contentions of the respective parties once added and their weight determined, did demonstrate the present intent of the parties to be married, and did constitute a common law marriage.⁷⁴

Additionally, with regard to the intentions of the parties, the Iowa Court of Appeals has stated the following:

⁶⁹ Fisher at 805.

⁷⁰ Id.

⁷¹ Lauer v. Banning, 131 N.W.783, 784 (1911).

⁷² In re Estate of Allen, 100 N.W. 2d 10, 13 (Iowa 1959) citing Markley v. Hudson, 54 N.E.2d 304, 306.

⁷³ Pegg v. Pegg, 115 N.W. 1027, 1028-30 (Iowa 1908).

⁷⁴ Fisher at 806-07.



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*A person may be entitled to marital rights if his or her intention is to be married, even though the other person's intention is not the same, provided they cohabit and provided the conduct of one person justifies the other to believe he or she intended to be married.*⁷⁵

The Iowa Supreme Court has noted the following in determining whether a common law marriage exists:

*[T]he fundamental question is whether their minds have met in mutual consent to the status of marriage which will be sufficiently established if it appears that they have lived together, intending thereby to be husband and wife. Neither such intention nor consent can be inferred from cohabitation alone, and reputation is of no significance, save as it has a bearing on the questions of intent.*⁷⁶

"The conduct of the parties and their general community reputation is evidence that can be used to support a present intent and agreement."⁷⁷

- c. Continuous Cohabitation.** Another element of a common law marriage that must be proven is continuous cohabitation. However, there is no particular time that cohabitation must exist to establish common law marriage.⁷⁸ Additionally, cohabitation alone does not of itself constitute marriage⁷⁹ because "[c]ommon law marriages do exist. Concubinage also exists."⁸⁰

*The term "cohabiting as husband and wife" is ambiguous. It may mean cohabitation under the assumption of the relation of husband and wife, or it may as well mean, without regard to any such actual relation, in the manner of cohabitation as between husband and wife.*⁸¹

So, then, evidence of cohabitation is merely evidence of the intent of the parties.

*Proof of cohabitation, as well as evidence of conduct and general repute in the community where the parties reside, tends to strengthen the showing of present agreement to be husband and wife as well as bearing on the question of intent.*⁸²

⁷⁵ Conklin ex rel. v. MacMillan Oil Company, 557 N.W.2d 102, 105 (Iowa App. 1996) citing In re Marriage of Winegard, 257 N.W.2d 609, 616 (Iowa 1977) citing McFarland v. McFarland, 2 N.W. 269, 273-74 (Iowa 1879).

⁷⁶ In re Estate of Boyington, 137 N.W. 949, 950 (Iowa 1912).

⁷⁷ In re Marriage of Gebhart, 426 N.W.2d 651 (Iowa App. 1988) citing Gammelgaard v. Gammelgaard, 77 N.W.2d 479, 480 (Iowa 1956).

⁷⁸ Love v. Love, 171 N.W. 257 (Iowa 1919), overruled in part on other grounds by In re Estate of Dallman, 228 N.W.2d 187, 190 (Iowa 1975).

⁷⁹ McFarland at 273.

⁸⁰ Hoese v. Hoese, 217 N.W. 860 (Iowa 1928).

⁸¹ Boyington at 951. Note: In the context of spousal support and determination of a substantial change in circumstances, "[c]ohabitation is evidenced by: (1) an unrelated person of the opposite sex living or residing in the dwelling house . . . , (2) living together in the manner of husband and wife, and (3) unrestricted access to the home." See In re Marriage of Ales, 592 N.W.2d 698, 702 n.1 (Iowa App. 1999).

⁸² Gebhart at 652 citing Gammelgaard at 480.



d. Public Declaration. The Iowa Supreme Court has held that the public declaration or holding out is the "acid test" in demonstrating a common law marriage. As the court stated in *In re Estate of Dallman*, "In other words, there can be no secret common-law marriage."⁸³

If there are inconsistencies in evidence as to the holding out of the parties to the public as husband and wife, i.e., evidence of the parties representing themselves as single people or not married, the court considers the evidence that weighs against the finding of a common law marriage to determine if the remainder of the evidence overcomes the evidence to the contrary.⁸⁴ The "holding out," however, must be general and substantial. "[O]ne element essential to the proof of such relationship is a general and substantial 'holding out' or open declaration thereof to the public by both parties thereto." (citations omitted)⁸⁵

e. Burden of Proof and Standard of Proof. The burden of proof in a case to establish that a common law marriage exists is on the party asserting the claim. "The burden of proof lies on the party asserting the common law marriage."⁸⁶ "The party carrying the burden of proof must prove all the elements of such a common-law marriage by a preponderance of the evidence."⁸⁷

*[A]ll of the essential elements of such a relationship must be shown by clear, consistent and convincing evidence, especially must all of the essential elements of such a relationship be shown when one of the parties is dead; and such marriage must be proved by a preponderance.*⁸⁸

f. Evidence. A common law marriage may be demonstrated by circumstantial evidence.⁸⁹ Continuous cohabitation of the parties and a public declaration or holding out to the public that the parties are husband and wife is circumstantial evidence that creates a fair presumption that a common law marriage exists.⁹⁰ The total of various contentions by all parties must be added and weighed.⁹¹

Examples of common law marriage cases in Iowa and the evidence presented in proving their existence include:

- A woman who lived with a man for several years and who was the mother of his child was recognized in their society as his wife by entertaining together and following in funeral processions together in the family carriage, and by purchasing her wardrobe on his account.⁹²
- Having an article published in the local paper recognizing a farewell party honoring them as "Mr. and Mrs.," purchasing a combination husband and wife fishing license in Minnesota, Christmas cards and

⁸³ Dallman at 190.

⁸⁴ See Gebhart at 652-54; Fisher at 806; and Estate of Stodola, 519 N.W.2d 97, 98-100.

⁸⁵ Dallman at 190.

⁸⁶ Gebhart at 652 citing Winegard at 510.

⁸⁷ Gebhart at 652 citing *In re Marriage of Grother*, 242 N.W.2d 1 (Iowa 1976).

⁸⁸ Fisher at 805 citing 55 C.J.S. Marriage s 45b, pp.911, 912.

⁸⁹ Id. at 806; Allen at 12.

⁹⁰ Winegard at 617.

⁹¹ *In re Estate of Long*, 102 N.W.2d 76, 81 (Iowa 1960).

⁹² McFarland at 274.



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invitations addressed to the couple as "Mr. and Mrs.," and charging household expenses to him.⁹³

- On an application for her life insurance policy, she named him as husband, they had a joint checking account, he placed a wedding ring on her finger in the presence of witnesses, and in an application for employment he indicated her as his wife.⁹⁴
- Her intent and belief that they were married, the public regarding them as married, continuous cohabitation, his failure to deny their marriage and acquiescence in allowing her to use his name and represent to the community that they were married, her receipt of a wedding band from him, hotel and travel reservations as "Mr. and Mrs.," receipt of wedding gifts without his objection, payment of retail accounts incurred by her with the appellation "Mrs.," his designation of her as beneficiary under his insurance policy as his wife, and checks endorsed to her using his last name as her own.⁹⁵
- Her intent and belief about their relationship, the community regarding them as husband and wife, continuous cohabitation for 16 years, his acquiescence in her use of his name and in representations to the community that they were husband and wife, her receipt of a diamond engagement ring and wedding ring from him, his payment of her charge accounts that were in the name of "Mrs.," payment of family and business debts from a single checking account, joint vacations with airline tickets using his last name for both, his introduction of her to friends and others as his wife, a joint AAA membership, operation of a business together, a newspaper publication for an auction sale listing them as owners with his last name, his will providing for her in a similar manner as providing for a spouse, and reference to her by his mother and sister as an "in-law."⁹⁶
- The parties submitted a statement as part of their tax audit stating that they had cohabited together as husband and wife, signed a health insurance contract document attesting to the fact that they had agreed to live as husband and wife which the court found most persuasive because it was signed before a notary, the man designated the woman as his beneficiary on his retirement plan as his common law wife, and they represented themselves as husband and wife at social events and while traveling.⁹⁷
- The parties cohabited for 14 years, filed tax returns with the filing status of married, filing jointly, and claimed her son as a dependent child, and he applied for and received social security benefits in a

⁹³ Gammelgaard at 482.

⁹⁴ Fisher at 805-06.

⁹⁵ Winegard at 612.

⁹⁶ Gebhart at 653.

⁹⁷ Stodola at 98-100.



greater amount because he led the benefits worker to believe that the parties were married.⁹⁸

The Iowa courts may not recognize a common law marriage when evidence is inconsistent and a finding that a common law marriage exists is merely for personal convenience or benefit.

- The court did not find a common law marriage to exist in order for a man to assert spousal privilege in a criminal action when the parties filed separate, single-status tax returns, maintained separate bank accounts, owned little jointly held property, and could produce no witnesses other than themselves to attest that they held themselves out as husband and wife.⁹⁹
- In a loss of consortium action, the court noted that loss of consortium actions had been recognized for spouses, parents, and children, but not for unmarried cohabiting persons. Iowa recognizes common law marriages, but not if the parties do not intend that result.

*The policy of this state is that the de jure family is the basic unit of social order. This policy is reflected in statutes governing the right to marry (citation omitted). It is reflected in the rule recognizing common law marriages. It is demonstrated by statutes defining the rights and responsibilities of husbands and wives toward each other and toward their children (citation omitted). The policy favoring marriage is not rooted only in community mores. It is also rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society. This policy would be subverted if persons could gain marital legal rights without accepting correlative marital legal responsibilities.*¹⁰⁰

- An ex-wife sought review of a decision denying her spousal death benefits under the workers' compensation law. After a divorce, the couple resumed cohabiting. There was conflicting evidence of their status as husband and wife. There was not a presumption in favor of establishing a common law marriage and there was no holding out or intent on her part to be married.¹⁰¹
- The couple was married by a minister, but did not obtain a license, and after the ceremony they told others that they were not legally married because the woman would lose her John Deere surviving spouse's pension benefits.¹⁰²

⁹⁸ In re Marriage of Wade, No. 98-1696 (Iowa App. June 14, 2000).

⁹⁹ State v. Ware, 338 N.W.2d 707, 711 (Iowa 1983).

¹⁰⁰ Laws v. Griep, 332 N.W. 2d 339, 340-41 (Iowa 1983).

¹⁰¹ Conklin at 104.

¹⁰² In re Estate of Atwood, 577 N.W.2d 60, 62 (Iowa App. 1998).



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- The parties were married ceremonially in 1988, had one child, divorced in 1990, and began cohabiting in 1991, which cohabitation lasted for 10 years. The woman claimed that the initial divorce was obtained so that she could receive various forms of public assistance, including financial aid to attend college. They maintained separate bank accounts, filed separate tax returns, the deed for a new home in 1999 designated him as a single person and the mortgage designated him as unmarried, titles to vehicles were in his name only, he claimed to be her husband during her hospitalization stay, she maintained individual credit cards, they often represented themselves as married to the community, and their daughter assumed they were married and was surprised to learn that they had been divorced. The fluctuating status of the couple was based on personal convenience or benefit. The inconsistency of the relationship undermines evidence of a present intent and agreement to be married.¹⁰³

G. Ending a Common Law Marriage.

A common law marriage cannot be ended by mere agreement of the parties, but may only be ended as any other marriage, by death or dissolution. While marriage is a civil contract, it is also a social institution and "[a]lthough the union is a voluntary one the tie may not be broken by agreement if the yoke becomes more irksome in reality than it appeared in prospect."¹⁰⁴ The Iowa Supreme Court has stated that:

*Once married by common law, one is married and subsequent representations of a single status do not invalidate the marriage by common law anymore than such representations would invalidate a marriage by ceremony. A dissolution decree is necessary to dissolve either marriage.*¹⁰⁵

H. Recent Developments and Anomalies in Common Law Marriage.

1. Pennsylvania and Common Law Marriage.

The status of common law marriage in Pennsylvania is of note because prior to January 1, 2005, Pennsylvania recognized common law marriages entered into in the state. In *Hantz v. Sealy*,¹⁰⁶ the Pennsylvania Supreme Court established that a common law marriage could be entered into if entered into with the parties' full consent per verba de praesenti. The words uttered could be in any form, as long as they were words in the present time. In 1833, the Pennsylvania Supreme Court held in *Rodebaugh v. Sanks* that common law marriage was a necessary alternative to marriage statute requirements because without such alternative, children would be considered born out of wedlock. Additionally, the Court held that the statute was merely directory and not the exclusive means to enter into a marriage.¹⁰⁷

In later years, the confusing nature of common law marriage in Pennsylvania was noted by the courts and was described by the Pennsylvania Superior Court as "a

¹⁰³ In re Marriage of Martin, 681 N.W.2d 612, 615-16, 618 (Iowa 2004).

¹⁰⁴ Hopping v. Hopping, 10 N.W.2d 87, 90 (Iowa 1943).

¹⁰⁵ Stodola at 100.

¹⁰⁶ 6 Binn. 405 (Pa. 1814).

¹⁰⁷ 2 Watts 9 (Pa. 1833) (part 2 of opinion).



fruitful source of perjury and fraud, and, in consequence, they are to be tolerated, not encouraged"¹⁰⁸ Later still, in another case, the Superior Court called common law marriage an anachronism because the reasons that had existed for common law marriage in frontier days no longer existed.¹⁰⁹ In that case and in a later case, however, the court noted that any abrogation of the doctrine must be left to the legislature.¹¹⁰

In *Staudenmayer v. Staudenmayer*,¹¹¹ the Supreme Court of Pennsylvania once again stated its disfavor regarding common law marriages, and in a concurring opinion, two justices supported the abrogation of common law marriage in Pennsylvania, citing other states' decisions finding that common law marriage is misunderstood, antiquated, and promotes a lack of commitment, and because the frontier conditions no longer existed. Following this decision, both chambers of the Pennsylvania General Assembly introduced legislation in 1999, 2001, and 2002 to abrogate common law marriage in Pennsylvania.¹¹² The legislation was not enacted in any of these instances, and Pennsylvania law continued to state that, regarding the statutory requirement of obtaining a marriage license, "[t]his part shall not be construed to change the existing law with regard to common law marriage."¹¹³

In *PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos)*, the Commonwealth Court (an appeals court that hears cases including appeals from decisions by state agencies) held that it would no longer recognize common law marriage claims, on a prospective basis, brought before the court. The court determined that "anticipatory overruling" was appropriate because there was no question as to the Pennsylvania Supreme Court's intention. In reaching the conclusion that common law marriage should be abrogated, the Commonwealth Court reasoned that single women are no longer viewed as a burden on the state and are now eligible to receive child support regardless of marital status, eligibility for inheritance rights of children no longer is based on the marital status of their parents, access to ceremonial marriages is easily available, the cost is minimal, and the process is quick and simple, and compliance with statutory requirements provides a screening of individuals to identify impediments and reduces the need for litigation to determine marital status. The advantages suggested in abrogating common law marriage included providing a bright line standard in disputes for the courts when parties adhere to statutory requirements, protecting parties in vulnerable situations who were misguided in their reliance on the doctrine, and assisting third parties in knowing the marital status of people.¹¹⁴

Following this ruling, there was confusion as to what the law regarding common law marriage was in Pennsylvania. The Pennsylvania Superior Court (another court of appeals that hears criminal and certain civil appeals, and children and family-related appeals from the courts of common pleas) in *Bell v. Ferraro*¹¹⁵ applied the common

¹⁰⁸ *Baker v. Mitchell*, 17 A.2d 738, 741 (Pa. Super. 1941).

¹⁰⁹ *Buradus v. General Cement Products Co.*, 48 A.2d 883, 885 (Pa. Super. 1946), *aff'd*, 52 A.2d 205 (1947).

¹¹⁰ *In re Miller*, 448 A.2d 25, 32 (Pa. Super. 1982).

¹¹¹ 714 A.2d 1016, 1019-1020, 1022-23 (Pa. 1998).

¹¹² H.B.43 and S.B.814 (Leg. Pa. 1999); H.B.316 and S.B.1233 (Leg. Pa. 2001); and H.B.2271 (Leg. Pa. 2002).

¹¹³ 23 Pa. Cons. Stat. § 1103 (2003).

¹¹⁴ 831 A.2d 1269, 1279-86 (Pa. Commw. 2003).

¹¹⁵ 849 A.2d 1233, 1234 (Pa. Super. 2004), n.1.



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law marriage law and pointed out in a footnote that it was not bound by the Commonwealth Court's decision and that it deferred abolition of common law marriage to the legislature. However, in another case, the Superior Court in *Stackhouse v. Stackhouse* ruled that although the matters before the Superior Court were not controlled by the decision of the Commonwealth Court, the common pleas trial courts in the state were not in error, per se, in applying the decision. In that case, the court concluded that it would take no position on the continued viability of common law marriage in the state.¹¹⁶

During the 2004 Legislative Session, the Pennsylvania General Assembly enacted legislation to bar the creation of any new common law marriage after January 1, 2005. Act 144, House Bill 2719 of 2004, amended 23 Pa. Cons. Stat., section 1103, by striking the language that provided that licensing requirements were not to be construed to change the existing law regarding common law marriage and instead to provide that no common law marriage contracted after January 1, 2005, would be valid, but did not render an otherwise valid common law marriage contracted before that date invalid.

2. Utah and Common Law Marriage.

In 1987, the Utah legislature, in an action that defied the trend of other states, enacted legislation, effective April 27, 1987, to recognize common law marriages contracted in that state.¹¹⁷ Prior to the enactment, Utah statute had, since 1888, prohibited and declared void any marriage that was not solemnized.¹¹⁸

The history of the legislation providing for common law marriage reveals that it was enacted as a fiscal measure to reduce welfare abuse. In speaking to the Utah Senate, Mr. Norman Angus, Director of the state Department of Social Services, noted that in terms of public assistance, the department could not consider as available the income or resources of an individual who resides in a household but has no legal responsibility for the care and maintenance of the woman or children in the household. Therefore, even if that individual is providing support to the household, the woman could still qualify for public assistance.¹¹⁹ Under the Aid to Families With Dependent Children Program, Utah denied stepparents who were legally obligated to support their children from being eligible for public assistance. Just as with stepparents, if a court order existed establishing cohabiting persons as being married under the common law marriage process, the family would be disqualified for public assistance.¹²⁰ The law, however, is not limited in application to those seeking public assistance.¹²¹

¹¹⁶ 862 A.2d 102, 105 (Pa. Super. 2004).

¹¹⁷ David F. Crabtree, Recognition of Common-Law Marriages, 1988 Utah L. Rev. 273, n.1 referring to Utah Code Ann. 830-1-4.5 (Supp. 1987).

¹¹⁸ Crabtree at 274; 1888 Utah Laws 88, 89 (repealed 1987).

¹¹⁹ Id. at 280.

¹²⁰ The state Department of Social Services estimated that approximately 300 cases would be ineligible for public assistance based on the new law, saving the state approximately \$323,500. However, these savings would be offset by administrative costs, including those costs associated with providing an administrative hearing to ensure due process in obtaining each order of marriage and those costs associated with staff involved in developing evidence to establish the common law marriages. Id. at 281-82, n.43.

¹²¹ As codified at Utah Code Annotated § 30-1-4.5 (Supp. 1987), a court or administrative board order would have to establish that a marriage is based upon a contract between two consenting parties who meet all of the following conditions: (1) are capable of providing consent; (2) are legally capable of entering into a solemnized marriage under Utah law; (3) have cohabited; (4) have mutually assumed marital rights, duties, and obligations; and (5) are holding themselves out to others in a manner so as to acquire a



Since the passage of the statute in 1987, reportedly none of the common law marriage claims in the Utah courts have developed in the context of its stated purpose: to address welfare fraud. Additionally, under the statute there have been problems with proof, issues of interpretation, and a constitutional challenge.¹²² In *Kelley v. Kelley*, a husband and wife who had been ceremonially married decided to transfer the company stock to the wife and then obtain a divorce in order to guard against the financial risk of the husband selling his company. However, they also decided to make no changes in their predivorce relationship and to continue to cohabit. They did not tell anyone, including their children, that they had divorced. A few years later, after the husband's affair with another woman, Mrs. Kelley sued for a modified divorce decree based on the couple having a common law marriage. The court held that a common law marriage had existed.¹²³ In a dissent, Judge Jackson provided a historical analysis of common law marriage and its existence in Utah. He noted that from the end of the 19th century common law marriage fell into disfavor, citing the reason that the impediments to ceremonial marriage brought about by life on the frontier no longer existed. He noted that Utah was in the "vanguard" of a cycle of restoring common law marriage in the United States, but stated, "However, it seems more likely that Utah's statute is an anachronistic rear guard."¹²⁴ Judge Jackson continued by noting that the breadth of application of the common law statute, which had been enacted for the narrow purpose of addressing welfare fraud, had a much broader application. He noted that a review of the cases revealed that other substantive areas of law had been implicated, including ownership and transfer of real and personal property, divorce and the attendant issues of child custody, child support, and property distribution, criminal law, and the motion in a criminal case by a county prosecutor to establish a common law marriage between a man and one of his wives in order to prosecute the man for bigamy. Judge Jackson noted other concerns with the statute and urged the legislature to institute a different administrative remedy for welfare fraud and not "recycle" the experiment of common law marriage.¹²⁵

3. Oklahoma and Common Law Marriage.

Various sources have concluded that common law marriage was abrogated by statute in Oklahoma in 1994 or 1998.¹²⁶ However, a group of Oklahoma legislators met in 2001 to receive testimony regarding whether or not to continue to recognize common law marriage and since that time have proposed legislation to prohibit common law marriage. The meeting of legislators in 2001 provided testimony specifying that the problems with common law marriage in Oklahoma were the legal problems such as spousal claims, probate cases, guardianship, social security cases, and insurance claims. The second issue was of a moral nature: the message being

general reputation as husband and wife. The order to establish the conditions would have to occur no later than one year after the termination of the relationship. *Id.* at 273.

¹²² Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 *BYU L. Rev.* 1189, 1221.

¹²³ *Kelley v. Kelley*, 9 P.3d 171, 171-81 (Utah App. 2000).

¹²⁴ *Id.* at 183.

¹²⁵ *Id.* at 185-86.

¹²⁶ The National Conference of State Legislatures reports that common law marriages might only be recognized if formed before November 1, 1998, www.ncsl.org/programs/cyf/commonlaw.htm. In her article, Cynthia Bowman reports that common law marriage in Oklahoma was abolished by statute in 1994. Bowman at 715, n.24.



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sent to young people by legitimizing "shacking up." Some asserted that common law marriage is no longer relevant in a society in which marriage is convenient and where lack of finality and uncertainty cause problems. Others noted that common law marriage has prevented some injustices and that the issue is the level of government enforcement in people's lives.

The author of HB1455, 2005 General Assembly, Rep. Lee Denney, provided that the intent of the bill was to strengthen marriage by returning it to its Christian foundation and that common law marriage did not have a Christian foundation because the parties were not making a commitment before God.¹²⁷

In addition to the activity of the Oklahoma General Assembly, the Oklahoma courts continue to recognize common law marriage in the state.¹²⁸

I. The Future of Common Law Marriage.

Arguments against common law marriage include: (1) difficulties brought about due to lack of public marriage records to verify property rights of common law spouses; (2) avoidance of the state's marriage statutes which are in opposition to the public policy behind these regulations, including medical examinations; (3) prevention of the spread of disease; (4) avoidance of fee payment to finance recordkeeping; (5) avoidance of waiting periods established to prevent impulsive unions; (6) difficulty in proving common law marriages; (7) the belief that sanctioning common law marriage debases formal marriages and encourages immorality and encourages perjury and fraud by unwed cohabitants hoping to gain the financial benefits of marriage; (8) imposing unintended legal relationships and obligations on parties; and (9) the idea that common law marriages are clandestine and promiscuous and that common law marriage should be used to punish those involved in illicit relationships.¹²⁹

In contrast, the arguments for retaining common law marriage include: (1) providing legal status to parties, thereby reducing vice (because common law marriage focuses on the relationship of the parties rather than on the fact of a ceremony, establishing a common law marriage thereby elevates the status of the relationship); (2) common law marriage does not promote meretricious relationships because if a relationship is simply meretricious, a common law marriage will not be established because the relationship must be public and is difficult to prove; (3) although common law marriage may circumvent the public policy of maintaining records and requiring examinations, common law marriage supports the public policies of preventing illegitimacy, reducing promiscuity, and encouraging marriage; (4) protecting the good faith expectations of the parties; (5) protecting the poor, women, children, and members of minority groups who would be most adversely affected by the abrogation of common law marriage; and (6) that if common law marriages did not exist, states would merely utilize other doctrines to address the needs of cohabiting couples, such as the doctrines of implied contract, putative marriage, marriage

¹²⁷ See www.lsb.state.ok.us/house/news5168.htm for a report on the 2001 meeting. See HB 2522, 2004 General Assembly, and HB 1455, 2005 General Assembly, for proposed legislation. See www.lsb.state.ok.us/house/news7370.html for a description of the author's intent regarding HB 1455.

¹²⁸ See *Standefer v. Standefer*, 26 P.3d 104 (Ok. 2001).

¹²⁹ Vaughn at 1136.



by estoppel, prescription and ratification, and the use of statutes that legitimize children when parents are not married.¹³⁰

In the final analysis, the public policy of the state on common law marriage has generally been left to the legislature to determine. In Iowa, as noted previously, the legislative intent to abrogate common law marriage in Iowa would not be presumed, but must be clearly expressed by the legislature.¹³¹ To date, Iowa has followed the guidance proposed in the following excerpt:

'The institution of marriage, commencing with the race, and attending man in all periods, in all countries of his existence, has ever been considered the particular glory of the social system. It has shown forth in dark countries, and in dark periods of the world, a bright luminary on his horizon. And but for this institution, all that is valuable, all that is virtuous, all that is desirable in human existence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and its hopes would have been wrecked together.' Marriage, then, says Mr. Bishop, is to be cherished by the government, as the first and choicest object of its regard. *'Therefore every court, in considering questions not clearly settled or defined in the law, should lean towards this institution of marriage; holding, consequently, all persons to be married who, living in the way of husband and wife, may accordingly be presumed to have intended entering into the relation, unless the rule of law which is set up to prevent this conclusion is distinct and absolute, or some impediment of nature intervenes.'*¹³²

IV. Statutory Marriage.

A. History of Statutory Marriage in Iowa.

1840. The Revised Statutes of the Territory of Iowa, compiled in 1843, chapter 100, effective March 1, 1840, provided for the regulation of marriages.

Gender, Age, and Race. Section 1 provided for the marriage of males 18 years of age and females 14 years of age, not nearer than first cousins, and not having a living husband or wife. If the male was less than 21 years of age, and if the female was less than 18 years of age, the consent of their fathers, or if their fathers were dead or incapacitated, the consent of their mothers or guardians, was necessary.

Section 13 provided that all marriages of white persons with Negroes or mulattoes were illegal and void.

License, Verification, and Fee. Section 6 required the parties to the marriage to obtain a license from the clerk of the district court in the county where the female resided, with the exception of Friends or Quakers, who were exempt from the license requirement.

Section 7 directed the clerk of the district court to inquire of the parties, upon oath or affirmation, as to the legality of the marriage, and, if the clerk was satisfied that there was no legal impediment to the marriage, to issue the license. If a party was underage, the

¹³⁰ Vaughn at 1137-48.

¹³¹ In re Stopps' Estate at 224.

¹³² In re McLaughlin's Estate, 30 P.651, 656 (Wash. 1892) citing Dickerson v. Brown, 49 Miss. 370, quoting Mr. Bishop On Marriage and Divorce, par.12.



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consent of the parents or guardian was to be provided personally before the clerk, or certified by the parent or guardian, attested to by two witnesses. One witness was then required to appear before the clerk to affirm the certification of the parent or guardian. The statute provided that the clerk could collect \$1.25 for administering the oaths or affirmation, granting the license, recording the certificate of marriage, and filing the necessary papers. If the clerk did not comply with the provisions and issued or signed a marriage license in another manner, the clerk was subject to payment to the aggrieved party of a sum not to exceed \$500.

Solemnization. Sections 2 through 5 provided that ordained ministers licensed by the clerk of the district court of any county, justices of the peace, and certain other religious societies were authorized to solemnize marriages.

Section 11 provided that if a person solemnized a marriage not in keeping with the statute or if the person was not legally authorized to solemnize a marriage, the person, upon conviction, was subject to payment to the county of a sum not to exceed \$500 or a sum equaling \$500, respectively.

Section 12 provided that any fine or forfeiture arising under the chapter was recoverable by action or debt or by indictment.

Certificate of Marriage and Recording. Section 8 provided that a certificate of marriage was to contain the Christian names and surnames, ages, and places of residence of the parties. The time and place of the marriage was to be transmitted to the clerk of the district court of the county where the marriage was solemnized within three months of the marriage to be recorded by the clerk.

Section 9 provided that the person responsible for transmitting the certificate was subject to payment of a fine of \$50 to the county for failure to do so, and the clerk was subject to a like fine for failing to record the certificate.

Section 10 provided that the record of the marriage by the clerk or a copy of the record was presumptive evidence of the marriage.

Validity. Section 14 provided that all laws in effect that were not embraced by the statutes of the state on the subject of marriage were repealed.

1842 — Solemnization. Chapter 101, effective February 17, 1842, as codified in the Revised Statutes of the Territory of Iowa of 1843, provided that marriages that were solemnized by an ordained or licensed minister in the territory prior to that date were held to be as valid under the law as those solemnized by a minister licensed as required by chapter 100 of the Revised Statutes.

1844 — Solemnization. Chapter 5 of the Laws of Iowa, passed at the Extra Session of the Legislative Assembly commencing June 17, 1844, and effective June 19, 1844, provided that in addition to ordained ministers, any minister of the gospel who provided credentials as being a regular licensed minister or preacher of any religious society was authorized to solemnize marriages in the same manner as if he were ordained.

1851. The Code of Iowa, approved February 5, 1851, provided for regulation of marriage.



Civil Contract. Code section 1463 provided that marriage was a civil contract requiring the consent of the parties capable of entering into other contracts, unless an exception was otherwise provided.

Gender and Age. Code section 1464 provided that a marriage was valid between a male of 16 years of age and a female of 14 years of age. If a party had not reached the age required, the marriage was a nullity at the option of the underage party at any time until the party was six months older than the required age.

License, Verification, and Fee. Under Code section 1465, prior to marriage the parties were required to obtain a license from the judge of the county court of the county in which the marriage would be solemnized.

Code section 1466 provided that a license was not to be granted if the parties were under the necessary age, if the parties did not have the consent of a parent or guardian if either was a minor, or if either party was not otherwise capable of entering into a civil contract.

Under Code sections 1467 and 1468, the judge was required to take testimony of competent and disinterested witnesses as to the age and condition of the parties to the marriage, unless the judge was acquainted with the age and condition of the parties, and was to enter the application for the license on the records of the county court stating acquaintance with the parties or the proof of the facts made by the witnesses and providing their names.

Code section 1469 required consent of the parent or guardian of a minor party to be filed in the county office.

Under Code section 1470, a judge who granted a license contrary to the law was guilty of a misdemeanor. If a marriage was solemnized without a license, the parties and anyone aiding the marriage were guilty of a misdemeanor.

Code section 1471 required that a fee of \$1 be paid to the county treasurer for the license.

Solemnization. Under Code section 1472, solemnization of a marriage could be performed by a justice of the peace, a judge of the county court, or the mayor of the city where the marriage took place; by a judge of the Supreme Court or district court of the state; or by an officiating minister of the gospel, ordained or licensed according to his denomination.

Under Code section 1474, if a marriage was solemnized with the consent of the parties but in a manner other than the manner prescribed by the statute, the marriage was valid, but the parties and any person aiding them were subject to a penalty of \$50 to be paid to the school fund.

Code section 1477 provided an exception to the solemnization requirements for members of certain denominations that had a peculiar mode of performing that ceremony. Under Code section 1478, in such a case, if the services of a clergyman or magistrate were not used, the husband was responsible for return of the certificate of marriage and was subject to the \$50 penalty if the return was not made.



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Certificate of Marriage and Recording. Following the solemnization, Code section 1473 required that the officiating minister or magistrate provide each of the parties with a certificate of the marriage.

Code section 1475 provided that a person solemnizing a marriage was also subject to the \$50 penalty if the person did not return the certificate to the county court within 90 days after the ceremony.

Code section 1476 required the clerk of the county court to keep a register of the names of the parties, the date of the marriage, and the name of the person solemnizing the marriage. This record was evidence of the marriage.

Legitimization. Under Code section 1479, illegitimate children were made legitimate by the subsequent marriage of their parents.

2005. In *In re Stopps' Estate* in 1953, the Iowa Supreme Court noted that "our law as to license requirements and ceremonial marriages has not greatly changed since the Code of 1851."¹³³ Chapter 595 of the Code of Iowa (2005) specifies the statutory requirements for entering into a marriage in the state.

Definitions. Code section 595.1 provides definitions related to the county system for data storage and retrieval.

Civil Contract. Code section 595.1A provides that marriage is a civil contract, and the parties must provide consent and must be capable of entering into contracts, unless an exception is otherwise provided.

Gender and Age. Code section 595.2 provides that the parties to a marriage in Iowa must be a male and a female in order for the marriage to be valid. The parties must be at least 18 years of age, unless they meet the alternative requirements of the statute. If the parties falsely represent their age as 18 years of age or older, the marriage is valid unless the person who falsely represented their age makes their true age known in an annulment proceeding initiated prior to reaching their 18th birthday. A child born to a marriage voided in accordance with these provisions is legitimate. The alternative requirements with reference to age provide that if the parties are 16 or 17 years of age, they must obtain the written consent of the parents, a parent, or a guardian of the underage party and the written consent must be approved by a judge of the district court. If both parents of the underage party are dead, incompetent, or cannot be located, and the underage party does not have a guardian, the judge must approve the proposed marriage. A judge's approval must be based upon a finding that the underage party or parties are capable of assuming the responsibilities of marriage and the marriage will serve their best interest. Pregnancy alone cannot be used to establish "best interest." If a parent or guardian withholds consent, the judge, upon application of the party, is to determine if consent was unreasonably withheld and then proceed based on the judge's determination.

License, Verification, and Fee. Under Code section 595.3, prior to solemnizing a marriage, the parties must obtain a marriage license from the county registrar. (Under Code section 331.611, the recorder is deemed to be the county registrar.) Code section 595.3 provides the circumstances under which a license is not to be granted, such as the parties being underage or closely related or lacking capacity to contract.

¹³³ *In re Stopps' Estate* at 222.



Under Code section 595.3A, the application form for a license to marry is to include information relating to abuse prevention.

Under Code section 595.4, in order to receive a marriage license, the parties must sign and file a verified application for the license with the county registrar in the county in which the license is to be issued. The application must include the social security numbers of the parties and at least one affidavit of a competent and disinterested person as to the age and qualifications of the parties. The fee for filing an application for a marriage license is \$35, which includes payment for one certified copy of the original certificate of marriage. (Under Code section 331.605, the county registrar is authorized to retain \$4 of each such fee for provision of the certified copy of the marriage certificate. The remainder of the fee is forwarded to the State Registrar of Vital Statistics on a monthly basis along with the original certificates of marriage.) After receiving the application, the county registrar may issue the marriage license, which becomes valid upon the expiration of three days after the date of issuance of the license. A license to marry may be validated prior to the expiration of the three-day waiting period due to emergency or extraordinary circumstances upon the order of a judge of the district court following application by the parties filed with the county registrar. A fee of \$5 is to be paid to the county registrar upon application for such an order, in addition to the fee for the marriage license. (Under Code section 331.605, waiver of the fee for early validation of the marriage may be authorized by the district court if the applicant demonstrates the inability to pay.) Code section 595.5 provides a process for the parties to indicate a name change in the application for a marriage license. The name used on the marriage license becomes the legal names of the parties to the marriage. Under Code section 595.7, the county registrar is also to provide the parties with a blank return when the license is issued.

Solemnization. Code section 595.9 provides that if the marriage of parties is solemnized without the procuring of a license, the parties and all those aiding them are guilty of a simple misdemeanor. Under Code section 595.11, if a marriage is solemnized with the consent of the parties, but not in accordance with statutory requirements, the marriage is valid, but the parties and the persons aiding and abetting them are to pay \$50 each to the Treasurer of State for deposit in the General Fund of the State. The payment of the fee does not apply to the person conducting the marriage ceremony if the person makes the return of the certificate of marriage to the county registrar within 15 days of the marriage.

Under Code section 595.10, after obtaining the marriage license, the marriage of the parties may be solemnized by a judge of the Supreme Court, Court of Appeals, or district court, including a district associate judge, an associate juvenile judge, a judicial magistrate, or a senior judge, or by a person ordained or designated as a leader of the person's religious faith. Code section 595.12 provides that the person authorized to solemnize the marriage may charge a reasonable fee for the marriage solemnization.

Certificate of Marriage and Recording. Code section 595.13 provides that after solemnization of the marriage, the person who solemnized the marriage is to attest to the marriage on the blank provided and is to return the certificate of marriage to the county registrar who issued the marriage license within 15 days of the marriage. Under Code



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section 144.36, the blank is to be signed by the person performing the ceremony as well as the witnesses to the ceremony.

Under Code section 595.16A, once the original certificate of marriage is received by the county registrar, the county registrar is to issue a certified copy of the original certificate of marriage to the parties. (Code section 144.16 provides for delayed registration of a marriage certificate, and Code section 144.36 provides for the recording of marriage certificates by the county registrar and for the filing of marriage certificates with the State Registrar. This Code section also prohibits inclusion of information regarding the race, previous marriages or educational level of the parties in the certificate of marriage. Code section 144.45 provides for certified copies of records and Code section 144.45A provides for the issuance of commemorative copies of certificates of marriage for a fee of \$35, with the fees collected being used to support the development and enhancement of emergency medical services systems and emergency medical services for children.) Code section 595.17 provides that the provisions relating to the obtaining of a license and the solemnization of the marriage do not apply to members of a denomination having an unusual mode of entering into a marriage. Under Code section 595.16, if a marriage is consummated without a cleric or magistrate, the return of the certificate of marriage may be made by either spouse to the county registrar.

Legitimization and Validity. Code section 595.18 provides that the subsequent marriage of the parents of children born outside of a marriage legitimizes the children and children who are born of a marriage which is otherwise void or for which granting of a license to marry is prohibited, are legitimate.

Code section 595.19 specifies which marriages of persons related by blood are void, and provides that marriages between persons who have a living husband or wife are void, but if the parties live and cohabit together after the death of or divorce from the former husband or wife, the marriage is valid.

With regard to marriages solemnized in another state, territory, country, or any foreign jurisdiction, Code section 595.20 provides that if the marriage was valid in that state, territory, country, or foreign jurisdiction, the marriage is valid in Iowa if the parties are a male and female and if the marriage would not otherwise be declared void.

B. Recent Statutory and Judicial Actions Related to Marriage.

1. Covenant Marriages.

Covenant marriage proposals have been considered in a minimum of 20 states and three states, Louisiana (1997), Arkansas (1998), and Arizona (2001), have enacted covenant marriage laws. Generally, covenant marriage provisions are an optional manner of entering into a marriage, require the couple to participate in premarital education, require counseling for problems during the marriage, provide for a longer waiting period prior to divorce, and specify certain exclusive grounds for divorce.¹³⁴ Couples may enter into a covenant marriage originally, or may convert an existing marriage to a covenant marriage. The grounds for divorce are similar in all three states. For example, in Arizona, the grounds for divorce from a covenant marriage include commission of adultery, commission of a felony resulting in

¹³⁴ <http://www.csgmidwest.org/MemberServices/QOM/2005/0305.htm>.



sentencing to death or imprisonment, abandonment of the matrimonial domicile for at least one year before the filing of the petition for dissolution and refusal to return, physical or sexual abuse of the spouse or child, living separate and apart for at least two years prior to the filing of the petition for dissolution, living separate and apart for at least one year from the date of a decree for legal separation, habitual abuse of drugs or alcohol, or that the parties both agree to the dissolution.¹³⁵ In the three states that provide for covenant marriages, 1 to 2 percent of the parties choose the covenant marriage option.¹³⁶

2. Defense of Marriage Acts and Constitutional Amendments.

In May 1991, three same-sex couples filed a lawsuit against the state of Hawaii that challenged the refusal to issue a marriage license on the sole basis that the applicants were the same sex. The trial court entered a judgment for the defendant, and the plaintiffs appealed. On appeal to the Hawaii Supreme Court, the Supreme Court vacated the trial court's order and remanded the case. The Supreme Court noted that although the plaintiffs did not have a fundamental constitutional right to same-sex marriage, under the Hawaii Constitution, Article I, section 5, the parties had a valid equal protection claim. Hawaii's counterpart to the 14th Amendment under the United States Constitution, Article I, section 5, reads as follows:

[N]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.

The Hawaii Supreme Court determined that for the purposes of an equal protection analysis under Article I, section 5, of the Hawaii Constitution, sex is a suspect category and because the statute discriminated on the basis of sex, the statute was subject to strict scrutiny. The Hawaii Supreme Court therefore vacated the circuit court's order and judgment and remanded the case for further proceedings relative to the opinion. In order for the state to be successful on remand, the state would have to prove a compelling state interest to uphold the statute. The state lost on remand, failing to provide a compelling state interest to support the limitation of marriage based on sex, and the state appealed again to the Hawaii Supreme Court.¹³⁷ However, in 1997, the Hawaii legislature voted to place a constitutional amendment on the ballot in November 1998 to allow the state legislature to limit marriage to men and women only. The constitutional amendment was adopted¹³⁸ and in *Baehr v. Miike*,¹³⁹ the Hawaii Supreme Court dismissed the case on the grounds that constitutional challenge was moot due to adoption of the constitutional amendment.

In the meantime, in 1996, Congress enacted the federal Defense of Marriage Act (DOMA), which provides that for the purposes of federal laws, rulings, regulations, or interpretations of administrative bureaus and agencies, marriage is defined as

¹³⁵ Ariz. Rev. Stat. tit. 25-903 (January 1, 2005).

¹³⁶ <http://www.csgmidwest.org/MemberServices/QOM/2005/0305.htm>.

¹³⁷ *Baehr v. Lewin*, 852 P.2d 44, 55-68, (Haw. 1993), reconsideration granted in part, 875 P.2d 225 (Haw. 1993), appeal after remand, *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), on remand to 1996 WL 694235 (Hawaii Cir. Ct. 1996), aff'd by *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

¹³⁸ Haw. Const., art. 1, § 23.

¹³⁹ 994 P.2d 566 (Haw. 1999).



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between one man and one woman¹⁴⁰ and also provided that a state did not have to recognize a same-sex marriage entered into in another state:

*No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.*¹⁴¹

Following the passage of the federal DOMA, many states enacted laws based on the federal law. Currently 42 states have statutes defining marriage as between one man and one woman.¹⁴² These states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Some states, including Iowa, also provide a public policy exception to the recognition of marriages which do not comply with the requirement that marriage is between a man and a woman.

Eighteen states have constitutional amendments defining marriage.¹⁴³ These states are Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Seven states do not define marriage either in statute or in their state constitution as being between a man and a woman. These states are Connecticut, Massachusetts, New Jersey, New Mexico, New York, Rhode Island, and Wisconsin.¹⁴⁴

3. Civil Unions.

Two states currently provide for civil unions between same-sex parties by statute: Vermont (2000) and Connecticut (2005). Civil unions offer the same rights, benefits, and protections as marriage but only on the state level.

Vermont. The Vermont legislature enacted legislation in April 2000 to provide for civil unions between same-sex couples. The legislation was the response of the legislature to the Vermont Supreme Court's ruling in *Baker v. State*.¹⁴⁵ In *Baker*, three same-sex couples, all in relationships ranging in duration from four to 25 years, and two with children, applied for marriage licenses and were refused as ineligible under the state marriage laws. In 1997, the plaintiffs filed a lawsuit against the state of Vermont and their respective town clerks who were responsible for issuing marriage licenses, seeking a declaratory judgment that refusal to grant the marriage licenses was a violation of the marriage statutes and the Vermont Constitution. The trial court

¹⁴⁰ 1 U.S.C. § 7.

¹⁴¹ 28 U.S.C. § 1738C.

¹⁴² <http://www.ncsl.org/programs/cyfl/samesex.htm>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 744 A.2d 864 (Vt. 1999).



dismissed the complaint, ruled that the marriage statutes could not be construed to permit issuance of marriage licenses to same-sex couples, and also ruled that the marriage statute was constitutional because it rationally furthered the state's interest in "promoting 'the link between procreation and child rearing.'"¹⁴⁶

The plaintiffs appealed, requesting injunctive and declaratory relief to secure a marriage license based on violation of the Vermont marriage statute and based on the statute being unconstitutional under the Common Benefits Clause of the Vermont Constitution. The Vermont Supreme Court, on appeal, in construing the marriage statute, rejected the claim that the plaintiffs were entitled to a marriage license under that statute. However, in determining the constitutionality of the marriage statute, the Court distinguished the unique Common Benefits Clause, Chapter I, Article 7, of the Vermont Constitution with an inclusionary principle at its core and its more generous protection, from the Equal Protection Clause of the 14th Amendment of the United States Constitution and what the Court viewed as its more rigid categories of analysis. The Court noted that "[t]he concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege."¹⁴⁷

The Court reviewed the state's purposes in establishing a statutory classification which excluded same-sex couples from the benefits of marriage. These interests related to promoting the link between procreation and child rearing, promoting security for children, and protecting the institution of marriage. The Court concluded that none of these interests provided a reasonable and just basis for excluding same-sex couples from the benefits of the marriage law. The Court cited the Common Benefits Clause of the Vermont Constitution, which in pertinent part, reads:

*That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community*¹⁴⁸

The Court held the following:

[P]laintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system

¹⁴⁶ Id. at 867-68.

¹⁴⁷ Id. at 867, 876-77.

¹⁴⁸ Vt. Const., ch. I, art. 7.



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*is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of law.*¹⁴⁹

The Court did not grant the plaintiffs the relief they sought by providing injunctive and declaratory relief because the Court did not determine that the plaintiffs were entitled to a marriage license, but determined only that they were entitled to the common benefits and protections that flow from marriage under Vermont law. Therefore, the Court allowed the current statutory scheme to remain in effect for a reasonable period of time, while the legislature enacted legislation to statutorily grant the benefits and protections constitutionally required. However, the Court noted that if the benefits and protections were not statutorily granted, the plaintiffs could seek the relief originally sought. The Court reversed the decision of the lower court, suspended the Court's decision, and retained jurisdiction to permit the legislature time to enact legislation consistent with the holding of the Court.¹⁵⁰

The legislature determined that instead of extending traditional marriage to same-sex couples, it would provide for an alternative institution, civil unions. The law was enacted in April 2000 and became effective July 1, 2000.¹⁵¹ By registering their civil unions, parties are able to receive

*the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, policy, administrative or court rule, common law or any other source of civil law, as are granted to spouses in a marriage.*¹⁵²

The statute also provided for reciprocal beneficiary status to allow two people related by blood or adoption to qualify for certain specified benefits that would otherwise only be available to spouses.¹⁵³

Connecticut. On April 20, 2005, the Connecticut legislature approved and the Governor signed legislation to provide for civil unions between same-sex parties in that state. The legislation also provided that marriage is a union between one man and one woman and provided that civil unions are only available to parties 18 years of age or older. The law took effect October 1, 2005.¹⁵⁴

4. Same-Sex Marriage.

Massachusetts is the only state to recognize marriage between same-sex parties. In 2001, seven same-sex couples sued the Massachusetts Department of Public Health for denial of access to marriage licenses and exclusion from the legal and social status of marriage as well as the protections, benefits, and obligations of marriage as violative of Massachusetts law. In May 2002, a Superior Court judge ruled in favor of the department, and the plaintiffs appealed. In November 2003, the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Dept. of Public Health* that even though the existing statute could not be construed to permit same-sex

¹⁴⁹ Baker at 867.

¹⁵⁰ Id. at 886-89.

¹⁵¹ Vt. Stat. Ann. tit. 15, ch. 23.

¹⁵² Vt. Stat. Ann. tit. 15, § 1204.

¹⁵³ Vt. Stat. Ann. tit. 15, ch. 25.

¹⁵⁴ Pub. Act No. 05-10 (2005).



couples to marry, denying same-sex couples the protections, benefits, and obligations of marriage that were available to opposite-sex couples was unconstitutional on equal protection and due process grounds under the state constitution. The Court noted that the commonwealth had failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples, dismissing the state's reasons, including furthering the state's interest in providing a favorable setting for procreation, ensuring the optimal setting for child rearing, and preserving scarce public or private resources. The Court also construed civil marriage to mean the voluntary union between two persons as spouses to the exclusion of all others. The Court vacated the summary judgment for the department, remanded the case to the Superior Court for entry of a judgment consistent with the opinion, and stayed the judgment for 180 days (until May 17, 2004) to allow the legislature to take appropriate action.¹⁵⁵

In December 2003, the Massachusetts Senate requested an advisory opinion from the Supreme Judicial Court to determine if a statute providing for civil unions would provide appropriate action. The Supreme Judicial Court responded that the civil union provision was not the constitutional equivalent of marriage and would create a separate class of citizens, which would violate the Equal Protection and Due Process Clauses of the Massachusetts Constitution and the Massachusetts Declaration of Rights.¹⁵⁶ The Massachusetts legislature then met in a constitutional convention and passed an amendment to the state constitution to establish civil unions but prohibit same-sex marriages. The earliest that the amendment may be placed before the voters is November 2006.¹⁵⁷ Based upon the ruling of the Court, the state of Massachusetts began issuing marriage licenses to same-sex couples beginning May 17, 2004. However, the state is enforcing its marriage evasion statute against out-of-state same-sex couples.¹⁵⁸

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¹⁵⁵ 798 N.E.2d 941, 949-51, 960-970 (Mass. 2003).

¹⁵⁶ Opinions of the Justices to the Senate, 802 N.E.2d 565, 589-72 (Mass. 2004).

¹⁵⁷ On September 14, 2005, the Massachusetts legislature was required to vote on the measure a second time. In a joint session the Massachusetts legislature disapproved the measure that would have banned same-sex marriage but allowed civil unions. Another proposed amendment would ban both same-sex marriage and civil unions. This measure is not eligible to come before the voters until 2008. http://www.usatoday.com/news/nation/2005-09-14-gay-marriage_x.htm.

¹⁵⁸ Mass. Gen. Laws Ann. pt. II, tit. III, ch. 207, §§ 10, 11, and 12 (West 2005).

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APPENDIX Statutory and Common Law Marriage Chart 2005

State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
Alabama	ALA. CODE tit. 30, ch. 1 (2005)	Yes. Recognized in case law.	Campbell v. Gullatt, 43 Ala. 57 (1869); Piel v. Brown, 361 So. 2d 90 (Ala.1978) Common law marriage elements: a capacity to contract a marriage; a present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation. (See Boswell v. Boswell, 497 So. 2d 479, 480 (Ala. 1986))
Alaska	ALASKA STAT. tit. 25, ch. 05 (2004)	No. The 1917 statute was interpreted as mandatory, not directory.	Edwards v. Franke, 364 P.2d 60, 63 (Alaska 1961) ALASKA STAT. § 25.05.011(b) (2004)
Arizona	ARIZ. REV. STAT. ANN. tit. 25, ch. 1 (West 2005)	No. Abrogated by statute in 1913.	Levy v. Blakely, 18 P.2d 263, 265 (Ariz. 1933) ARIZ. REV. STAT. ANN. § 25-111 (West 2005)
Arkansas	ARK. CODE ANN. tit. 9, subtitle 2, ch. 11 (West 2005)	No. Common law marriage never was a part of the law of the state and statute was interpreted as mandatory, not directory.	Furth v. Furth, 133 S.W. 1037, 1038-39 (Ark. 1911)
California	CAL. FAM. CODE div. 3 (West 2005)	No. Statute of 1895 interpreted as abolishing common law marriage.	Norman v. Thomson, 54 P. 143 (1898); Marvin v. Marvin, 557 P.2d 106, 122 n.24 (Cal. 1976) CAL. FAM. CODE, div. 3, pt. 1, § 300 (West 2005)
Colorado	COLO. REV. STAT. ANN. tit. 14, art. 2, pt. 1 (West 2005)	Yes. Recognized in case law.	People v. Lucero, 747 P.2d 660 (Colo. 1987) "[I]n this state a marriage simply by agreement of the parties, followed by

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State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
			cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a 'common-law marriage,' may be valid and binding." Taylor v. Taylor, 50 P. 1049 (Colo. App. 1897)
Connecticut	CONN. GEN. STAT. ANN. ch. 815E (West 2005)	No. Not recognized.	Gould v. Gould, 61 A. 604, 610 (1905) (Hamersley, J., concurring)
Delaware	DEL. CODE ANN. tit. 13, ch. 1 (2005)	No. Common law marriage not adopted in the state and statute interpreted as mandatory, not directory.	Wilmington Trust Co. v. Hendrixson, 114 A. 215, 222 (Del. Super. 1921); Owens v. Bentley, 14 A.2d 391, 392 (Del. Super. 1940)
District of Columbia	D.C. CODE ANN. tit. 46, subt. I, ch. 4 (2005)	Yes. Recognized in case law.	"So, whatever the rule may be elsewhere, in the District of Columbia it is that when a man and a woman who are legally capable of entering into the marriage relation mutually agree, in words of the present tense, to be husband and wife, and consummate their agreement by cohabiting as husband and wife, a common-law marriage results." U.S. Fidelity & Guaranty Co. v. Britton, 269 F.2d 249, 251 (C.A.D.C. 1959)
Florida	FLA. STAT. ANN. ch. 741 (West 2005)	No. Abrogated by statute effective January 1, 1968.	FLA. STAT. ANN. § 741.211 (West 2005)
Georgia	GA. CODE ANN. tit. 19, ch. 3 (West 2005)	No. Abrogated by statute effective January 1, 1997.	GA. CODE ANN. § 19-3-1.1 (West 2005)
Hawaii	HAW. REV. STAT. ANN. div. 3, tit. 31, ch. 572 (Matthew Bender 2004)	No. Statute interpreted as mandatory, not directory in 1920.	Parke v. Parke, 25 Haw. 397 (Haw. Terr. 1920) (part 5 of opinion)
Idaho	IDAHO CODE ANN. tit. 32, ch. 2-5 (2005)	No. Abrogated by statute effective January 1, 1996.	IDAHO CODE § 32-201 (2005)
Illinois	750 ILL. COMP. STAT. ANN. art 5, pts. II, III (2005)	No. Abrogated by statute effective June 30, 1905.	Leshner v. Leshner, 159 Ill. App. 432 (Ill. App. 1 Dist. 1911), rev'd on other grounds, 250 Ill. 382 N.E. 483 (Ill. 1911)

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State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
			750 ILL. COMP. STAT. ANN. 5/214 (2005)
Indiana	IND. CODE ANN. tit. 31, art. 11 (2004)	No. Abrogated by statute effective January 1, 1958.	In re Sutherland's Estate, 204 N.E.2d 520 (Ind. 1965) IND. CODE 31-11-8-5 (2004)
Iowa	IOWA CODE ch. 595 (2005)	Yes. Recognized in case law. Penalty in statute for improper solemnization.	The three elements that must exist to create a common law marriage in Iowa are: 1. Intent and agreement in praesenti to be married by both parties. 2. Continuous cohabitation. 3. Public declaration or holding out to the public that the parties are husband and wife. (See In re Estate of Fisher, 176 N.W.2d 801, 805 (Iowa 1970) IOWA CODE § 595.11 (2005)
Kansas	KAN. STAT. ANN. ch. 23, art. I (2004)	Yes. Recognized in case law. The statute limits recognition of common law marriages to parties 18 years of age or older.	To establish a common-law marriage, plaintiff must prove: (1) Capacity of the parties to marry, (2) a present marriage agreement, and (3) holding out of each other as husband and wife to the public. Sullivan v. Sullivan, 413 P.2d 988, 992 (Kan. 1966) State v. Walker, 13 P. 279, 283-85 (Kan. 1887) KAN. STAT. ANN. § 23-101 (2004)
Kentucky	KY. REV. STAT. ANN. ch. 402 (West 2004)	No. Abrogated by statute in 1852.	Harris v. Harris, 2 S.W. 549 (Ky. App. 1887); Murphy v. Bowen, 756 S.W.2d 149, 150 (Ky. App. 1988) KY. REV. STAT. ANN. § 402.020 (West 2004)
Louisiana	LA. CIV. CODE ANN. arts. 86-93 (2004)	No. Not recognized.	Green v. Crowell, 69 F.2d 762, 764 (5th Cir. 1934)
Maine	ME. REV. STAT. ANN. tit. 19-A, pt. 2, ch. 23 (2005)	No. Not recognized.	Pierce v. Secretary of U.S. Dept. of Health, Education and

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State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
			Welfare, 254 A.2d 46, 48 (Me. 1969)
Maryland	MD. CODE ANN., FAM. LAW tit. 2 (West 2005)	No. Not recognized.	Denison v. Denison, 35 Md. 361 (1872)
Massachusetts	MASS. GEN. LAWS ANN. ch. 207 (West 2005)	No. Not recognized. Never adopted as the common law, and statute interpreted as mandatory, not directory.	The Inhabitants of the Town of Milford v. the Inhabitants of the Town of Worcester, 7 Mass. 48 (1810); Commonwealth v. Munson, 127 Mass. 459, 466-67 (1879)
Michigan	MICH. COMP. LAWS ANN. ch 551 (West 2005)	No. Abrogated by statute effective January 1, 1957.	MICH. COMP. LAWS ANN. § 551.2 (West 2005)
Minnesota	MINN. STAT. ANN. ch. 517 (West 2005)	No. Abrogated by statute effective April 26, 1941.	MINN. STAT. ANN. § 517.01 (West 2005)
Mississippi	MISS. CODE ANN. tit. 93, ch. 1 (West 2005)	No. Abrogated by statute effective April 5, 1956.	MISS. CODE ANN. § 93-1-15 (West 2005)
Missouri	MO. ANN. STAT. tit. XXX, ch. 451 (West 2005)	No. Abrogated by statute effective March 31, 1921.	State v. Eden, 169 S.W.2d 342, 344-45 (Mo. 1943) MO. ANN. STAT. § 451.040 (West 2005)
Montana	MONT. REV. CODE ANN. tit. 40, ch. 1 (2003)	Yes. Recognized today in statute. Montana also provides for consummation of a marriage without solemnization by written declaration.	MONT. REV. CODE ANN. § 26-1-602 (30); § 40-1-403; § 40-1-311 "[T]he party asserting that a common law marriage exists has the burden of proving: (1) that the parties were competent to enter into a marriage; (2) that the parties assumed a marital relationship by mutual consent and agreement; and (3) that the parties confirmed their marriage by cohabitation and public repute." In re Estate of Hunsaker, 968 P.2d 281, 285 (Mont. 1998)
Nebraska	NEB. REV. STAT. ch. 42, art. 1 (2005)	No. Abrogated by statute effective 1923.	Collins v. Hoag & Rollins, Inc., 241 N.W. 766, 767-69 (Neb. 1932); Sorensen v. Sorensen, 100 N.W. 930 (Neb. 1904)

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State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
			NEB. REV. STAT. § 42-104 (2005)
Nevada	NEV. REV. STAT. ANN. tit. II, ch. 122 (West 2004)	No. Abrogated by statute effective March 29, 1943.	NEV. REV. STAT. ANN. § 122.010 (West 2004)
New Hampshire	N.H. REV. STAT. ANN. tit. XLIII, ch. 457 (2004)	Yes, but recognized in statute only posthumously, after the death of one of the parties. See N.H. REV. STAT. ANN. § 457.39 (2004) and http://www.nhbar.org/pdfs/7-02comlaw.pdf	N.H. REV. STAT. ANN. § 457.39 (2004)
New Jersey	N.J. STAT. ANN. tit. 37, ch. 1 (West 2005)	No. Abrogated by statute effective December 1, 1939.	N.J. STAT. ANN. § 37:1-10 (West 2005)
New Mexico	N.M. STAT. ANN. ch. 40, art. 1 (West 2005)	No. Not recognized. New Mexico Supreme Court held the statute of 1860 abolished common law marriage or that it was evidence that common law marriage had already been abolished.	In re Gabaldon's Estate, 34 P.2d 672, 673-75 (N.M. 1934)
New York	N.Y. DOM. REL. LAW ch. 14, art. 1-3 (McKinney 2005)	No. Effect of statute requiring solemnization was to abolish common law marriage effective April 29, 1933. Prior to this, common law marriage was abolished by statute from January 1, 1902, to January 1, 1908.	In re Seymour, 185 N.Y.S. 373 (N.Y. Sup. Ct. 1920); Estate of Benjamin, 311 N.E.2d 495, 496 (N.Y. 1974) N.Y. DOM. REL. LAW ch. 14, art. 3, § 11
North Carolina	N.C. GEN. STAT. ANN. ch. 51 (West 2005)	No. Not recognized. Statute interpreted to be mandatory, not directory.	State v. Wilson, 23 S.E. 416, 418 (N.C. 1897); State v. Samuel, 19 N.C. 177 (1836) (part 3 of opinion)
North Dakota	N.D. CENT. CODE ch. 14-03 (2003)	No. Statute of 1890 was interpreted to be mandatory, not directory.	Schumacher v. Great N. Ry. Co., 136 N.W. 85, 86-87 (N.D. 1912) N.D. CENT. CODE § 14-03-01 (2003)

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State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
Ohio	OHIO REV. CODE ANN. tit. XXXI, ch 3101 (West 2005)	No. Abrogated by statute effective October 10, 1991.	OHIO REV. CODE ANN. § 3105.12 (West 2005)
Oklahoma	OKLA. STAT. ANN. tit. 43 (West 2005)	Yes. Recognized in case law. Statute interpreted to be directory, not mandatory.	Reaves v. Reaves, 82 P. 490, 492, 494, 496 (Okla. 1905) "A common law relationship is contractual, just as is a ceremonial marriage. It must be founded upon a mutual agreement, to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable of entering into such a contract; consummated by their cohabitation as man and wife as well as their open assumption of other marital duties." 178 P.2d 638, 640 (Okla. Crim. App. 1947)
Oregon	OR. REV. STAT. ANN. tit. II, ch. 106 (West 2003)	No. Not recognized. Statute interpreted to be mandatory.	Huard v. McTeigh, 232 P. 658, 662-63 (Or. 1925)
Pennsylvania	PA. CONS. STAT. ANN. tit. 23, part II (West 2005)	No. Abrogated by statute effective January 1, 2005.	Baker v. Mitchell, 17 A.2d 738, 741 (Pa. Super. 1941) PA. CONS. STAT. ANN. tit. 23, part II, § 1103 (West 2005)
Rhode Island	R.I. GEN. LAWS tit. 15, ch. 1-3 (2004)	Yes. Recognized in case law. Statute interpreted as directory, not mandatory.	Holgate v. United Electric Rys. Co., 133 A. 243, 244-45 (R.I. 1926) "It can be established by clear and convincing evidence that the parties seriously intended to enter into the husband and wife relationship (citations omitted), and that their conduct was of such a character as to lead to the belief in the community that they were married (citations omitted). That there are the prerequisite serious intent and belief is demonstrable by inference from cohabitation, declarations, reputation among kindred and friends, and other competent circumstantial evidence." Sardonis v. Sardonis, 261 A.2d 22, 24 (R. I. 1970)

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State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
South Carolina	S.C. CODE ANN. tit. 20, ch. 1, art. 3 (2004)	Yes. Recognized in case law. Statute interpreted as directory, not mandatory.	State v. Ward, 28 S.E.2d 785, 786-87 (S.C. 1944) "It is essential to a common law marriage that there shall be a mutual agreement between the parties to assume toward each other the relationship of husband and wife. Cohabitation without such an agreement does not constitute marriage." Johnson v. Johnson, 112 S.E.2d 647, 651 (S.C. 1960)
South Dakota	S.D. CODIFIED LAWS ch. 25-1 (2005)	No. Abrogated by statute effective July 1, 1959.	S.D. COMP. LAWS ANN. § 25-1-29 (2005)
Tennessee	TENN. CODE ANN. tit. 36, ch. 3 (West 2005)	No. Statute interpreted as mandatory. However, courts do provide for estoppel to deny marriage.	Bashaw v. State, 9 Tenn. 177 (TENNERRAPPP 1829); Martin v. Coleman, 19 S.W.3d 757, 760 (Tenn. 2000)
Texas	TEX. FAM. CODE ANN. tit. 1, sub. A (Vernon 2005)	Yes. Recognized in statute as informal marriage.	McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934) TEX. FAM. CODE ANN. tit. 1, sub. A, § 2.401-2.405 (Vernon 2005)
Utah	UTAH CODE ANN. tit. 30, ch. 1 (West 2005)	Yes. Recognized in statute effective April 27, 1987. See Laws 1982, c. 246, § 2 and David F. Crabtree, Recognition of Common-Law Marriage, 1988 Utah L. Rev. 273 n.1.	UTAH CODE ANN. § 30-1-4.5 (West 2005)
Vermont	VT. STAT. ANN. tit. 15, ch. 1 (2003-2004)	No. Common law marriage never in effect, and statute interpreted as superseding common law marriage.	Morrill v. Palmer, 33 A. 829, 831 (Vt. 1895)
Virginia	VA. CODE ANN. tit. 20, chs 2, 3 (West 2005)	No. Statute interpreted as mandatory and as wholly superseding common law marriage.	Offield v. Davis, 40 S.E. 910, 912-14 (Va. 1902)

Marriage Law

State	Statutory Marriage Authority	Common Law Marriage	Common Law Marriage Authority
Washington	WASH. REV. CODE ANN. ch. 26.04 (West 2005)	No. Statute interpreted as mandatory.	In re McLaughlin's Estate, 30 P. 651, 658-59 (Wash. 1892)
West Virginia	W. VA. CODE ANN. ch. 48, art. 2 (West 2005)	No. Statute interpreted as mandatory.	Beverlin v. Beverlin, 3 S.E. 36, 39-40 (W. Va. 1887)
Wisconsin	WIS. STAT. ANN. ch. 765 (West 2005)	No. Attorney general opinion that 1917 statute was mandatory.	In re Van Schaick's Estate, 40 N.W.2d 588, 589 (Wis. 1949)
Wyoming	WYO. STAT. ANN. tit. 20, ch. 1, art. 1 (2005)	No. Statute interpreted as mandatory.	In re Robert's Estate, 133 P.2d 492, 498-503 (Wyo. 1943)

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