FAMILY LAW in AMERICA

Sanford N. Katz

THIRD EDITION

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Introduction

Family law came of age during the last half of the twentieth century. Earlier, in practice, scholarship, and legal education, it was given little attention or respect. Perhaps the reason for the low status of family law practice, defined narrowly as domestic relations and almost exclusively concerned with divorce, was that it dealt with human conflicts and real people in distress, not legal abstractions. It should also be remembered that divorce in the United States, opposed by some religions, was a taboo subject, and the status of a divorced person carried with it a social stigma. Therefore, it was natural that the reputation of divorce lawyers would suffer. Major law firms rarely accepted divorce cases, leaving them to be handled by lawyers in small firms or single practitioners.

Even though family law was almost exclusively statutory, in court it had the reputation of being essentially discretionary law. Interpretations of phrases like "in the best interests of the child" or "cruel and abusive conduct" were thought to be more dependent on the mood of the judge than on case law. A negative criticism of judicial decisions in family law cases was that they were fact-driven—as if decisions in other kinds of cases were not. Appeals in family law cases were infrequent so that the trial judge was basically the final decision-maker. It was rare for the U.S. Supreme Court to hear a family law case.

In mid-century, family law was stagnant. Little law reform occurred in the 1940s. For one thing, few legislators were thinking about family law during World War II and immediately afterward. In 1945 the country was concerned with rebuilding its economy and providing opportunities for veterans to enter colleges and return to their jobs.

During the decades of the 1940s and early 1950s, law schools were not educating students to practice family law. Indeed, if a course in family law was offered at all, it was a basic course, often taught by a part-time lecturer. The major textbook that covered most areas of family law was Professor J. Warren Madden's *Handbook of the Law of Persons and Domestic Relations* published in 1931. The casebook that dominated the field was the 1952

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edition of *Cases and Other Materials on Domestic Relations*, edited by Albert C. Jacobs, President of Trinity College; and Julius Goebel Jr., Professor of Law at Columbia University Law School. Unlike the law faculties at British and European universities, which had renowned family law scholars, and where family law was considered a serious intellectual study, American law schools had very few major family law professors. Mostly they were senior scholars educated in Europe like Max Rheinstein of the University of Chicago Law School; or with strong European ties, like Karl Llewellyn, first at Columbia and later at the University of Chicago Law School. Both professors had interests in other disciplines, like sociology and anthropology, which they related to family law.

The period of major changes in family law began in the late 1950s and early 1960s. The latter decade and the one following might be considered the most important era in the last half of the twentieth century for family law practice and scholarship. The American Bar Association recognized family law as a specialty in 1958 and established the Family Law Section. Judge Paul W. Alexander of Ohio, the father of therapeutic divorce, was its first chairman.

Although it is hard to discern any consistent national family policy, during the late 1950s and 1960s in both state capitals and in Washington, D.C., there seemed to have been a willingness to look at the family in realistic terms and to address issues that had been dormant for years. The civil rights movement left its imprint on family law with respect to law reform and in raising consciousness about the protection of individual rights. At the same time, through the efforts of governmental programs and private foundations, people of limited income were given access to legal services, which provided lawyers for family law cases in court as well as for representation at federal and state administrative hearings. A number of cases that have made major changes in family law were the result of the work of legal services lawyers.

The legislative movement to recodify state family law, particularly divorce law, began mid-century. For example, attempts to change the divorce law in New York can be traced back to 1945. New York's recognition of adultery as the sole ground for divorce prompted lawyers to engage in deceptive practices. In response to the reform efforts of leaders of the New York Bar, the New York State Legislature broadened the grounds for divorce in 1966, thus bringing New York into line with other enlightened jurisdictions.

In 1969 California became the first state to enact a divorce law without fault-based grounds. As state after state began to enact no-fault divorce laws,

the emphasis in divorce litigation shifted from proving grounds for a fault-based divorce to rethinking the purpose of alimony, and determining who should be awarded what property and who should be the custodian of the children. The concept of rehabilitative alimony grew out of the discretionary powers of the judge in the 1970s and was adopted by courts, which began to award alimony as a temporary device to aid the dependent spouse (usually the wife) in becoming self-supporting. This was a major change in alimony, which was a method of spousal support after divorce, frequently for the wife's life, based on her needs and the husband's ability to pay. During that same decade, states began to examine their residency requirements for divorce jurisdiction, and slowly these requirements were shortened, bringing some uniformity in the country and lessening the need for a couple to leave their home state to seek a divorce elsewhere.

An important influence on divorce reform was the efforts of the Commissioners on Uniform State Laws. That private agency was established in 1891 to bring uniformity to certain areas of law. Through the years it has drafted a number of uniform laws dealing with family law issues including marriage, divorce, adoption, premarital agreements, child custody jurisdiction, and parentage in cases of illegitimacy. I have included those referred to in the text in the appendix. Even though not all states have followed the Commissioners' lead, the acts nonetheless provide useful guides in determining the direction of the law or what lawyers, judges, and scholars think the law ought to be.

The Commissioners had been working on divorce law for seventy-five years before the Uniform Marriage and Divorce Act was promulgated in 1970. It was adopted in part only by eight states, yet it succeeded in alerting lawyers, legislators, and judges that the time had come to replace the old order with new ideas about marriage, divorce, and child custody. Some state bar associations responded by backing changes in their divorce laws and using the Uniform Marriage and Divorce Act as a model.

The Act introduced the concepts of irretrievable breakdown as a ground for no-fault divorce and equitable division of property, and it enumerated factors for determining both. Although it can be said that listing factors that judges must consider in assigning property in divorce or in any other area of family law decision-making is a legislative attempt to limit a judge's discretion and, in a way, to control judicial power, there are advantages both for lawyers and judges. Factors are enormously helpful to lawyers in organizing the amorphous amount of material in child custody and matrimonial

property litigation. Also, they can provide a judge with a checklist for monitoring the presentation of evidence during trial as well as for writing findings of fact.

The hesitation of some lawyers to advocate the adoption of the Act may well have been based on their belief that it would end the kind of divorce practice to which they had become accustomed and basically complicate what was to them a simple process. After all, under the title theory of property subscribed to in many states, he who held property got it. What was simpler than that? With equitable division of property, lawyers would have to ask the following questions in preparing a divorce case for settlement or litigation: What is separate and what is marital property? What factors should be used to determine the characterization? What is its value? When should it be valued? Little did lawyers realize when equitable distribution was first introduced how complex it would be and that they would need help from other professions like accountants; pension and actuarial experts; and real estate, business, and other valuators.

In child custody also, the Act brought clarity. The best interests of the child, which had been and continues to be the basis for determining custody decisions in any number of legal contexts, were often criticized for being vague. The Act did more than just state that a decision should be in the best interests of the child. It provided factors that judges were to consider in awarding custody. That meant that judges were required to focus on, among other matters, the environment in which the child was raised, the child's relationship with his or her parents, friends, and others, as well as inquiring into the child's own wishes and the mental and physical health of those involved in the child's life. Just as experts in other fields were important in marital property issues, they were also necessary in child custody disputes. Thus, psychiatrists, social workers, psychologists, educators, and pediatricians were consultants in child custody cases, both to lawyers in preparation of their cases and to judges in reaching decisions.

At the time some states were reviewing their divorce laws and procedure, they were also considering court reform. Humanizing the divorce process by utilizing alternatives to the adversarial system in an informal setting became a goal. Judge Paul W. Alexander had accomplished such procedural and court reforms in Toledo, Ohio, in the 1950s, but that has long been forgotten. In a way, Judge Alexander was ahead of his time. Now we speak of negotiation, arbitration, and mediation as if they were entirely new concepts. Lawyers educated in rules of procedure and evidence and trained to argue

find it difficult to think of alternative methods of dispute resolution in family matters. But as litigation becomes extremely expensive, as it is today in major metropolitan areas, middle-class divorcing couples may be forced to choose mediation for purely economic considerations and failing that, to represent themselves in court, now seen more and more.

The bar's reluctance to promote the establishment of family courts known for their informality and often providing social services to litigants may be based on lawyers' belief that to do so would be retrogressive. To some, it would represent a return to the days of lax procedure, and perhaps turn courts into social service agencies. In addition, the bar may believe that divorce practice, especially with regard to marital property, is so complex that only the techniques derived from the formal adversary process are appropriate. Yet, the bar has been more receptive to the establishment of juvenile courts perhaps, because their jurisdiction deals with the behavior of children, not with economic matters.

In 1960s and 1970s, through the efforts of child welfare specialists at the Children's Bureau of the then U.S. Department of Health, Education, and Welfare, the federal government focused on the condition of children. In the early 1960s, that agency set up a working group to study the findings of a Denver, Colorado, pediatrician, Dr. C. Henry Kempe, and those of the Los Angeles Police Department dealing with children who had been physically abused. The product of that group's deliberations was the Model Mandatory Child Abuse Reporting Act.

Looking back, it is hard to imagine that developing a child abuse reporting act would be controversial, but it was. Family privacy was deeply rooted in American life and law. To invade it was thought to be an infringement on fundamental parental rights. Requiring certain professional people like pediatricians and nurses to report abuse would be a breach of confidential relationships. Little thought then was given to mandating priests, rabbis, or ministers to report abuse under any circumstances. Every aspect of the Act was criticized, including who was to report, what was to be reported, and the penalties for not reporting. It took time for the concept of reporting child abuse to an appropriate state agency to be accepted, but eventually it was. The national concern for the protection of children in their homes in the 1960s raised the issue of the safety of others in the family. The reporting laws, greatly expanded from the original model law, and now found in all jurisdictions, may have laid the foundation for family violence laws that were to follow.

A curious paradox may have resulted from the enactment of laws meant to protect children. Mandated reporting of child abuse caused a significant increase in the foster care rolls, a disproportionate number of whom were African American children. Was this just the result of overzealous child welfare workers whose first response was removal? Or, had abuse been occurring but just had not been detected? For whatever reason, the impact of state intervention on the family during the decade of the 1960s was the most disruptive for poor urban African American families. It has been said that their economic status made these families, forced to use public rather than private facilities, more highly visible and thus more vulnerable. All the major problems of the poor, especially the lack of employment and educational opportunities, inadequate housing and healthcare, were stressors on urban African American families. But these families suffered the additional burden of racial and social prejudices within their communities and in the child protection system.

During the 1970s and 1980s, the federal government began to suggest solutions to the problem of foster care drift. At that time the idea of "permanency planning" was first promoted and ultimately later became part of child protection practice and law. The Children's Bureau supported development of two model acts, the Model Act to Free Children for Permanent Placement and the Subsidized Adoption Act. They were designed to overcome barriers identified as preventing children from being adopted and to encourage suitable couples, especially foster parents, to adopt "hard to place" children. During these decades, the plethora of negative social and economic conditions in many urban African American communities worsened. But there was no comprehensive national family policy that acknowledged the depth of the problems and need for long-range planning to solve them. The piecemeal approach was, and is, essentially applying small bandages to a major social wound.

The federal government made more attempts to deal with child protection during the mid-1970s, 1980s, and 1990s. To that end it undertook a number of initiatives by proposing laws for Congress to enact, which had the effect of basically taking control of state child protection systems through federal financing. The acts reflected a policy of encouraging state agencies to try to prevent intervention and removal of children from their parents, but if removal occurred to make reasonable efforts to reunite families by providing social and other services to parents in need of a range of services. It promulgated regulations for foster care, to which states had to adhere if they wished

to secure funding for their foster care and adoption programs. In addition it introduced the concept of child support guidelines for states to adopt in order to bring some sense of uniformity and fairness to the system, once again using economic incentives as a method of encouraging the use of the guidelines and at the same time reducing the number of children dependent on public funds. State legislatures did enact laws that set down child support guidelines and a number of alternative methods of collecting support, usually from delinquent fathers.

During the 1960s and 1970s the law school world began to realize the importance of family law issues. Professor Homer H. Clark Jr. completed his first edition of *The Law of Domestic Relations in the United States* in 1968, a brilliant textbook, which was national in scope and analytical in approach. That work and the second edition, published in 1987, have greatly stimulated family law scholarship and have been widely cited in appellate opinions. Casebooks for law school courses appeared mostly influenced by Jacobs and Goebel, at least in the order of the presentation of cases and materials. A book that broke new ground, *The Family and the Law*, written by Professor Joseph Goldstein and Dr. Jay Katz, a law professor and psychoanalyst of Yale Law School, was published in 1965. Their twelve-hundred-page volume departed from the traditional family law casebook in providing an overall theoretical framework in which they asked fundamental questions about substantive family law and the legal process that handles family law issues. Influenced by the approach of Yale Law Professor Harold Lasswell and the language of bankruptcy, they divided the family law process into questions dealing with the establishment, administration, and reorganization of family law relationships. In addition, Professor Goldstein and Dr. Katz brought Freudian psychology to bear on family law. The seeds of *Beyond the Best Interests of the Child*, written by Professor Joseph Goldstein, Dr. Albert Solnit, and Anna Freud in 1973 were planted in *The Family and the Law* eight years earlier.

A non-legal work that has had an influence on child custody judicial decision-making is *Beyond the Best Interests of the Child*, which applied Anna Freud's theory of child development to decisions about child placement. The authors' focus was on a child's physical and emotional well-being rather than on other values or on parental rights. Based on years of clinical experience, they concluded that a child needs continuity of care with an adult who wants the child and can provide him or her with affection, stimulation, nurturing, and an assurance of safety and protection. In a divorce case where the parents

cannot resolve their child's custody, Goldstein, Solnit, and Freud wrote that the judge's job is to determine who, among the claimants for custody, can fulfill those needs. They introduced new terms like "psychological parent" and "least detrimental alternative," which have become part of the legal lexicon. Their emphasis on continuity of care has been thought to be the basis for the primary caretaker doctrine, which has found support in some jurisdictions. The idea of minimizing modifications in child custody cases is reflected in the Uniform Child Custody Jurisdiction Act.

By 1970 the complexities of family law were becoming even more visible. During the decades of the 1960s and 1970s, the number of U.S. Supreme Court cases that dealt with family relationships and children in the judicial process was impressive. They dealt with the extent to which family members received due process of law and equal protection of the law in matters dealing with illegitimate children and their rights of inheritance and support from their father, the rights of putative fathers to the custody of their illegitimate children and the right to notice and an opportunity to participate in cases dealing with their children's custody and in some adoption cases, the rights of husbands to receive alimony, the rights of parents to decide the kind of education their children should receive, the rights of parents and their minor daughters in abortion matters, and reproductive rights of women. With their decisions in the field of family law, the U.S. Supreme Court was not just setting down guiding principles, it was changing a culture.

At the same time, on the state supreme court level, family law issues that were previously well settled were litigated with surprising results. On the question of whether the law should recognize committed adult relationships other than informal or formal marriage, like contract cohabitation, the California Supreme Court responded in the affirmative. Whether a couple about to be married can set the terms by which their property will be divided upon divorce, a Florida court, breaking with tradition, responded affirmatively.

A decade later, it became clear that family law could no longer be studied separately from constitutional law, contracts, torts, property, business associations, trusts, and tax. Because family law practice had become so complex, it was not possible for lawyers to keep current in every aspect of family law. As a result, subspecialties developed. To be an effective divorce lawyer one had to have a sophisticated knowledge about the latest developments in tax and marital property, the latter having been influenced by Professor Charles Reich's concept of "the new property." Child protection lawyers needed to learn

about the child welfare system, including the latest congressional enactments regulating certain aspects of foster care and adoption. Knowledge about international conventions being developed by the International Conference at The Hague and the ability to work with foreign law materials were essential for international family law practice.

In the past twenty-five years, major social and political movements and advancements in reproductive technology have had a direct impact on family law. The social and political movements have not necessarily been successful in making changes in the law, although some have, but they have forced legislators, judges, lawyers, and scholars to rethink the bases for laws relating to family life.

The legal landscape of today has been shaped by many factors: the movement for racial equality, children's rights, women's rights, gay and lesbian rights, and the social and legal agenda of certain religious groups. Marriage, for example, has undergone fundamental changes because of its being considered a special kind of partnership, which a couple can almost define themselves by a prenuptial agreement. No longer does marriage mean that a wife's identity—her name and her domicile, for example—is totally linked to her husband's. Nor does marriage give a husband license to violate his wife's bodily integrity. With those and other changes, one can begin to see a movement to reduce what was clearly state-imposed inequality and dependency in marriage.

Two cases, *Goodridge v. Department of Public Health* decided by the Supreme Judicial Court of Massachusetts in 2003; and the other, *Obergefell v. Hodges* decided by the United States Supreme Court in 2015, have made a fundamental change in the institution of marriage. Same-sex marriage was made legal in the United States. Both cases illustrate the impact of constitutional law on family law. The struggle by same-sex couples to marry, which had been waged since 1971 in various states, finally was successful. It took over thirty years for continuity and change to win over history and tradition.

The institution of adoption is no longer monolithic. The traditional model of adoption involves termination of a birth parent's parental rights. The process is clothed in secrecy, and both adoption agency and court records are sealed. A second model being developed by adult adopted persons, some birth parents, and lawyers is called "open adoption" and has two meanings: open adoption records and postadoption visitation rights for birth parents. With a new century, established principles in family law are increasingly being challenged. For example, the definition of heir, ordinarily

easily determined by the identity of the parent and date of birth, is being re-examined in light of new reproductive technologies. Who is a male and who is a female, again thought to be easily determined by anatomy, is also being re-examined in light of discoveries about genetics.

The American Law Institute, one of the most prestigious law groups in the United States, which produced the *Restatement of Law* series, undertook the job of drafting principles of family law, which reflect the most current thinking in the field. The American Law Institute's *Principles of Family Dissolution*, published in 2002, and to which I refer from time to time, represents an enormous amount of research to support its recommended principles regulating the economic consequences of divorce including child support, spousal maintenance and the assignment of property, contract cohabitation, domestic partnerships, and child custody decision-making. Whether state legislatures will adopt the Principles remains to be seen, but they certainly will have an impact on state supreme court justices when they are faced with new issues for which there is neither legislative guidance nor judicial precedent.

The family is being continuously redefined. Who will define it, individuals themselves, legislators, or the courts? What legal consequences will flow from being designated a member of a family? What should the role of the state be in establishing family relationships, in protecting family members, and terminating membership in the family? Will the movement toward legislative codification in family law continue with the result that judicial discretion will decrease considerably? Will existing models of marriage, divorce, or adoption, for example, be expanded or reshaped by either legislatures or judges, if they have the power, to include new fact patterns, or will new models be established by legislatures? For example, we have already seen that the conventional model of adoption has been expanded, both by way of judicial discretion and by legislatures, and relabeled "open adoption" to include visitations by biological parents.

It is hoped that this book will provide information for responding to those general questions. Each chapter has been written separately and can be read without reference to others. Therefore, if there is any redundancy, that is the reason. I have tried to describe the models in family law, like marriage, divorce, and adoption that legislatures and courts have developed over time and how these models are either being enlarged or joined by new models. In the main, I have adopted the approach of an observer. But from time to time I have made my own suggestions as to what I believe

to be a sensible approach. These may be found both in the text and in the narrative footnotes.

In adopting a structure for this book, I have been influenced by the work of the late Professor Joseph Goldstein and Dr. Jay Katz. I have found their perception of the cycle of state and family interaction in terms of three basic problems for decision—establishment, administration or maintenance, and termination or reorganization—to be extremely useful, and I have somewhat modified the framework. In Chapter 1, I discuss issues of establishing adult relationships, including friendship and informal marriage, and how individuals have attempted to regulate their upcoming marriage by entering into prenuptial agreements. In Chapter 2, I discuss the establishment of formal marriage including same-remarriage, the legal issues involved in maintaining that relationship. In Chapter 3, I discuss divorce, both as a termination of a marriage and as the reorganization of new relationships between the divorcing spouses and their children. In Chapter 4, I examine the parent–child relationship through the lens of child protection laws with emphasis on the issues of state intervention into that relationship. In Chapter 5, I discuss the establishment of a new parent–child relationship through adoption.

It is astounding to realize the changes that have occurred in family law during the last half of the twentieth century and the beginning of the twenty-first. If those years are any prologue for the decades ahead, the next generation of lawyers, judges, legislators, and family law scholars is in for a future that I believe is neither predictable nor imaginable.

1

Friendship, Marriage-Like Relationships, and Informal Marriage

Introduction

Family law in America concerns the legal aspects of relationships between adults and between parents and their children. The conventional model for establishing a family has been through the adult relationship called "marriage," which state legislatures regulate by setting rules for its establishment, maintenance, termination, and reorganization. Historically, however, legislatures were not concerned with, and did not regulate, committed adult relationships short of marriage. Those kinds of relationships were not considered "family" relationships but friendships.

The law generally has not established any rules regulating friendship. For example, contract law does not recognize informal social engagements between friends. It has often been stated that these kinds of arrangements are best regulated by the parties themselves, not by courts or legislatures. No matter how close, long lasting, affectionate, trusting, and loyal the friendship may be, laws of evidence do not accord friends any privileges or provide any protection for shared confidences. Injury to a friend does not normally provide the other friend with a tort action. The death of a friend leaves the surviving friend unprotected by intestacy laws. The irony here is that friends may share more values and have closer ties with each other than family members. Yet, unless the friends themselves choose to enter a legally recognized relationship or structure their relationship by using a formal legal device like a contract or a will, that relationship will have no legal consequences.

The road to marriage has traditionally consisted of romantic friendship, courtship, engagement, and then formal marriage. It is during the formal or informal engagement period that a couple may think of entering into a prenuptial agreement. However, this behavior pattern has changed dramatically in the past fifty years. There may no longer be defined periods on the road to marriage, and marriage itself may no longer be the final relationship between

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two people. Couples may live together as a temporary and flexible arrangement to preserve their individual interests, as a prelude to marriage, as a trial marriage, or they may live together permanently either informally or with a formal agreement.[1] In the past, same-sex couples could choose a formal

[1] Professor Morrison has written:

> [C]ritical to an assessment of the centrality of marriage is the extent to which Americans are involved in non-marital unions, perhaps in lieu of marriage or remarriage. A dramatic rise in the prevalence of cohabitation over the past twenty-five years makes it clear that non-marital unions have become an increasingly acceptable: 1. alternative to marriage; 2. step in the progress toward first marriage (by giving couples the opportunity to size each other up as potential spouses); as well as 3. a substitute for marriage after separation and divorce. Moreover, the widespread acceptance of cohabitation, in turn, diminishes the "imperative" of marriage. Lynn Casper and her colleagues at the US Census Bureau estimate a steep and nearly linear increase in unrelated couple households from 1 million in 1977 to more than 4 million in 1997, a figure that is even higher when other data sets are used for the estimates. Thus, despite a significant postponement in marriage, the prevalence of cohabitation makes contemporary young adults nearly as likely to be sharing a household with a partner as those in previous decades. The rise in cohabitation is of course facilitated by the . . . loosening social mores about non-marital sex, contraception, and abortion, and changes in the importance placed on the institution of marriage, but also by the wariness on the part of young people whose own parents have divorced to enter more permanent unions. In addition, the oft-cited emphasis of contemporary Americans on self-fulfillment contributes to the prevalence of cohabitation. Cohabitation is a way to have some of the benefits of marriage, without the legally binding aspects. Cohabiting couples can stay together so long as it proves personally rewarding, but the door is implicitly always open if either party becomes dissatisfied. Using data from the National Survey of Families and Households (NSFH), to examine cohabitation trends across American cohorts, Larry Bumpass and James Sweet found that the share of persons who lived in a non-marital union before first marriage increased fourfold from the 1965–74 marriage cohort (11 per cent) to the 1980–84 marriage cohort (44 per cent). They estimate that well over half of more recently formed marriages were preceded by cohabitation. When comparing successive birth cohorts from 1940–44 and 1960–64, they showed an increase from 3 to 37 per cent of females who had cohabited before age 25. Comparing data from the late 1980s to the early 1990s, cohabitation increased in every age category, particularly among the youngest women. For example, while 17 per cent of single women ages 25 to 29 years cohabited in the first wave of the survey, 23 per cent did so by the second wave. Strikingly, almost one-quarter of unmarried 25–to 29-year-olds, 30–to 34-year-olds, and 35–to 39-year-olds were currently cohabiting in 1992–94. Blacks are more likely than whites to live with a non-married partner, but this is largely attributable to distinctive demographic characteristics such as low education, family background, and timing of marriage. Available evidence makes it clear that cohabiting unions and marriages are not equivalent. Both the characteristics of those who choose to live together as well as the character of the unions themselves are distinctive. For example, those who live together outside of marriage have traits more in common with single persons than with married persons. Cohabiting unions are generally briefer and less stable than marriages. Specifically, it is estimated that 60 per cent of cohabiting unions dissolve within the first two years. For some, cohabitation is a step in the courtship process. Larry Bumpass and his colleagues report that slightly less than half of cohabiting couples (who had not previously married) in the NSFH stated that they had definite plans to marry and 74 per cent of the couples either had definite plans or thought that they would marry their partners.

See Donna Ruane Morrison, *A Century of the American Family*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 67–69 (Sanford N. Katz, John Eekelaar, & Mavis Maclean eds., 2000) [hereinafter CROSS CURRENTS].

or informal model short of marriage, for a living arrangement. In a limited number of jurisdictions couples may now enter into a formal arrangement generally called domestic partnership or civil union.

Whatever the arrangement, the relevant legal questions are the following: What relationships should be labeled "family"; who should be authorized to make such a designation, the state or the parties themselves; and should the state regulate them? At the present time, two kinds of adult relationships that are not formally recognized by the state as marriage are contract cohabitation and domestic partnership.

Contract Cohabitation

Contract cohabitation is a relationship in which two adults live together without being either formally or informally married, without a desire to be married or because they are of the same sex and are therefore unable to marry in a legally recognized civil ceremony. Yet through their formal or informal expressions or conduct, these adults wish to be legally recognized as a couple. The fact that contract cohabitants do not hold themselves out as married differentiates them from a couple who live in one model of marriage: a common law marriage relationship. In fact, a cohabitation contract may even begin with a clause specifically denying a marriage relationship. For example, in the nineteenth-century case of *Peck v. Peck*,[2] a libel (petition) for divorce was filed in Massachusetts. The couple signed a written contract in 1877, which included the following provision:

> We, the undersigned, hereby enter into a copartnership on the basis of the true marriage relation. Recognizing love as the only law which should govern the sexual relationship, we agree to continue this partnership so long as mutual affection shall exist, and to dissolve it when the union becomes disagreeable or undesirable to either party. We also agree that all property that shall be acquired by mutual effort shall be equally divided on the dissolution of said copartnership. Should any children result from this union, we pledge ourselves to be mutually held and bound to provide them support whether the union continues or is dissolved.

[2] 30 N.E. 74 (Mass. 1892).

The Supreme Judicial Court of Massachusetts was unwilling to consider the relationship a marriage and therefore affirmed the lower court's dismissal of the libel, since no state in which the couple had lived, including Massachusetts, recognized a private contract of marriage. The case illustrates that over a hundred years ago, couples were attempting to define their relationships, sometimes by flouting nineteenth-century conventions. The contract in *Peck* has a surprisingly modern tone to it, and although the agreement alone still would not meet the statutory requirements of a formal marriage, its terms might very well be enforceable if the couple signed the agreement before going through a proper ceremony. It could also serve as a cohabitation contract in a state that recognizes such agreements.

Adults living together in an intimate relationship without being formally married were, and in some states still may be, considered to be living in an immoral relationship. Such a characterization can serve as the basis for modifying a custody decree. For example, in *Jarrett v. Jarrett*,[3] the Supreme Court of Illinois decided that a change in custody from a mother to a father "whose conduct did not contravene the standards established by [the Illinois legislature] and earlier judicial decisions" was justified because of the mother was openly and continuously cohabitating with a man to whom she was not married but with whom she intended to continue to live. To that court, such conduct had a negative impact on the children's emotional health and moral development.

Nonmarital cohabitation is illegal in some states because persons who enter into such relationships by definition do so without being married, and if they engage in intimate sexual conduct, they would be violating fornication statutes.[4] In addition, cohabitation contracts have been criticized as promoting the inequality of women.[5]

The California case of *Marvin v. Marvin* legitimized cohabitation arrangements by providing remedies for the couple in question.[6] In 1964, while still married to another woman, the well-known actor Lee Marvin began living with his girlfriend, Michelle, who gave up her musical career to become Mr. Marvin's companion. The couple continued to live in that relationship after Mr. Marvin divorced his wife. The total amount of time the

[3] 400 N.E.2d 421 (Ill. 1979).

[4] For a discussion of the policy underlying the non-enforcement of cohabitation contracts, *see* Hewitt v. Hewitt, 394 N.E.2d 1204 (1979).

[5] *See* Ruth Deech, *The Case against Legal Recognition of Cohabitation*, *in* CONTRACT COHABITATION 300 (John M. Eekelaar & Sanford N. Katz eds., 1980).

[6] 557 P.2d 106 (Cal. 1976).

two lived together like a husband and wife without a written agreement was six years. Each contributed to the relationship in his or her own way, with Mr. Marvin providing the economic support for the relationship through his work in films and Michelle assuming the role of a companion and housekeeper. In fact, Michelle had changed her last name to Marvin, an act that would normally be strong evidence of a common law marriage, a relationship not recognized in California.

The relationship ended, and after Mr. Marvin forced Michelle to leave the household, she sought the court's assistance in determining her contractual and property rights by way of declaratory relief. In her complaint for relief, Michelle alleged that the couple had had an oral agreement in which they promised to hold themselves out as married and to share their resources. Specifically, Michelle requested the court to impose a constructive trust upon half of the property acquired during the years the couple lived together. After the trial court denied Michelle the relief she sought, she appealed to the Supreme Court of California.

The Supreme Court of California reversed the trial court in holding that Michelle Marvin had a cause of action for breach of an express contract of cohabitation and remanded the case to the trial court, where the couple could establish facts necessary to support a cause of action. Two footnotes in the Supreme Court's opinion provided alternative remedies to contract if the case had the appropriate facts. These two footnotes read:

> 25. Our opinion does not preclude the evolution of additional remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.
>
> 26. We do not pass upon the question whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship is entitled to support payments from the other party after the relationship terminates.[7]

The availability of equitable remedies broadened Michelle Marvin's legal options. And it was equity, not contract, to which the Superior Court of California turned to provide Michelle with a sum of money to educate

[7] *Id.* at 123.

herself and obtain gainful employment. To the superior court, Michelle's lawyer had proven through writings or conduct that an express or implied contract existed between the couple. Mr. Marvin appealed that decision to the California Court of Appeals, which reversed the superior court's monetary award, stating that it was not based on any recognized legal or equitable obligation.[8] To the appeals court, the superior court did not have the power to create a new substantive right to award what resembled a modern form of "rehabilitative alimony" under the guise of "doing equity." But any kind of financial support would have presupposed a marriage, a status that did not exist. Thus, after years of litigation and the creation of new family law doctrine, Michelle Marvin was left with nothing.

What is startling about *Marvin v. Marvin* is that California, a state that did not recognize common law marriage, placed its judicial imprimatur on the legality of two persons living together in what appeared to be an informal marriage. In fact, by recognizing legal rights in the Marvin relationship, the California court signaled its willingness to move beyond traditional restrictions on common law marriage by recognizing a relationship that began meretriciously, that is, while Mr. Marvin was already married to another woman.

Basically, *Marvin v. Marvin* stands for the proposition that two people may live together without being formally or informally married, and may set the terms of their relationship so long as they do not contract for sexual services.[9] In addition, if a couple has not set their own terms through mutual promises, but if certain conduct is found to exist, a court may superimpose upon the parties liabilities under trust law or equitable theories including quasi-contract. However, as Professor Marsha Garrison observes, the promise of expanded rights for cohabiting couples represented by *Marvin v. Marvin* has gone largely unfulfilled.[10] In California and other American jurisdictions, courts have used an exceptionally high evidentiary standard for establishing unjust enrichment or a cohabitation agreement between cohabiting parties. As a result, plaintiffs seeking to exercise rights as cohabitants have been

[8] 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

[9] The *Marvin* case dealt with a heterosexual couple, although nowhere in the opinion does the court limit its holding to a man and a woman. In Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997), a Florida appeals court upheld a cohabitation agreement between gay partners. But a California appeals court was unwilling to enforce a cohabitation contract between two gay men that included a promise to render services as a lover in addition to acting as a homemaker, companion, and housekeeper. *See* Jones v. Daly, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981).

[10] Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 319–21 (2008).

largely unsuccessful. This in turn, has allowed several critical questions regarding the legal status of nonmarital cohabitants to persist.[11]

The broadest and most important of these questions is whether cohabitation contracts should be the secular or functional equivalent of traditional marriage. Certainly, if in a formal document a couple defines their relationship to mirror the rights and obligations of marriage, it would seem that except for the matter of the legitimacy and custody of children, in an action for breach of contract, a court would enforce the contract. This is not to say that two parties to a cohabitation agreement can bind third parties or create rights that are limited by statute.

Another difficult question is whether courts should use the divorce model to divide assets and order support after the termination of a judicially determined, not privately negotiated, cohabitation contract. Footnote 26 in the California Supreme Court's decision in *Marvin* made clear that the court would not decide the support issue. At least three states apply marital property concepts to the distribution of cohabitants' property upon the termination of the relationship.[12] The Supreme Judicial Court of Massachusetts, however, would not extend the same property rights upon the termination of a cohabitation contract as it would in a marriage case. That court rejected "equitable remedies that might have the effect of dividing property between unmarried parties."[13] Elsewhere I have said that "applying the divorce model of equitable distribution of property to a cohabiting couple does make sense where property has been acquired jointly with the expectation that it would be jointly enjoyed."[14] Judicial findings of fact based on evidence drawn from formal declarations and the conduct of the parties would determine whether such an expectation existed.

Whether cohabiting adults enjoy the same benefits as a married couple depends on the issue and the state in which the benefits are sought. California, for example, has an inconsistent record with regard to the rights of cohabiting adults. In that state, cohabitants do not enjoy the evidentiary protection given to a married couple even if the couple had promised to be loyal and to keep confidences. Nor does that state allow consortium claims for injury to live-in cohabitants, nor claims for negligent infliction of

[11] These questions follow.

[12] *See* Cornnell v. Francisco, 898 P.2d 831 (Wash. 1995); Marriage of Lindsey, 678 P.2d 328 (Wash. 1984); Shuraleff v. Donnelly, 817 P.2d 764 (Or. Ct. App. 1991); Wilbur v. DeLapp, 850 P.2d 1151 (Or. Ct. App. 1993); Pickens v. Pickens, 490 So. 2d 872 (Miss. 1986).

[13] *See* Wilcox v. Trautz, 693 N.E.2d 141, 145 (Mass. 1998).

[14] *See* Sanford N. Katz, *Marriage as Partnership*, 73 Notre Dame L. Rev. 1251, 1267 (1998).

emotional distress.[15] The California Supreme Court was reluctant to provide a cohabiting couple with the same rights as marital couples in an unemployment compensation case where a woman sought unemployment compensation benefits because she was forced to move to another state with her boyfriend. To that court, such a move, which did not result in a marriage, was not a "good cause."[16] Yet in *MacGregor v. Unemployment Ins. Appeals Bd.*,[17] the same court allowed a woman to obtain unemployment benefits because her relocation to New York was based on her desire to "maintain and preserve" her family, which included her fiancé and their child.

Persons living together in a formal or informal cohabitation contract must be particularly mindful of matters dealing with incapacity and death. Ordinarily, family members are considered "next of kin" and are consulted by medical professionals seeking consent for medical matters. Unless the cohabiting partners have formally signed documents giving each other the power to make decisions about their lives, like healthcare proxies, physicians and hospital administrators turn to family members. Even where cohabiting couples sign power of attorney documents, wills, or insurance policies, in which they name each other as beneficiary, such documents might be subject to attack by family members who may not have approved of the cohabitation contract.[18]

If a state requires a special family relationship for holding property in joint tenancy, contract cohabitants would have to be tenants in common. All the presumptions that attach to marriage, like the legitimacy of children and the presumption of gifts between the couple, do not attach to nonmarital partners. Unless a state had a social policy favoring a cohabitation relationship or a statute authorized it, a cohabitant could not bring an action for wrongful death against his or her partner unless dependency was the criterion, as in some workman's compensation statutes.[19]

[15] *See* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988). *See also* Medley v. Strong, 558 N.E.2d 244 (Ill. App. Ct. 1990), where the Appellate Court of Illinois affirmed the dismissal of a woman's claim against the doctors and hospitals for the negligent injury to her companion that resulted in the amputation of his penis. The Illinois court held that the plaintiff lacked legal standing to maintain the action.

[16] Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904 (Cal. 1983).

[17] 689 P.2d 453 (Cal. 1984).

[18] *See* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997).

[19] *But see* Langan v. St. Vincent's Hospital, N.Y. Sup. Ct., Nassau Cty., No. 11618/02, 29 Fam. L. Rep. (BNA) 1267 (Apr. 22, 2003), where a New York trial court did allow a member of a same-sex civil union entered into and recognized in Vermont to collect under the New York Wrongful Death Statute, *infra* note 48 and accompanying text.

Children born to a cohabiting couple present special problems both for the children and the parents. For the children, the major problem is support and the possibility of the insecurity of their relationship with their parents.[20] For the father, the major problem from a legal perspective is the ambiguity of his relationship with his children. So long as the couple is unmarried and the state has no statute legitimizing all children,[21] the children are illegitimate. If a child is born to a heterosexual couple and the male would like to secure his relationship with his child, he must establish his parenthood by a DNA test and seek the appropriate remedy for acknowledgment before petitioning for co-guardianship or adoption. In a same-sex relationship of two women, one of whom has borne the child, the nonbiological parent can either petition for co-guardianship or adoption.[22] In the same-sex relationship of two men, either co-guardianship or adoption is appropriate if the state allows same-sex adoption. Adoption provides the more secure relationship because a guardianship not only does not involve statutory inheritance rights but also ordinarily terminates when a child reaches majority. Adoption provides a child with inheritance rights and the security of a lifelong relationship with his or her parents.

Professor Garrison argues that marriage and contract cohabitation should not be legal equivalents because the parties to these relationships have different expectations of their partners. Where marriage implies "expectations of financial interdependence and continued sharing" between spouses, studies suggest that Americans in cohabitation relationships regard themselves as fundamentally independent from their partners and understand

[20] Professor Morrison has written: Significantly, a growing number of cohabiting unions involve children. In 1960, of the 439,000 unmarried-couple households, 197,000 contained children under 15 years of age. By 1998, the number of unmarried-couple households had grown to over 4 million (4,236,000) with over 1.5 million of those (1,520,000) containing children. Because these data have not been collected at the national level until very recently, we know very little about how non-married and remarried partners share their incomes and assets, which has important implications for the economic standing of children in these unions. One possibility is that cohabiting couples do not pool their financial resources as much as married couples do, but income-sharing may be more common in relationships of longer duration or when the relationship has produced children. Alternatively, mothers rely exclusively on their own incomes in short-term cohabiting relationships. This makes cohabitation a risky enterprise for children in terms of economic standing and stability. Moreover, children whose mothers cohabit are also at risk of behavioral and emotional difficulties owing to the instability of these arrangements and the ambiguous parental role of non-marital partners. *See* Cross Currents, *supra* note 1, at 69.

[21] *See*, e.g., Ariz. Rev. Stat. Ann. § 8–601 (West 2003), which states: "Every child is the legitimate child of its natural parents and is entitled to support and education as if, born in lawful wedlock." *See also* the Uniform Parentage Act § 202 in the appendix.

[22] *See In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993), where the highest courts in Massachusetts and Vermont allowed the adoption of the child of the birth mother's partner.

their bonds to one another as lacking the permanence of marriage.[23] Thus, in Professor Garrison's view, the different legal rights enjoyed by married and cohabiting couples are an accurate reflection of reality and need not be reconciled until the relationships embody the same degree of commitment.[24] Whether right or wrong, it appears that the legal rights of contract cohabitants will remain in doubt for the foreseeable future.

Registered Domestic Partnership and Civil Union

The status of registered domestic partnership is the natural outgrowth of the law of contract cohabitation. In a certain sense it is the ultimate formalization of contract cohabitation, with requirements for establishing the relationship; maintaining it, for example, by honoring mutual support obligations and sharing a common residence; and for terminating the relationship. To a limited extent, cohabitation contracts are also regulated in those states that require the agreements to be in writing and comply with its statute of frauds.[25] But no state mandates cohabitation contracts to have the kind of requirements and documentation found in registered domestic partnerships. Registration is important because it provides tangible evidence of a relationship without regard to that relationship's having to be proven. Therefore, a registered domestic partnership is to contract cohabitation what formal ceremonial marriage is to common law marriage. Formal marriage is presumed legal once documentation is presented; common law marriage has to be proven by a variety of evidentiary matters including documents, like bank accounts, and the testimony of third parties.

Generally speaking, the purpose of registered domestic partnerships is to provide legal recognition and a legal framework for a couple who either do not wish to marry or who do not qualify for a marriage license because of the heterosexual requirement, but who have committed themselves to living together and sharing their lives both economically and socially. Registered domestic partnerships in the United States began in an unconventional way. They first appeared in cities and were limited to city employees who lived

[23] *See* Garrison, *supra* note 10, at 322–31.
[24] *See id.* at 331.
[25] *See*, e.g., MINN. STAT. §§ 513.075–.076 (West 2003) (originally enacted in 1980); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 1987).

with a partner of the same sex. Their purpose was to provide these employees with the same kind of social and economic benefits, such as health insurance, institutional visitation rights, sick leave, and bereavement leave, as were available to married couples. In other words, the definition of "family member" included registered domestic partners. What made this status unusual was that in the United States, as a general rule only, states, not cities, have the power to regulate the establishment of family relationships. And, in order for city governments to legislate in this area of the law, again as a general rule, they must obtain authority from their state legislatures under what is called "home rule."

The Tenth Amendment to the U.S. Constitution reserves certain legislative powers to the individual states. Most of these reserved powers pertain to education, law enforcement, and domestic relations. Technically, since local governments are the creation of the states and derive all of their authority from the state, the areas in which a city can act free from state government intervention are very limited. Throughout the latter half of this century, however, many states have recognized the need for more autonomy among local governments. Therefore, states have amended their constitutions with home rule provisions that allow local governments to expand their realm of legislative authority.[26] While the amount of autonomous power the state gives to local governments varies widely, generally a city is given either specifically enumerated powers or broad "police powers."[27] Challenges to local domestic partnership ordinances have focused on whether the local government has the authority to act based on the powers that the state has granted to it by its specific home rule ordinance.[28] For example, in *Lilly v. City of Minneapolis*,[29] the Minnesota Court of Appeals held that the city of Minneapolis domestic partnership ordinance was invalid. The court reasoned, in part, that the city

[26] *See* Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417, 437 (1991) (quoting Note, *Conflicts between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 739 (1959)).

[27] For an extensive analysis of the tensions between state authority and autonomous local authority, *see* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Note, *Conflicts between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 739 (1959); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

[28] For a discussion of these challenges, *see* Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417, 435–41 (1991); David C. Weigel, Note, *Proposal for Domestic Partnership in the City of Detroit: Challenges under the Law*, 74 DETROIT MERCY L. REV., 825, 835–44 (1997) (citing *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995) (upholding in part the City of Atlanta's domestic partnership ordinance because it did not establish rights that would exceed the city's legislative authority). *See also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2355–56 (2003).

[29] 527 N.W.2d 107 (Minn. Ct. App. 1995).

exceeded its legislative authority because the ordinance was intended to address discrimination, an area of statewide concern.

Two major issues surround the concept of registered domestic partnership. The first issue is whether the status of registered domestic partnership should be completely limited by the statute that created it or whether, like marriage, it should include benefits beyond its statutory basis like those embedded in the common law. For example, if a registered domestic partnership statute does not provide for mutual support obligations, could those obligations be implied? Those who argue for equality between registered domestic partnerships and marriage maintain that the new status should mirror marriage. Equating a domestic partner with a spouse in all legal matters would require a total revision of state laws so that wherever the word "spouse" is stated, the phrase "or domestic partner" is added. The second issue related to registered domestic partnerships is whether couples who wish to enter into such a relationship can limit their statutory responsibilities by way of a pre-domestic partnership contract.[30]

Four American jurisdictions—California, the District of Columbia, Hawaii, and Vermont—have enacted some form of registered domestic partnership statute. Each one is different. Other jurisdictions have pending legislation dealing with establishing, terminating, or limiting the status.[31] The statutes in California and the District of Columbia are relatively restrictive. California's Domestic Partnership Registration Law[32] is limited to two categories: same-sex couples who are not blood relatives and who agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership; and heterosexual couples, one or both of whom are over the age of sixty-two. The law was described by California's then-governor as one "which would enable domestic partners to make medical decisions for incapacitated loved ones, adopt their partner's child, use sick leave to care for their partner, recover damages for wrongful death, and allow the right to be named a conservator of a will."[33] In addition, the California Domestic Partnership Law allows a domestic partner to recover for negligent

[30] The American Law Institute takes the position that couples should be allowed to set their own terms within certain limits. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, ch. 7, § 7.02 (American Law Institute 2000).

[31] These states are Arkansas, Maine, Massachusetts, New York, Oregon, Rhode Island, and Washington.

[32] *See* CAL. FAM. CODE §§ 297–99.6 (West 2001).

[33] *See* Bill Ainsworth, *Governor Signs Measure Giving New Rights to Domestic Partners*, SAN DIEGO UNION TRIB., Oct. 15, 2001, at A1.

infliction of emotional distress and also gives the partner spousal rights in probate and decedents estate matters. The District of Columbia's law[34] is limited to the employees of the District and the private sector and concerns work-related benefits.

The laws in Hawaii and Vermont were the result of two court cases that tested the right of same-sex couples to marry under each state's constitution. In the 1993 case of *Baehr v. Lewin*,[35] the Hawaii Supreme Court held that its marriage law that limited marriage to heterosexual couples was discriminatory. The case, in which the plaintiffs sought injunctive and declaratory relief, was remanded to a lower court so that it could apply the "strict scrutiny" standard to the statute. The lower court was not convinced by the state's major argument that heterosexual marriage provided the best environment for raising children and held in 1996 in *Baehr v. Miike*[36] that the marriage law was unconstitutional as applied in violation of the equal protection clause of the state's constitution. The injunction was stayed pending an appeal to the Hawaii Supreme Court, which ultimately affirmed the decision without opinion.[37] In the meantime, the Hawaii legislature enacted its Reciprocal Beneficiary Law,[38] which provided same-sex couples with certain economic benefits. The following year, in 1998, the citizens of Hawaii voted to amend its state constitution to limit marriage to heterosexual couples.[39]

In *Baker v. State of Vermont*,[40] the Vermont Supreme Court held that limiting marriage to heterosexual couples violated its state's common benefits clause, which 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. . . ."[41] However, the court then went on to state that it was the function of the legislature, not the courts, to provide a remedy.[42] Thus,

[34] *See* D.C. Code 32–701, 702, 704, 705, 706 (2001).
[35] 852 P.2d 44 (Haw. 1993).
[36] *See* Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996).
[37] *See* Baehr v. Miike, 950 P.2d 1234 (Haw. 1997).
[38] *See* Haw. Rev. Stat. ch. 572C-1 to–7 (Michie Supp. 1998).
[39] *See* Haw. Const. art. 1, § 23.
[40] 744 A.2d 864 (Vt. 1999).
[41] Vt. Const. ch. 1, art. 7.
[42] A Massachusetts superior court made the same suggestion in *Hillary Goodridge and Julie Goodridge* et al. *v. Department of Public Health* et al., Suffolk Superior Court, C.A. No. 01-1647-A (May 2002). That case was appealed to the Supreme Judicial Court of Massachusetts, which vacated and remanded the case. *See* Hillary Goodridge & et al. v. Department of Public Health & another, 798 N.E.2d 941 (Mass. 2003). The case is discussed in Chapter 2 of this book.

the legislature was given the opportunity to make one of two changes in Vermont law: modify the marriage law and remove the restriction of marriage to heterosexual couples, or create an alternative to marriage that would provide same-sex couples with benefits equal to those enjoyed by heterosexual married couples. Rather than changing its legislation by expanding the definition of marriage, the legislature broke new ground and created a model for a committed adult relationship with its own definitions and its own requirements exclusively designed to meet the needs of same-sex couples.[43] Civil union was thus born free from the negative historical associations that marriage carries and, as a result, civil union partners are free to order their lives without the stereotype or conventional roles identified with marriage. The civil union model is more readily adaptable to the modern-day same-sex couple's wishes and expectations.

Thus, in both Hawaii and Vermont, the same-sex couples who sought relief from the courts under each state's constitution convinced each court of the merits of their claim of discrimination.[44] Although they failed to obtain an order for the issuance of a marriage license, they inspired legislative action by way of the enactment of domestic partnership and civil union laws, a new paradigm for adult relationships.[45]

Hawaii chose to call its domestic partnership law "Reciprocal Beneficiary Law," giving persons who met the requirements of the law certain rights and benefits that attach to the status of marriage. According to the law, the status is restricted to individuals over eighteen years of age and unmarried or not committed to another reciprocal beneficiary. In order to meet the requirements of the law, the individuals must be legally ineligible to marry each other and must voluntarily and formally consent to the establishment of the relationship. The unique nature of the law is that the disability to marry would include persons who are related to each other, like a widowed mother and her unmarried son. For purposes of inheritance, Hawaii chose to equate the status of reciprocal beneficiary with spouse throughout its probate code. Further, in 2011, Hawaii enacted a civil union

[43] *See* discussion of the Vermont Civil Unions Act, Pub. Act. 91. H. 847, below.

[44] Professor Barron points out that although the Vermont and Hawaii cases were decided under state constitutional law, federal constitutional law laid the predicate for the reasoning upon which the judgment was based. *See* Jerome A. Barron, *The Constitutionalization of American Family Law: The Case of the Right to Marry, in* Cross Currents, *supra* note 1, at 257.

[45] In 2009, the Vermont legislature overrode the governor's veto and enacted a law legalizing same-sex marriage. *See 15 V.S.A. § 8.; see also* 2009 Vermont Laws No. 3 (S. 115).

law on February 23, 2011, and civil unions became available in the state on January 1, 2012.[46]

The Vermont Civil Union Statute was similarly based on a desire to provide a genuine, secular alternative to marriage for same-sex couples. The most important provision of the law is entitled "Benefits, protections and responsibilities of parties to a civil union," which states that individuals who formally establish a civil union in Vermont are to be treated as if they were married in Vermont.

The Hawaii and Vermont civil union statutes provide a model for other jurisdictions seeking to offer same-sex couples an alternative to marriage without assigning the word "married" to the couple. By expressly stating that couples who establish a civil union in Vermont can claim all benefits and protections given to married couples, whether the benefits and protections are based on a statute, regulation, or common law, the Vermont legislature has managed to reach a compromise with those who want to reserve the label "marriage" for heterosexual couples and those who want to provide same-sex couples with equal rights and benefits under law.

The first state to explore the extraterritorial recognition of the Vermont Civil Union Statute was Georgia. In *Burns v. Burns*,[47] the Court of Appeals of Georgia was asked to decide whether a former wife had violated a court visitation order by cohabiting with another adult with whom she was not married. The former wife's defense was that she had entered into a civil union with a woman in Vermont, and the two were thus married in Vermont. She argued that Georgia should give full faith and credit to the Vermont law. In addition, she argued that her right to privacy included the right to define her family for herself, free of Georgia's placing any limitation on that right. The Georgia court held that the wife was not married in Vermont because a civil union was not marriage under Vermont law. The court went on to say that even if the wife had entered into a marriage with another woman, Georgia would not recognize the status because of that's state's definition of marriage as a union "only of man and woman."

A year after Georgia decided that it would not recognize a Vermont civil union as a marriage, the New York Supreme Court (a trial court) held that it would recognize a Vermont civil union for purposes of conferring a right of

[46] Josh Levs, *Two More States Allow Same-Sex Civil Unions*, CNN, Jan. 2, 2012, *available at* http://www.cnn.com/2012/01/01/us/civil-unions/?hpt=hp_t3%20Two%20more%20states%20allow%20same-sex%20civil%20unions.

[47] 560 S.E.2d 47 (Ga. Ct. App. 2002).

the surviving member of the union to sue as a spouse for the wrongful death of his partner.[48] The court stated that, had the case arisen in 1993, years before the enactment of the Vermont Civil Union Statute, the surviving partner would not have been considered a "spouse" under the New York Estates, Powers, and Trust Law, which governs wrongful death suits. However, since then the judges stated that New York has manifested a public policy that would recognize the Vermont status. This manifestation has taken the form of New York laws that would consider a same-sex partner as a "family member" under rent control laws. He would also be eligible to receive city or state employment benefits had his partner been killed in the September 11th attack, he would be able to adopt his partner's biological child, and he and his partner would be free from discrimination based on sexual orientation. In addition, the New York judge noted that New York had not enacted a "mini-Defense of Marriage Act" based on the federal model, and therefore the state was free to recognize a civil union between a same-sex couple. To the judge, a couple in a civil union should be treated as spouses and should receive the same benefits as spouses in a heterosexual marriage.

Just as same-sex marriage and registered domestic partnerships have won support in state courts and legislatures over the past decade, so too have same-sex civil unions. Same-sex civil unions are available in New Jersey as of 2007, in Illinois as of 2011, in Hawaii as of 2012, and in Colorado as of 2013.[49] Notably, the implementing statute in each state confers rights, benefits, protections, and obligations upon partners in same-sex civil unions nearly identical to those conferred upon married, heterosexual spouses. What is more, a number of states that previously authorized same-sex civil unions—Connecticut, Vermont, New Hampshire, Rhode Island, and Delaware—now have approved same-sex marriage in full. This trend may suggest that the states where only same-sex civil unions are recognized soon may offer same-sex marriage on equal terms with heterosexual marriage.

Informal Marriage

Informal marriage is often misunderstood because of the widely held belief that unless a couple goes through a formal ceremony, no matter how simple,

[48] *See* Langan v. St. Vincent's Hospital, *supra* note 19.

[49] *See* C.R.S 14-15-104 (a) (2013); HAW. REV. STAT. ANN. § 572–1 (2011); 750 ILL. COMP. STAT. ANN. 75/10 (2011); N.J. STAT. ANN. § 37:1–29 (2006).

with documentation, they are not really married. There is a further assumption, which is clearly wrong, that there are no requirements for the establishment of an informal marriage, but that individuals have complete autonomy. In fact, informal marriage does have requirements and, if properly established, results in the creation of the same rights and obligations that attach to a formal ceremonial marriage. The important fact in all informal marriages is a couple's holding out to the community that they are married. In a way, this is an application of the old equity adage that if a couple behaves as if they are married, the law treats them as such. The "as if" concept manifests a social policy of advancing legal or right conduct. Stated another way—the law assumes that a couple who acts as if they were married (not just living together) are married because to assume otherwise would be to assume illegal conduct.

Informal marriages can be divided into two major categories: substance—common law marriage and de facto marriage; and procedure—procedural marriage, which includes putative marriage and marriage by estoppel.

Common Law Marriage and De Facto Marriage

Common law marriage is basically a matter of substantive law. It is an informal marriage in which a man and a woman who fulfill the requirements of marriage, except for a ceremony and formal documentation, agree to live together openly as husband and wife and have the reputation in the community that they are married. This definition is subject to qualifications, depending on the jurisdiction (whether it supports the status or is hostile toward it) and the context in which common law marriage status is claimed (probate, workman's compensation, wrongful death, etc.). The twelve American jurisdictions (without any discernable pattern) that allow for the establishment of common law marriages are Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.[50] However, other states may recognize

[50] *See* (Alabama) Stringer v. Stringer, 689 So. 2d 194 (Ala. Civ. App. 1997); (Colorado) *In re* Marriage of Cargill, 843 P.2d 1335 (Co. 1993); (District of Columbia) Coates v. Watts, 622 A.2d 25 (D.C. 1993); (Iowa) Conklin v. MacMillan Oil Co., 557 N.W.2d 102 (Iowa Ct. App. 1996); (Kansas) Dixon v. Certain Teed Corp., 915 F. Supp. 1158 (D. Kan. 1996); (Montana) Matter of Estate of Alcorn, 868 P.2d 629 (Mont. 1994); (Oklahoma) Matter of Estate of Carroll, 749 P.2d 571 (Okla. Ct. App. 1987); (Pennsylvania) Staudenmayer v. Staudenmayer, 714 A.2d 1016 (Pa. 1998); (Rhode Island) Petrarca

common law marriage under conflict of laws rules, assuming that common law marriage is not offensive to the public policy of those states, or recognize the relationship if it was entered into the state while the status was valid.[51] The more difficult question is that of domicile. If a couple legally domiciles in one state where common law marriage is not recognized, moves to another state where common law marriage is recognized, and then moves back to their legal domicile, should the domiciliary state recognize the marriage? If the couple can prove that they have fulfilled the requirements using the standard of proof in the sister state, the answer should be "yes."[52] Common law marriages result in a legal marriage in which children are legitimate and termination of that marriage is accomplished through divorce.

The major problem with common law marriage is that of proof. So often the issue is raised years after the couple established the relationship. That is especially common in the context of a decedent's estate contest where one party is challenging the claim of a widow or of a child as an heir. It is often suggested that, in a dispute where there is an allegation of a common law marriage, unless there is some written evidence, there is the possibility of fraud and perjury.[53] Without an official marriage certificate or

v. Castrovillari, 448 A.2d 1286 (R.I. 1982); (South Carolina) Barker v. Baker, 499 S.E. 2d 503 (S.C. Ct. App. 1998); (Texas) Russell v. Russell, 865 S.W.2d 929 (Tex. 1993); (Utah) Whyte v. Blair, 885 P.2d 791 (Utah 1994).

[51] The Georgia statute allows for recognition of common law marriage if the status existed before 1997. Georgia abolished common law marriage in 1996. *See* Ga. St. 19-3-1.1 (1996).

[52] *See In re* Estate of Bivians, 652 P.2d 744 (N.M. 1982), where the New Mexico Supreme Court held that even though the New Mexico couple had lived in Texas and Colorado where common law marriage is valid, they failed to present evidence to fulfill the requirement of a present agreement to be married in each state. The fact that the wife testified that the couple intended to be married wherever they were was insufficient to support a common law marriage even though the couple lived together in those states. The New Mexico court looked to Colorado and Texas to determine the standard of proof in those states. The court wrote: Although New Mexico courts determine the quantum of proof here, we note the standard of proof applied by the courts in Colorado to prove a common law marriage is higher than that of Texas. To establish a presumption of marriage by cohabitation and repute, the marriage contract must be proven by clear, consistent and convincing and positive evidence. . . . The court went on to state that there was not sufficient evidence to support the requirement of a present intention to become married in Colorado. *Id.* at 753.

[53] In Staudenmayer v. Staudenmayer, 714 A.2d 1016 (Pa. 1998), Justice Newman wrote: Because claims for the existence of a marriage in the absence of a certified ceremonial marriage present a "fruitful source of perjury and fraud," Pennsylvania courts have long viewed such claims with hostility. . . . Common law marriages are tolerated, but not encouraged. While we do not today abolish common law marriages in Pennsylvania, we reaffirm that claims for this type of marriage are disfavored. . . . The burden to prove the marriage is on the party alleging a marriage, and we have described this as a "heavy" burden where there is an allegation of a common law marriage. When an attempt is made to establish a marriage without the usual formalities, the claim must be reviewed with "great scrutiny." With those words as a prelude, the Supreme Court of Pennsylvania held that Linda Staudenmayer did not meet her burden of proof in establishing that she and Theodore had uttered words "we are husband and wife"—*verba in praesent*—a requirement in Pennsylvania. Absent that sentence, the fact of their constant cohabitation and their reputation as being husband and wife was not sufficient evidence to establish a common law marriage.

any other written documentation, convincing an official or a judge of the existence of a marriage requires other supporting written evidence, like bank accounts, tax forms, title to real property, medical records, employment applications, or insurance policies; as well as the testimony of family members, neighbors, and friends. The evidentiary burden of proof of the relationship is either clear and convincing evidence, or a preponderance of the evidence. By requiring and weighing evidence against the higher standard of proof, a court makes it more difficult to prove the existence of a marriage.[54] And it is through the rules of evidence that a court may manifest its position on common law marriage. In addition, if one were to request that a court take judicial notice of the law of a state that allows common law marriage, a legal memorandum of the state of that law would be required.

A common misunderstanding regarding common law marriage is that the status requires that the parties live together for a certain number of years. While fact patterns in individual cases may show that a couple cohabited for seven years, that number may not be a general requirement. New Hampshire, a state that does not generally recognize common law marriage, requires three years of cohabitation (before death of one of the parties) for a couple to be considered de facto married.[55] Generally, evidence of sustained and open cohabitation is necessary for the establishment of a common law marriage. Merely registering in a motel for a night or passing through a jurisdiction that recognizes common law marriage would not satisfy that requirement.[56]

[54] The case of *In re* Estate of Hall, 588 N.E.2d 203 (Ohio Ct. App. 1990), illustrates this point. In that case a man and a woman lived together from 1986 until 1988. Twenty-two witnesses testified and forty-nine documentary exhibits were presented at a decedent's estates hearing. Evidence elicited during the hearing brought out the fact that while the couple had worked and lived together and shared expenses, they each had separate checking accounts and filed separate income tax returns stating that each was "single." The decedent did not list the woman as his beneficiary on his life insurance policy (although the woman did list the man as her beneficiary under her policy). However, the couple had intermingled their finances, jointly purchased property and stock, and had a joint tombstone on which the decedent listed the woman as his wife. The Ohio appellate court noted that while that state did not "favor" common law marriage, it did recognize the status if the couple fulfilled certain requirements: the mutual consent of both parties to join together as man and wife, manifested either expressly in conduct or in words, and a holding out to and a recognition by the community that the couple was married. The court affirmed the lower court's decision to deny the removal of an administrator of the estate and appoint the woman as the administratrix, since she was the common law widow.

[55] *See In re* Buttrick, 597 A.2d 74 (N.H. 1991).

[56] *See* Vandever v. Industrial Commission, 714 P.2d 866 (Ariz. Ct. App. 1985); Kennedy v. Damron, 268 S.W.2d 22 (Ky. 1954); Goldin v. Goldin, 426 A.2d 410 (Md. App. 1981); Walker v. Hildenbrand, 410 P.2d 244 (Or. 1966).

A number of states have abolished common law marriage through the years, such as Georgia in 1996.[57] The justifications for abolishing common law marriage have mostly moral overtones, which may reflect an unconscious class bias. In addition, there seems to be an inordinate concern for respect for formality and a feeling that somehow the dignity and stability of a marriage are diminished by allowing a court to decide whether a couple was married rather than having a simple document speak for itself. That sentiment was reflected in Justice Nigor's concluding paragraph in his concurrence in *Staudenmayer v. Staudenmayer*: "Thus, as marriage is necessarily an affirmative act, and ancient impediments no longer pertain, I would advocate the abolishment of common law marriage in Pennsylvania so that official records, not the courts, may determine if and when the parties were married."[58] The emphasis on official records may be equally important as religious or moral concerns in the movement toward abolition of common law marriage. Bureaucrats, whether in government or private industry, who must decide questions of marital status for economic reasons (like determining who among claimants is the widow or legitimate child for obtaining insurance proceeds), seek clarity, which written documentation, if available, can provide.

Procedural Marriage and Other Informal Marriages for Limited Purposes

Even with a ceremonial marriage that has been documented, the written evidence may be lost or unavailable for a variety of reasons. It is unusual in daily life that one has to produce a marriage certificate. Yet couples, family members, and friends assume that if a couple claims to be married, they are in fact married. To assume otherwise would have dire consequences. In decedents' estates matters alone, the result would be catastrophic, creating no widow and making children illegitimate. In other words, there would be no legitimate heirs based on marriage.

[57] *See* Ga. St. 19-3-1.1 (1996). In *Staudenmayer,* 714 A.2d at 1023, Justice Nigro wrote a concurring opinion in which he stated, "I would . . . advocate the abolition of common law marriage in this Commonwealth thereby joining the majority of jurisdictions which have recognized the inappropriateness of such an ancient convention in modern times."

[58] *Staudenmayer*, 714 A.2d 1023.

To avoid such a result, the law has created procedural devices like certain presumptions, which reflect popular beliefs and are based on the idea, perhaps even the ideal, that persons act in an honorable and legal way. In addition, presumptions aid in the judicial process and facilitate reaching a decision. For example, there is the presumption, which may be rebutted with evidence, of the validity of the most recent of serial marriages. That presumption, based on the principle of monogamy, assumes that the absent spouse terminated the marriage by obtaining a divorce. The presumption of the validity of a marriage also presumes that the persons who married had the capacity to marry and were married by a person with the authority to marry. There is also the presumption that children born during a marriage are the legitimate children of that marriage. If that presumption did not exist, the result would be chaotic. The application of presumptions results in the establishment of a de facto marriage, which resembles a common law marriage.

There are a number of interesting cases that illustrate in certain contexts, like workman's compensation or the termination of a long-standing relationship, the extent to which courts will protect a spouse who believes she is married even though she has not gone through a formal marriage ceremony and does not live in a state that recognizes common law marriage. In *Parkinson v. J & S. Tool Company*,[59] Ruth Parkinson attempted to collect compensation for the death of her husband under the New Jersey Workman's Compensation Law. She had been denied recovery from a lower tribunal and sought relief in the Supreme Court of New Jersey. Ruth Parkinson had married Richard Parkinson in a Roman Catholic ceremony in 1927. The couple had two children. In 1939 Ruth obtained a divorce from her husband, but eleven years later the couple reunited. They wanted to be remarried in the Catholic Church, and when they requested that a priest marry them, the priest replied that they were "already married in the eyes of God." Consequently, the couple did not remarry, either in a religious or civil ceremony. Assuming they were still married, they lived together with their children for over twenty years when Richard Parkinson was killed.

The Compensation Tribunal found that Ruth Parkinson did not fulfill the requirements for marriage in New Jersey, which does not recognize common law marriage,[60] and denied her death benefits. Ruth Parkinson's lawyers

[59] 313 A.2d 609 (N.J. 1974).

[60] N.J. Stat. Ann. 37:1–10 (1939) reads in part: All common law marriages entered into after December 1, 1939 are invalid . . . and failure in any case to comply with both prerequisites (license and marriage performed by one authorized to solemnize marriages) which shall always be construed as mandatory and not merely directory, shall render the purported marriage absolutely void.

argued that even though she was not the legal widow, she should be considered the de facto widow who was dependent on the decedent. And, since dependency was a requirement under the workman's compensation statute,[61] Ruth Parkinson met the requirement.

The Supreme Court of New Jersey held that Ruth Parkinson, a person of limited education who relied on the advice of a priest, should receive the dependent's compensation as the de facto spouse of Richard Parkinson. The court made a major point of underscoring Ruth Parkinson's innocence both in her life experience and in the sense that she was under the mistaken belief that she was married. The dissenting justice took a narrow view, stating that one was either married—having fulfilled the state's requirement—or not married—failing to fulfill the state's requirement. Unlike other courts that are willing to carve out a status of de facto spouse based on dependency in the workman's compensation cases,[62] he was not.

In *Fung Dai Kimn Ah Leong v. Lau Ah Leong*,[63] a Chinese couple was married in Hawaii according to Chinese customs, but without a marriage license from civil authorities. They had thirteen children. The wife not only acted as mother by caring for the children and the house but also participated in the husband's successful business. After living together as a family for thirty-five years, the husband ceased to recognize the mother of his children as his wife and denied her any interest in his property. The U.S. Court of Appeals held that principles of equity should protect the woman who lived in a de facto marriage with her husband and provide her some equitable relief. The court stated:

> We conclude that plaintiff is entitled to a measure of relief. Upon the question of what standard should be applied in determining the amount and character thereof . . . no specific general rule can be formulated. Each case must be adjudged in the light of its own peculiar facts and the local laws. Here, we think, it will be proper for the court in further proceedings to take into consideration the relative contributions of property, and of personal service in point of value, made by the two parties in the accumulation of the

[61] N.J. STAT. ANN. 34:15–13(f) reads: The term "dependents" shall apply to and include any or all of the following who are dependent upon the deceased at the time of accident or the occurrence of occupational disease, or at the time of death, namely: . . . wife. . . .

[62] In workman's compensation cases, courts have tended to protect dependent de facto wives. *See*, e.g., West v. Barton-Malow Company, 230 N.W.2d 545 (Mich. 1975) and Powell v. Rogers, 496 F.2d 1248 (9th Cir. 1974).

[63] 27 F.2d 582 (9th Cir. 1928).

> property standing in the defendant's name, the amount and value of such property at the time their *de facto marital relation* ceased, and the amount of property accumulated by plaintiff during the same period and standing in her name, the local statutes affecting the *marital relation* and divorce, and alimony and dower, or other pecuniary interests of the wife, whether absolute or contingent, present or in expectancy.[64] (emphasis added)

What is so interesting about this 1928 case is that it is treated as a de facto marriage yet the suggested remedies resemble a modern version of a termination of a cohabitation contract. In a way, the case was a precursor to *Marvin v. Marvin*.[65]

Putative Marriage and Marriage by Estoppel

A good faith belief in one's being married is the major factor in putative marriage. Based on the civil law tradition as incorporated in the Uniform Marriage and Divorce Act,[66] the concept of putative marriage is designed to protect parties, mostly women, who enter into a marriage, whether formal (ceremonial) or informal (common law marriage) without knowledge that either or both of the parties are under a disability to marry.[67] Putative marriage is thus voidable. The putative wife may seek an annulment and even be awarded alimony.[68] Marriage by estoppel is designed to prevent a spouse from denying the validity of a marriage after she has accepted its benefits.

[64] *Id.* at 585–86.

[65] 18 Cal. 3d 660 (1976).

[66] Uniform Marriage and Divorce Act § 209 reads as follows: Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited. . . . or declared invalid. . . . If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice. *See* a discussion of the putative spouse doctrine in the Principles of the Law of Family Dissolution (American Law Institute §6.01(d) 2002).

[67] The Social Security Act recognizes the putative spouse doctrine in 42 U.S.C. § 416(h)(1)(B)(i) (2002).

[68] *See* Kindle v. Kindle, 629 So.2d 176 (Fla. Dist. Ct. App. 1993), where the marriage lasted twenty years and the putative wife received permanent alimony on the basis of "equitable principles." The dissent in the case would have allowed the annulment but not permanent alimony.

A case that illustrates the application of the putative marriage in the context of a decedent's estates contest and marriage by estoppel is *Newburgh v. Arrigo*.[69] In that case, a stepson and his stepmother were in a dispute as to who should receive the proceeds from a settlement of a claim for the wrongful death of the stepson's father. The decedent married his wife, Joan, in New Jersey in 1973, after Joan had been allegedly divorced in New Jersey two months prior. The stepson alleged that Joan's first divorce, which occurred in Mexico in 1962, was defective, and that her second marriage, as well as her third marriage to his father, were invalid as a result. After evaluating the evidence, the court held that the stepson had not met the burden of proving with clear and convincing evidence the invalidity of the Mexican divorce or the invalidity of his stepmother's prior marriages.

The court discussed estoppel during the course of its opinion. The judge wrote that "one who enters into and accepts the benefits of a marriage may be equitably estopped from denying the validity of that marriage. For example, a husband who participates in obtaining his wife's prior foreign divorce may be estopped to deny the validity of that divorce."[70] Applying that principle to the case at hand, the court went on to write that marriage by estoppel would not be applicable because Joan's husband had not helped her to procure her Mexican divorce, and in fact there was no evidence that her husband even knew of her divorce. Further, the court noted that estoppel could not be imputed to the stepson.

One can see how the application of estoppel can in fact create marriage by estoppel, although in *Newburgh*, the husband was dead. The difference between marriage by presumption and marriage by estoppel is that, in the former, the law recognizes a marriage that may in fact be valid. However, in marriage by estoppel, the law recognizes that the marriage may not be valid but that a spouse acted as if it was and must accept the consequences of that action.

A question that is raised about these procedural marriages is this: How can one avoid the negative consequences? The answer is that once a spouse discovers a defect in the marriage, the spouse must take some action to either affirm or disaffirm the marriage. Otherwise, the good faith requirement of benefiting from the defective marriage may be lost. For example,

[69] 443 A.2d 1031 (N.J. 1982).
[70] *Id.* at 1036.

in *Mason v. Mason*,[71] Lucy Mason had married Weary Mason in 1922. The marriage was not validly dissolved. Yet in 1962, Weary Mason married Sally Mason. Lucy Mason, knowing about the second marriage, never asserted her rights as Weary's wife. Thus, when Weary Mason died in 1962, by virtue of her knowledge and inaction, Lucy was estopped from attacking the invalidity of Weary's second marriage and taking title to his property as his widow, just as Weary would have been estopped from denying the validity of his second marriage.

Prenuptial Agreements

The history of prenuptial agreements in the United States illustrates the tension between the state regulation of marriage on the one hand and private ordering on the other. Historically, prenuptial agreements were entered into by wealthy people who wanted to preserve their personal assets or their estate plan, which had been drafted before their marriage. Prenuptial agreements also were used by older people, usually after they had already married at least once, who wanted to protect the financial interests of children from a previous marriage.

Indeed, until 1960, individuals entering into marriage could only contract away certain inheritance rights. Contract provisions about divorce, especially its economic consequences, were considered beyond the legal powers of individual parties. The permanence of marriage was such a fundamental legal principle that even mentioning divorce in a prenuptial agreement had the effect of invalidating the provision dealing with divorce, or possibly the entire agreement. Judges felt that the divorce provision might encourage the termination of the marriage, an action that would be contrary to the strong public policy encouraging the lifetime character of marriage.

The 1970 Florida Supreme Court decision in *Posner v. Posner*[72] is the case most often cited for breaking new ground and establishing the validity of a premarital agreement. The Florida court, referring to the changes in society and the prevalence of divorce, held that divorce could indeed be an event

[71] 174 So. 2d 629 (Fla. Dist. Ct. App. 1965).

[72] 233 So. 2d 381 (Fla. 1970). There are, however, earlier Oklahoma cases that have upheld prenuptial contracts that were just and reasonable. *See*, e.g., Pence v. Cole, 205 P. 172 (Okla. 1922); Talley v. Harris, 182 P.2d 765 (Okla. 1947); Clark v. Clark, 202 P.2d 990 (Okla. 1949); and Hudson v. Hudson, 350 P.2d 596 (Okla. 1960).

about which the marrying couple could contract. The couple could establish their own formula for the distribution of assets upon divorce. This was a major decision, handed down during the same decade as *Marvin v. Marvin*,[73] another decision about adult relationships that opened up a whole new area of law called contract cohabitation.

The major issue concerning prenuptial agreements is whether they really are formal contracts governed by conventional contract law doctrine, including the requirement of consideration and other formalities,[74] or whether they are a special kind of contract peculiar to family law and governed by special rules.[75] Special kinds of contracts with their own set of rules are not unknown or unusual in the contract world. Not all contracts are "bargained-for exchanges." For example, contracts of adhesion, like those that dominate the insurance industry, are by definition not negotiated or bargained for. They are basically "take-it-or-leave-it" contracts. Yet they are contracts whose provisions are interpreted by different rules and standards compared with ordinary commercial contracts that are ordinarily the result of negotiation.

A prenuptial agreement will be enforced if both the process by which it was negotiated and its terms are fair. Generally, the "fairness" of both the process and terms are evaluated at the time of execution, although fairness may be a standard at the time of enforcement (namely at the death of one of the parties or at the time of divorce) or both. Indeed, Massachusetts has adopted "the second look doctrine," which allows the court to evaluate the fairness of the prenuptial agreement at the time of execution and also at the time of enforcement. [76]The "second look" doctrine may be another way of

[73] 557 P.2d 106 (Cal. 1976).

[74] Some states require prenuptial agreements to satisfy the state's statute of frauds and to be in writing. *See*, e.g., Mass. Gen. L. ch. 209, §§ 25, 26, and Uniform Pre-Marital Agreement Act § 4. *See also* § 7.04(1) of the Principles of the Law of Family Dissolution (American Law Institute 2002) (requiring that premarital agreement be in writing).

[75] Two cases decided in 1990 by different jurisdictions illustrate the tension between treating prenuptial agreements as ordinary contracts and treating them differently. In Simeone v. Simeone, 581 A.2d 162 (PA. 1990), after acknowledging the fact that husbands and wives have been treated unequally in the law, the Pennsylvania Supreme Court stated that the law has advanced to treat spouses equally. It then enforced the prenuptial agreement in the case using standard contract analysis. In the Wisconsin case of *In re* Marriage of Greenwald, 454 N.W.2d 34 (Wis. Ct. App. 1990), the Wisconsin Court of Appeal upheld a prenuptial agreement that it found to be fair at the time of divorce.

[76] For the Massachusetts rule, *see* Osborne v. Osborne, 428 N.E.2d 810 (Mass.1981). *See also* McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989), where the Supreme Court of Minnesota stated: By having a substantive fairness review at the time of enforcement, as well as at the time of execution, some courts have been able to relieve parties from contract provisions, which even though procedurally and substantively fair at the inception, have become unconscionably unfair at the time of enforcement as the result of circumstances originally not foreseen by the contracting parties. *Id.* at 267.

expressing the doctrine of "changed circumstances," which in commercial contracts would ordinarily not provide a modification or discharge. It is because of the doctrine of "the second look" that in Massachusetts the enforcement of a prenuptial agreement as written may be unpredictable. Unlike the precontractual period in ordinary contract negotiation, where arm's-length dealing may be common, that same time frame in prenuptial agreements is one in which the couple stands, as one state supreme court stated, "in a confidential relationship with each other."[77]

Courts have set the following conditions as manifesting a fair process: full disclosure of each person's assets, actual consultation with legal counsel or the opportunity for such consultation,[78] and a certain period of time that must elapse between the signing of the prenuptial agreement and the wedding.[79] If one or more of those conditions are not met, courts may question the fairness of the process. If an individual waives a condition, the waiver, if made with knowledge, will be enforced. If the enforcement of a prenuptial agreement would result in a noticeable disproportion of assets, at least one state utilizes a presumption of nondisclosure.[80] Unconscionability has also been used as a defense against the enforcement of a prenuptial contract when the result of enforcement would leave the parties in an extraordinarily unequal position, especially where there has been a provision for the wife to receive no support payments.[81]

[77] In DeMatteo v. DeMatteo, 762 N.E.2d 797, 802 (Mass. 2002), the Supreme Judicial Court of Massachusetts stated, "Full and fair disclosure of each party's financial circumstances is a significant aspect of the parties' obligation to deal with each other 'fairly and understandingly' because they stand in a confidential relationship with each other."

[78] *See*, e.g., Lutz v. Schneider, 563 N.W.2d 90 (N.D. 1997), where the North Dakota Supreme Court held a premarital agreement unenforceable because one of the parties was not adequately advised to obtain independent counsel before executing the agreement.

[79] In *DeMatteo v. DeMatteo, supra* note 77, the Supreme Judicial Court of Massachusetts was asked to decide whether a prenuptial agreement in which there was a vast disparity between the man and woman was enforceable. At the time of execution, the wife's assets totaled $5,000 plus some personal property of no major consequence. The husband's assets totaled between $108 million and $133 million. The major term of the agreement provided that in the event of divorce, the wife was to receive $35,000 adjusted annually for increases in the cost of living. The wife's lawyer argued that both the process and the terms were unfair, losing on both claims. The court discussed the process in great detail, noting that the wife had had time to think about the terms of the agreement, knew about her prospective husband's financial worth, and had the assistance of counsel who explained the consequences of signing the agreement. To assure fairness, the court pointed out that a video camera was used to film the signing. *See also* §§ 7.05 and 7.07 of the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 66, which set out the procedural and substantive requirements of a prenuptial agreement. With regard to the time frame, the Principles require at least a thirty-day period before marriage for the execution of the agreement.

[80] *See* Arnold v. Arnold, 553 S.W.2d 255 (Ark. 1977).

[81] *See* Uniform Premarital Agreement § 6. That section reads as follows: Section 6. Enforcement. (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that: (1) that party did not execute the agreement voluntarily; or (2) the agreement was

Premarital contracts have been attacked as having the potential to perpetuate the unequal economic status of women in marriage. Professor Brod has written:

> Premarital agreements have a disparate impact on women—and thereby discriminate against them. Thus, the enforcement of premarital agreements implicates public policy concerns related to the eradication of gender discrimination, as well as concerns with individual autonomy and "freedom of contract" principles.
>
> Premarital agreements should be greeted with skepticism, not embraced with enthusiasm. In addition to strengthening the 'freedom of contract' principle and supporting individual autonomy, the law governing the enforcement of premarital agreements should be fashioned to effectuate other public policies: the eradication of gender discrimination and the attainment of economic justice for the economically vulnerable spouse at the end of a marriage. The tension between these policies and the "freedom of contract" principle can be reconciled by the adoption of a regime that enforces a premarital agreement only if the agreement attains economic justice for the economically vulnerable spouse or, failing that, if the bargaining process culminating in execution of the agreement was demonstrably fair. In determining whether a premarital agreement should be enforced, the law may presume that an economically unjust agreement is the result of an unfair bargaining process and an economically just agreement is the result of a fair process. . . . By enforcing agreements only if there are guarantees of substantive or procedural fairness, the law will mitigate the disparate impact of premarital agreements on women as a class, while avoiding paternalism and respecting the rights of women (and men) to contract in their own interests.[82]

unconscionable when it was executed and, before the execution of the agreement, that party: (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party. (b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. (c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

[82] Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 294–95 (1994).