Fundamentals of Family Law

SECOND EDITION

J. Shoshanna Ehrlich

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Wolters Kluwer

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Second Edition

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To Alan, Emma, my father, and the memory of my mother

Welcome to the study of family law. This book is intended to provide you with a thorough working knowledge of this exciting area of the law. Along with its in-depth topical coverage, the book also addresses the important skills that a family law paralegal is likely to need in an active law office, such as client interviewing and legal drafting. However, in my view, it is not enough for a textbook simply to cover the topics and skills that a student will need in order to work effectively in a law office. Accordingly, the book also introduces you to some of the critical and often controversial issues in the field today so that you can be an informed and engaged member of the legal community.

This book is divided into 13 chapters, each of which follows the same basic format. Most chapters begin with a brief introduction to the covered topic, and the material is then presented in headed subsections. Throughout each chapter, key terms are bolded and then defined in the margins of the text. At the end of the chapters, you will find a chapter summary, list of key terms, review questions, discussion questions, and assignments. To help orient yourself, you may find it helpful to read the summary before you read the chapter. The review questions follow the order of the chapter and are designed to help you determine how well you understood the chapter. They are a useful self-testing device. The discussion questions frame some of the more controversial and less settled aspects of the law discussed in the chapter. The assignments are designed to help you apply and further develop your understanding of the law.

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In using this book, you should keep a few important points in mind. First, although every effort has been made to ensure that this book is current, the law is always changing, and that which is current today may be obsolete tomorrow based on a new court decision or statute. Second, this book is written for a national audience and is not geared to the law of any particular state. In the course of your studies, you may want to learn more

about the law of your state. Third, although I hope that this book will continue to be a resource for you when you leave school, it should be clear from the first two points that when working on an actual case, this book should not be your primary source of legal information. No book can substitute for the legal research required to ensure a current and comprehensive understanding of the applicable law in your jurisdiction. Good luck, and I hope you enjoy your entry into this fascinating area of the law!

July 2019 *J. Shoshanna Ehrlich*

This development of this book has benefited greatly from the contribution of many wonderful people who have given generously of both their time and their expertise. And although I certainly hope that it is free of errors, if any do exist, I take full responsibility for them.

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Chapter One

Marriage and Cohabitation

When people think about marriage, they usually think of it as a private, intimate relationship shaped by the love, commitment, and needs of two individuals. However, this understanding of marriage as an essentially private relationship fails to account for the fact that the state also has an interest in marriage—an interest that is grounded in the belief that the exclusivity, permanence, and procreative potential of the marital bond promotes social cohesion and stability. To promote this interest, states traditionally have exercised considerable control over marriage, and as an important corollary, have traditionally denied legal recognition to unmarried couples in order to buttress the privileged status of marriage.

Although the modern trend has been away from state control over marriage in favor of greater individual autonomy, state laws continue to structure this relationship. They determine who is eligible to marry, what the rights, entitlements, and obligations of spouses are during the marriage, and what their continuing responsibilities are toward one another should the marriage fail. In short, marriage is a legally transformative act. For example, upon marriage:

- each partner becomes formally connected to the family of the other. One literally acquires a "family-in-law." Mirror relationships are created such that the mother of one spouse becomes the mother-in-law of the other.
- spouses automatically acquire the right to a wide range of entitlements, such as Social Security and workers' compensation benefits, health insurance coverage, beneficial immigration status, and statutory rights of inheritance.
- spouses acquire a mutual duty to support one another. Historically, this obligation was imposed only upon husbands, but this obligation is now mutual.

Moreover, as we will see in Chapter 4, if a marriage ends, rights to property and support are automatically triggered, and state law provides a structured framework within which competing claims can be resolved. Although one does not usually think of divorce as a "benefit" that comes with marriage, it is important to recognize that divorce provides married couples with a structured dissolution process that is not available to unmarried couples.

Reflecting the continued privileged nature of the marital relationship, the law draws a clear line between married couples and cohabiting ones. However, since, as discussed in this chapter, marriage equality has become the law of the land, this distinction has lost some of its practical significance as same-sex couples now enjoy the same right that heterosexual couples have long enjoyed—namely, the ability to decide whether or not they wish to formalize their relationship through marriage. Nonetheless, given that many couples do choose to live together rather than marry, it remains important to understand the key legal distinctions between these relationships; accordingly, we take up the subject of cohabitation at the end of this chapter.

Regulation of the Relationship: A Brief History

Common Law:
The law of England as accepted by the colonies prior to the American Revolution; also refers to judge-made law

Our original marriage laws were based upon English **common law**. As eloquently expressed by William Blackstone, a famed English legal commentator, a defining aspect of this tradition was the legal subordination of married women:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything. . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either one of them acquire by the marriage.[1]

Marital unity:
A common law principle espousing that upon marriage a husband and wife become one, resulting in the suspension of the wife's legal identity

It is worth noting that this doctrine of **marital unity** by which a husband and wife are regarded as a single legal person bears a striking similarity to the biblical concept of the unity of the flesh.

Personal Property:
All property owned by an individual other than real property; includes both tangible and intangible assets

Outwardly manifested by the requirement that she take her husband's last name as her own, marriage altered a woman's legal status; rights that she possessed as a single woman were transferred to her husband in exchange for his support and protection. For example, she lost the right to own **personal property**, and any such property a woman owned at the time of marriage or subsequently acquired became her husband's.

Real property—land and whatever is grown on or fixed to it—was treated differently. Title did not pass to the husband, but he acquired the exclusive right to manage and control the realty together with the right to all rents and profits derived from it, and a married woman could not convey her realty without the consent of her husband.

Real Property: Refers to land and that which is growing upon or affixed to it

A married woman was also regarded as legally incompetent. Accordingly, any **contracts** that she entered into were null and void. She also lost her **testamentary capacity**—the ability to make a will—and any wills she had made prior to marriage were automatically revoked. She could not sue or be sued in her own name. As the owner of her legal claims, her husband had to be joined as a party and was entitled to collect any damages. A married woman also lost the right to her own labor, and a husband acquired the right to his wife's services both at home and as performed for third parties. Because her labor belonged to him, he acquired an interest in the fruits of her labor, and monies paid to her for services she rendered became his.

Contracts: Legally enforceable agreements between two or more parties

Testamentary Capacity: The legal ability to dispose of one's property at death through the execution of a will

In exchange for the loss of her legal persona, a married woman was entitled to be supported by her husband, and he became responsible for her debts, including those she came into the marriage with. This exchange of services for support lay at the heart of the traditional legal concept of marriage and resulted in the husband's unquestioned status as the head of household, with the right to make all major family decisions, including where the family was to live. This core dimension of the marriage relationship endured well into the twentieth century, long after other traditional features had been replaced by more modern rules.

It should be noted that based upon patterns of colonization and territorial acquisition, eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington) were influenced by Spanish civil law rather than English common law.[2] Known as **community property** states, at least in theory, the status of married women was different in these jurisdictions. Here, a wife's legal identity did not merge into her husband's. Instead, each spouse retained his or her separate identity, and marriage was viewed as a partnership. Subject to limited exceptions, property acquired during marriage was considered community property and belonged to both partners; however, the husband was given complete authority over the community property, including his wife's earnings.

Community Property: A system of property ownership between husband and wife in which each spouse has a vested one-half ownership interest in all marital property regardless of title

Married Women's Property Acts

Beginning in the late 1830s, states began passing laws known as the **Married Women's Property Acts**, which led to a gradual improvement in the legal status of married women.[3] Interestingly, the first such Acts were enacted in the South and appear to have been motivated by economic concerns, rather than by a desire to emancipate married women. Prompted by

Married Women's Property Acts: The series of statutory reforms that gradually improved the legal status of married women

the economic panic of 1837, in which many southern plantation owners faced bankruptcy and loss of property—including slaves—to their creditors, legislators passed laws giving married women rights of ownership over their own property, which served to protect it from being seized by their husbands' creditors. Husbands, however, retained their common law right of management and control over their wives' property.

In other regions of the country, most notably the Northeast, the passage of these Acts responded more directly to concerns being voiced by the newly emerging women's rights movement about the legal subordination of married women. Seeking greater equality within the domestic realm, reformers demanded "(1) full control over their property with the powers to contract, will, and sue regarding it; (2) the right to their own wages; (3) recognition of the wife's joint right to the earnings of the co-partnership; and (4) equal guardianship of their children."[4]

Striking at the heart of the traditional marital relationship and the husband's privileged position within the home, these demands were seen as radical and were often greeted with scorn and apprehension that women were seeking to rule their husbands. However, over the last half of the nineteenth century, states responded to these demands in halting fashion. By the turn of the century, married women had many more rights than they had previously possessed, and, in some states, they could own property, enter into contracts, and sue and be sued in their own name. However, in no state did these laws recognize married women as the legal equals of their husbands, who continued to enjoy their status as the legal head of household.

The Move to Legal Equality

Reflecting the deeply entrenched nature of gender norms in our marriage laws, in 1940, a federal district court in Michigan refused to uphold an agreement between a husband and wife in which the husband agreed to quit his job and follow his wife in her travels in exchange for a monthly sum of money, explaining that:

> As a result of the marriage contract . . . the husband has a duty to support and to live with his wife and the wife must contribute her services and society to the husband and follow him in his choice of domicile. The law is well settled that a private agreement between persons married or about to be married which attempts to change the essential obligations of the marriage contract as defined by the law is contrary to public policy and unenforceable.
>
> Even in the states with the most liberal emancipation statutes, . . . the law has not gone to the extent of permitting husbands and wives by agreement to change the essential incidents of the marriage contract.[5]

However, in the late 1960s, as the feminist movement gained strength, women again began challenging existing marriage (and other) laws that limited their rights based on fixed notions of appropriate female behavior, by, for example, requiring them to take their husbands' name or to follow them in their choice of domicile, or by limiting their right to freely dispose of property or obtain credit in their own right. Relying primarily on the **equal protection clause** of the fourteenth amendment of the U.S. Constitution (or analogous provisions in state constitutions), courts gradually began striking down most of the remaining sex-based laws on the ground that it was improper for states to assign rights and responsibilities based on fixed assumptions about the proper roles of men and women.

Equal Protection Clause: A clause in the fourteenth amendment to the U.S. Constitution that prevents states from imposing arbitrary and discriminatory legislative classifications

Illustrative of this approach, in 1979, the U.S. Supreme Court invalidated Alabama's alimony law because it imposed a support obligation only on men:

> [T]he "old notion" that "generally it is the man's primary responsibility to provide a home and its essentials," can no longer justify a statute that discriminates on the basis of gender. "No longer is the female destined solely for the home and the rearing of a family, and only the male for the marketplace and world of ideas. . . ."
>
> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. Whereas here, the State's . . . purposes are well-served by a gender-neutral classification . . . the State cannot be permitted to classify on the basis of sex.[6]

In addition to relying on equality principles to invalidate these laws, some courts also looked to the Supreme Court's decision in Griswold v. Connecticut, in which it struck down a Connecticut statute prohibiting the use of contraceptives by married couples based on a protected right of marital privacy under the **due process clause** of the fourteenth amendment.[7] Following suit, courts similarly limited the authority of states to structure the terms of the marital relationship in accordance with fixed understandings of spousal roles without regard for the wishes and interests of the marriage partners themselves.

Due Process Clause: A clause found in both the fifth and fourteenth amendments to the U.S. Constitution that protects persons from arbitrary or intrusive governmental actions

Entrance into Marriage: Choosing a Spouse

Although state laws no longer define marital rights and obligations based upon gender, they continue to play a role in shaping our understanding of the marital relationship by imposing certain restrictions on an individual's choice of marital partner. Most of these restrictions, such as those that prohibit close family members from marrying, are not terribly

controversial. However, one of the most heated issues of our time has been whether states can prohibit same-sex partners from marrying. As discussed below, after decades of struggle, in June of 2015, the Supreme Court, in the seminal Obergefell v. Hodges decision,[8] declared that these bans are unconstitutional.

We begin this section by looking at leading Supreme Court cases, including *Obergefell*, that impose constitutional limits on the authority of state to regulate marital partner choice. We then turn our attention to the most common marriage restriction laws that remain in effect today.

Marriage as a Fundamental Right

In 1967, the U.S. Supreme Court, in the case of Loving v. Virginia,[9] struck down Virginia's anti-miscegenation law, which prohibited interracial marriage between white and "colored" persons. Reflective of their racist origins, anti-miscegenation laws date back to the time of slavery and were once in effect in a majority of states. When *Loving* was decided, Virginia was one of 16 states that still prohibited interracial marriage. Virginia's law was challenged by a couple who had been convicted of violating the ban on interracial marriage. They were given a one-year jail sentence, which was suspended on the condition that they leave Virginia and not return for 25 years.

On appeal, Virginia's highest court upheld the Lovings' conviction, concluding that the law was a valid exercise of state power to "'preserve the racial integrity of its citizens'" and prevent "'the corruption of blood'" and a "'mongrel breed of citizens.'"[10] The Supreme Court disagreed. Focusing on the racial hatred that had motivated the passage of anti-miscegenation laws, the Court held that Virginia had violated the equal protection clause of the fourteenth amendment by restricting an individual's choice of marriage partner based on racial classifications. It also held that, under the due process clause of the fourteenth amendment, marriage is a *fundamental right*: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[11] This case marks the first time that the Supreme Court limited the authority of a state to regulate entry into marriage. Commentators subsequently wondered if the protected right to choose one's marital partner would extend to other situations or instead be limited to race-based marriage bans.

In a series of rulings, the Court subsequently made clear that, although the right to marry is not absolute, the fundamental right to choose one's marital partner extends beyond the matter of race. For example, in the

1987 case of Turner v. Satley, the Court invalidated a Missouri law prohibiting inmates from marrying, subject to limited exceptions such as in the case of pregnancy or the birth of a child, on the grounds that the state's interest in rehabilitation and security did not justify divesting prisoners of the fundamental freedom to enter into marriage with a person of their choosing.[12]

Marital Rights of Same-Sex Partners

Gay men and lesbians have been fighting for the right to marry since at least the early 1970s, when a number of same-sex couples who sought and were denied marriage licenses brought lawsuits in state courts challenging the fairness of restricting marriage to heterosexual couples. Citing *Loving,* they argued that this restriction was discriminatory and impermissibly interfered with their fundamental right to marry a person of their own choosing. In short, as in *Loving*, they argued that the denial of a marriage license violated their rights to equal protection and due process of the law under the applicable state constitutions.

In this early round of cases, courts did not take these assertions seriously. They consistently concluded that the fundamental right to choose one's marital partner did not extend to same-sex partners because marriage has always been between a man and a woman. The courts similarly concluded that because same-sex couples are critically different from heterosexual couples, particularly with respect to procreative potential, the denial of marital rights did not violate the equal protection clause.

Following these defeats, gay rights activists turned to other approaches, such as domestic partnership initiatives (discussed next), to obtain recognition of their relationships and access to family benefits.

Some also hoped that a more gradualist approach would lead to a greater acceptance of gay couples, which in turn would eliminate social hostility to the idea of same-sex marriage.

The Renewed Struggle for Marriage Equality

In the late 1980s, prompted in part by the AIDS epidemic and bolstered by gains in civil rights protections for gay men and lesbians, activists again began to focus on securing equal marriage rights. This time, based on challenges brought by couples in Hawaii and Alaska, it looked as if the courts were poised to extend marital rights to same-sex couples. However, while the cases were winding their way through the courts, opponents waged successful campaigns to amend their respective state constitutions to define marriage as being between one man and one woman, thus effectively bringing the court challenges to an end.

The Backlash: The Campaign to Preserve Marriage as a Heterosexual Institution

When it looked as if marriage equality might become a reality in Hawaii and Alaska, opponents of marriage equality launched a fierce campaign to formally encode the traditional meaning of marriage as an exclusive relationship between a man and a woman into law at both the state and federal levels. At the federal level, this opposition was encoded into law with the enactment of Defense of Marriage Act (DOMA). DOMA both authorized states to deny recognition to valid same-sex marriages that were entered into in states where they were permitted and defined marriage for purposes of federal law as being exclusively between a man and a woman. Following the lead of the federal government, a majority of states enacted laws or amended their constitutions to define marriage as exclusively being between a man and a woman. In addition to banning marriages between same-sex partners in the enacting states, these "mini-DOMAs" also withheld recognition of marriages between same-sex partners that were validly entered into in a state permitting such unions.

Marriage Equality Becomes a Reality

In 2003, in the groundbreaking case of Goodridge v. Department of Public Health, the Massachusetts Supreme Judicial Court ruled that same-sex couples have a constitutional right to marry.[13] In reaching this decision, the court focused on the profound importance of the marital relationship, stating:

> Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." Civil marriage anchors society by encouraging stable relations over transient ones. . . .
>
> Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, fidelity, and family. . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.[14]

In deciding for the plaintiffs, the court rejected the state's assertion that the marriage ban is necessary to ensure a favorable setting for procreation and child rearing, concluding that there is no reasonable connection between protecting the welfare of children and barring same-sex couples from marrying. The court also rejected the state's argument that allowing same-sex partners to marry would trivialize or even destroy "the institution

of marriage as it has historically been fashioned." Instead, the court stated that "[i]f anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities . . . [and] is a testament to the enduring place of marriage in our laws and in the human spirit."[15]

Making clear that Massachusetts was not simply an outlier, in less than a decade after the *Goodridge* decision, marriage equality had become a reality in eight states as well as in the District of Columbia. In some jurisdictions, this was similarly accomplished by a ruling from the state's highest court, while in others it was accomplished by way of a legislative enactment or voter-approved ballot initiatives.

Marriage Equality: The Law of the Land

In 2013, in the case of United States v. Windsor, the Supreme Court invalidated the section of DOMA that defined marriage for purposes of federal law as being exclusively between a man and a woman on the grounds that the denial of federal recognition to intimate relationships that states had "deemed . . . worthy of dignity in the community equal with all other marriages" in accordance with "evolving understandings of the meaning of equality," injured the very group of people that states were seeking to protect by placing "same-sex couples in an unstable position of being in a second-tier marriage."[16] In reaching this decision, the Court made clear that this differentiation was demeaning to same-sex couples and humiliating to their children by making it "more difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[17]

Although *Windsor* did not speak directly to the constitutionality of state marriage bans, the decision accelerated the pace of change as state and federal courts relied on its powerful language to strike down existing state marriage bans. Thus, for example, in concluding that "Virginia's same-sex marriage bans impermissibly infringe on its citizens' fundamental right to marry," the federal appeals court relied on *Windsor* for the proposition that laws that evince "disrespect for the 'moral and sexual choices' that accompany a same-sex couple's decision to marry" are constitutionally infirm.[18] Accordingly, by the time the *Obergefell* case reached the United States Supreme Court, a majority of states had embraced marriage equality.

The case of Obergefell v. Hodges was brought by 14 same-sex couples and two men whose partners had died. The plaintiffs were from the states of Ohio, Tennessee, Michigan, and Kentucky, which all had laws defining marriage as being exclusively between one man and one woman. The parties argued that their rights had been violated under the fourteenth amendment either because their state had barred them from marrying or had failed to recognize the validity of a marriage entered into in another state.

James Obergefell's story poignantly captures the impact of this definition of marriage on the lives of the parties. James had been with his partner, John Arthur, for more than two decades. When John was diagnosed with amyotrophic lateral sclerosis (ALS) in 2011, the parties decided to marry before he died. Since their home state of Ohio did not allow marriage between same-sex partners, they flew to Maryland in a medical transport plane and were wed in the plane on the tarmac, as John was too ill to leave the plane. After his death three months later, the state of Ohio refused to list James as his surviving spouse on the death certificate, which meant, as the Court put it, that they "must remain strangers" even in death.[19]

In its landmark ruling in favor of the plaintiffs, the Court began by explaining that the "history of marriage is one of both continuity and change."[20] It thus noted that marriage had once been viewed as an "arrangement by the couple's parents based on political, religious, and financial concerns," and that in the not too distant past, "a married man and woman were treated by the State as a single male-dominated legal entity."[21] Paralleling these developments, the Court also underscored the changing legal and social status of gay men and lesbians, remarking that until recently, "many persons did not deem homosexuals to have dignity in their own distinct identity."[22]

Citing *Loving*, the Court held that the well-established constitutional rule that marriage is fundamental applies with "equal force to same-sex couples" based on four essential principles, namely that:

1. "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" and is "among the most intimate that an individual can make";
2. marriage dignifies the commitment of two persons by offering "the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other";
3. marriage "safeguards children and families" by affording material benefits and protections to children as well as by offering them "permanency and stability" and the security of knowing that their families are accepted;
4. "marriage is the keystone of our social order."[23]

In so holding, the Court rejected the argument made by the defending states that the plaintiffs were not seeking to "exercise the right to marry but rather a new and nonexistent 'right to same-sex marriage.'"[24] In repudiating this assertion, the Court thus made clear that there is but a single category of marriage that includes both heterosexual and same-sex couples alike.

As in *Loving*, the Court also held that the ban on same-sex marriage violated the equal protection clause. Explaining that the rights of liberty and equality as respectively embedded in the due process and the equal protection clauses often worked hand in hand, it concluded that restricting

the freedom of gay men and lesbians to marry the person of their choosing also abridged "central precepts of equality" that constituted a "grave and continuing harm" in an established realm of fundamental importance.[25]

A complex question that courts have begun to grapple with since *Obergefell* is whether or not the decision has retrospective application so as to enable the backdating of a couple's marriage to the date that they "would have married, but for the existence of a legal barrier to doing so."[26] This is not simply an abstract question, as some entitlements, such as Social Security dependency benefits, are calibrated based upon the length of a marriage, while others depend on whether or not a couple was married at the time the right to the benefit actually accrued. In thinking about whether *Obergefell* should be applied backwards in time, two considerations are particularly important. First, when a statute, such as a state law banning marriages between two same-sex partners, is declared unconstitutional, it is generally treated as being *void ab initio.* In short, it is regarded as being "wholly void and ineffective . . . from the time of its enactment, and not from the date of the decision striking the statute[;] it is as if the statute had never been passed, and never existed."[27] Second, Supreme Court jurisprudence supports a general presumption of **retroactivity** in all civil cases, except in limited circumstances, such as where, for example, to do so would defeat the ownership rights of a purchaser of real estate.[28]

Retroactivity: The application of a court decision backwards in time following the declaration that a statute is unconstitutional.

A number of courts that have addressed this issue have concluded that *Obergefell* should be applied retroactively in order to accomplish the goal of marital parity (see also the mention of retroactivity in the section on common law marriage below). For example, in a Texas automobile accident case, the Court allowed a woman to seek wrongful death benefits as a spouse following the death of her partner of 18 years based on the reasoning that the failure to do so would defeat the Court's ruling that same-sex couples must be afforded access to marriage on the same terms as heterosexual couples.[29]

The Backlash Against Obergefell

Needless to say, many people around the country greeted the hard-won victory in *Obergefell* with a tremendous sense of both relief and joy that marriage equality for same-sex couples was at long last the law of the land. However, in keeping with the view expressed by Chief Justice Roberts in dissent that the universal meaning of marriage is "the union between a man and a woman" and that the right announced by the majority had "no basis in the constitution,"[30] the decision has also generated considerable pushback. Perhaps most prominently, some wedding-related businesses, including bakers, florists, and photographers, have refused to provide services to same-sex couples based upon a religious opposition to such marriages. Seeking to encode a right of refusal into law, a number of states have

enacted measures (or are considering doing so) that seek to insulate religious objectors from being sued under state public accommodation laws in jurisdictions that, in addition to barring businesses that offer goods or services to the public from discriminating on grounds such as race or sex, also bar discrimination based on sexual orientation and/or gender identity.

In support of their asserted right of refusal, these merchants seek shelter in the first amendment's right to freedom of religion, which they argue protects them from being compelled to engage in conduct, such as baking a cake or designing an invitation for a wedding ceremony, that is contrary to their religious beliefs. As a corollary, some have further argued that the first amendment's guarantee of free speech protects them from being forced by antidiscrimination laws to communicate messages they do not believe in. As a Colorado baker argued, "wedding cakes inherently convey a celebratory message about marriage" and requiring him to provide a wedding cake for a gay couple would compel him to "convey a celebratory message about same-sex marriage in conflict with [his] religious beliefs."[31]

These refusals present a clash of deeply cherished constitutional rights — namely, on the one hand, the right to equal treatment and on the other, the right to freedom of religion and speech. To date, most lower courts have come down on the side of same-sex couples who are seeking access to wedding-related services on the same basis as heterosexual couples. For example, an Arizona appeals court recently explained in a case involving a studio that did not want to make custom goods for same-sex weddings that "[p]rohibiting places of public accommodation from discriminating against customers is not just about ensuring equal access, but about eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma."[32] Or as succinctly put by the Supreme Court of Washington in State of Washington v. Arlene's Flowers, involving the refusal of a florist to provide flowers for the wedding of two gay customers, the case was "no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches."[33] To date, the Supreme Court has yet to issue a definitive ruling on this issue; however, there is a good chance it will do so over the next few years, so stay tuned.[34]

Restrictions on the Entry into Marriage

Although the right to marry is now constitutionally protected, as noted above, the Supreme Court has nonetheless made clear that the right is not absolute and may be restricted in order to advance compelling state interests. To this end, all states still have laws in effect that place limitations on the marriage right. Most commonly, these measures prohibit family members from marrying one another; restrict parties to one spouse at a time; and establish marital age requirements.

Incest

Incest:
Unlawful sexual relations between persons who are closely related to each other

All states have **incest** laws that make it a crime for family members within a certain degree of kinship to engage in sexual relationships with one another. Running along parallel lines, marriage restriction laws generally prohibit these same relatives from marrying.

These laws have religious roots and can be traced back to the book of Leviticus. At one time, based on the view that a husband and wife were a single person, incest laws applied equally to persons related by marriage (affinity) and those related by blood (consanguinity); in effect, the blood relatives of one spouse were treated as the blood relatives of the other. Today, most states no longer prohibit marriages between persons related by affinity but retain the prohibition against marriage between stepparents and stepchildren to protect children from sexual exploitation.

In terms of specific prohibitions, all states forbid marriage between a parent and child, a grandparent and grandchild, and siblings of whole or half blood. Most states treat sibling relationships created through adoption as a blood relation, and thus prohibit marriage between adopted siblings, and most, if not all, states prohibit marriage between an uncle and a niece and between an aunt and a nephew. With respect to first cousins, the trend is in favor of lifting this restriction, and many states now permit first cousin marriages. This trend reflects the fact that concerns about the genetic risks of "inbreeding" have turned out to be less significant than once believed, at least where first cousins are concerned. According to a report of the National Society of Genetic Counselors, studies indicate that "the increased risk for a significant birth defect in offspring of a first cousin union range between 1.7 and 2.8% above the risk of the general population."[35] However, some states permit first cousins to marry only where the parties are over procreative age or provide evidence of genetic counseling.

Given that marriage is a fundamental right, some commentators have questioned the appropriateness of state laws that prevent consenting adults from marrying one another based on family ties. As expressed by one author:

> All too often . . . society is merely trying to save the individual from conduct that society finds repulsive. State intervention into adult decision-making must be restricted to those instances where the danger of imminent bodily harm is readily demonstrable and marriage between adults related by consanguinity or affinity does not meet this requirement.[36]

Although there has been some loosening of incest-based restrictions, most notably with respect to first-cousin marriages, there does not appear to be any real movement favoring the elimination of this category of marriage restriction laws.

Multiple Marriages

Bigamy:
The unlawful act of contracting a second marriage while one or both of the partners is already married to someone else

Polygamy:
The situation where an individual has multiple spouses at the same time

All states prohibit a person from having more than one spouse at a time. The term **bigamy** describes the situation where a person enters into a second marriage while his or her first marriage is still in effect; the term **polygamy** applies to the situation where an individual (most commonly a man) has multiple spouses at the same time. A marriage contracted in violation of the "more than one spouse at a time" prohibition is void and may subject the participants to criminal prosecution.

Like incest prohibitions, these laws have religious underpinnings: Monogamy is a central tenet of the Judeo-Christian belief structure. However, unlike the incest taboo, the prohibition against multiple spouses has far less universal reach. For example, in this country, Mormon settlers in what is now Utah regarded the taking of multiple wives as a matter of divine right based on a revelation of the religion's founder, Joseph Smith. In 1890, the Mormon Church repudiated the practice as a condition of Utah's admission as a state; however, since then Mormon fundamentalists have revived the practice.

Although rooted in religious principles, the prohibition of multiple spouses has been justified on a number of policy grounds. Perhaps most important, it has been regarded as essential to preserving the integrity of families by limiting an individual's financial and emotional commitments to a single spouse and their offspring. However, since the Court has made clear that marriage is a fundamental right, some commentators have questioned the validity of this rationale, noting that these laws do not really promote the state's interest in protecting family integrity since the same concerns about financial and emotional instability are present with remarriage (or as it is sometimes called, sequential polygamy) and no limits are placed on the number of times a person can remarry and reproduce with each successive spouse.

Marital Age

Age of Capacity:
The minimum age below which a young person may not marry

Age of Consent:
The age at which a minor becomes eligible to consent to his or her marriage

Complex rules govern the ability of young people to marry. Most states set a minimum age, referred to as the **age of capacity**, below which a young person may not marry. Commonly, this age is 14. Some laws contain exceptions for circumstances such as pregnancy, but the exception usually confers a conditional rather than an absolute right of marriage, since most states require a minor to first obtain parental and/or judicial consent. Most states also set an age at which a person becomes eligible to consent to his or her own marriage. This is referred to as the **age of consent**, and it is usually set at 18—the age of majority.

For young people below the age of consent and, where applicable, above the age of capacity, the right to marry is usually conditional upon obtaining parental and/or judicial consent. Generally, states allow minors

who are close to the age of consent to marry with the permission of a parent only, but in the case of younger teens, states may require authorization from both a parent and a judge. In some states, if a parent withholds permission, a minor can petition the court for permission to marry.

Although the parental/judicial consent requirement is intended to be protective of young people, it is important to recognize that most states do not actually require that their wishes be taken into account. Moreover, in many jurisdictions there is no formal requirement that the court make a determination that the marriage is in the best interest of the minor; accordingly, a "judge may simply confirm that the child's parents consent to the marriage without any independent questioning or investigation."[37] As a result, a teen may be compelled to enter into a marriage that is against her wishes or not in her best interest. The risk of this occurring is compounded by the fact that only a small handful of states require the appointment of counsel for minors in these cases.

These laws were designed to serve at least two state interests. First, by requiring parental participation and approval, they support the traditional authority of parents over their children. Second, and perhaps more importantly, they are thought to protect minors from making ill-advised decisions with potentially long-term harmful consequences for themselves and future offspring. Although there has been a growing trend toward granting minors greater legal autonomy, challenges to these laws have not generally been successful.[38] One important reason is that unlike other decisions, such as whether to terminate a pregnancy, the marriage decision can be postponed without any lasting harmful consequences. Moreover, unlike anti-miscegenation laws or laws prohibiting marriage between same-sex partners, age-restriction laws are not an absolute barrier to marrying one's chosen partner; they simply require deferral of the marriage date.

There is a general assumption in this country that child marriages are not a frequent occurrence here. However, it occurs more frequently than people typically imagine is the case. According to the Tahirih Justice Center, more than "200,000 children under age 18 were married between the years 2000 and 2015" in this country.[39] The Center further reports that early marriage is "more common among those who are of lower socioeconomic status, socially conservative, liv[ing] in rural areas, and living in Southern states," and participants are "likely to come from very religious families . . . [with] the practice cut[ting] across many faiths." Importantly, "the religious institutions or denominations may not promote or condone child marriage"; rather, devout parents may press their daughter (typically it is a daughter) into an early marriage in order to "'safeguard a moral standard.'"[40]

A detailed discussion of the concerns commentators have raised about youthful marriage is beyond the scope of this book; however, a few points are in order as the law has slowly begun to respond to some of them.

One important consideration is that 90 percent of teen marriages involve a young woman marrying an adult male, who may well be decades older than she is. Not uncommonly she may be pregnant and be coerced into the marriage by her parents, despite her own wishes to the contrary. In short, her gender in combination with her age may make her particularly vulnerable to parental pressure, particularly in communities in which premarital pregnancy and abortion are frowned upon. In fact, as will be discussed in Chapters 3 and 12, the law has begun to regard forcing a teen into marriage against her wishes as abusive behavior that may entitle a teen to some kind of protection through abuse prevention or child protective laws, although as we will see, these are novel approaches to the issue. Layering on to concerns about parental coercion is the risk of coercion at the hands of a prospective spouse, particularly if he is considerably older than his prospective spouse; however, there is considerable disagreement over whether significant gaps in age render a relationship inherently unequal. Separate and apart from this uneasiness about the potential for coercion, significant concerns have been raised about a range of adverse impacts that early marriage may have on young women, including lower educational attainment, mental health complications, and a higher risk of domestic violence.[41]

As a result, a number of states are considering revising their marriage consent laws. One option under consideration would be to raise the minimum age of marriage to 17 or 18, with no parental or judicial consent exception. Another approach would be to require a far more searching judicial inquiry before consent can be given, including careful consideration of the minor's best interest in accordance with detailed statutory guidelines. In this regard, the Commonwealth of Virginia has adopted an interesting hybrid approach, which sets the minimum age of marriage at 18 unless a minor, who must be at least 16, has successfully petitioned the court for emancipation — a declaration that requires a searching inquiry into the minor's best interest and her capacity for making an informed decision regarding entry into marriage.[42]

Marriage Formalities

State control over marriage, particularly in structuring the terms of the marital relationship, has diminished over time. However, as clearly evidenced by the requirement that a couple must obtain a license in order to be recognized as legally wed, marriage continues to be a state-sanctioned and regulated relationship.

Thus, although we tend to think of a marriage ceremony as a private event, it is actually compliance with state licensing procedures, rather than saying "I do," that makes one married.

Obtaining a Marriage License

Although the requirements vary from state to state, the differences are generally minor. Allowing for variation, the following discussion provides an overview of the steps a couple must follow in order to establish a valid marriage, as well as and the rationale behind these requirements.

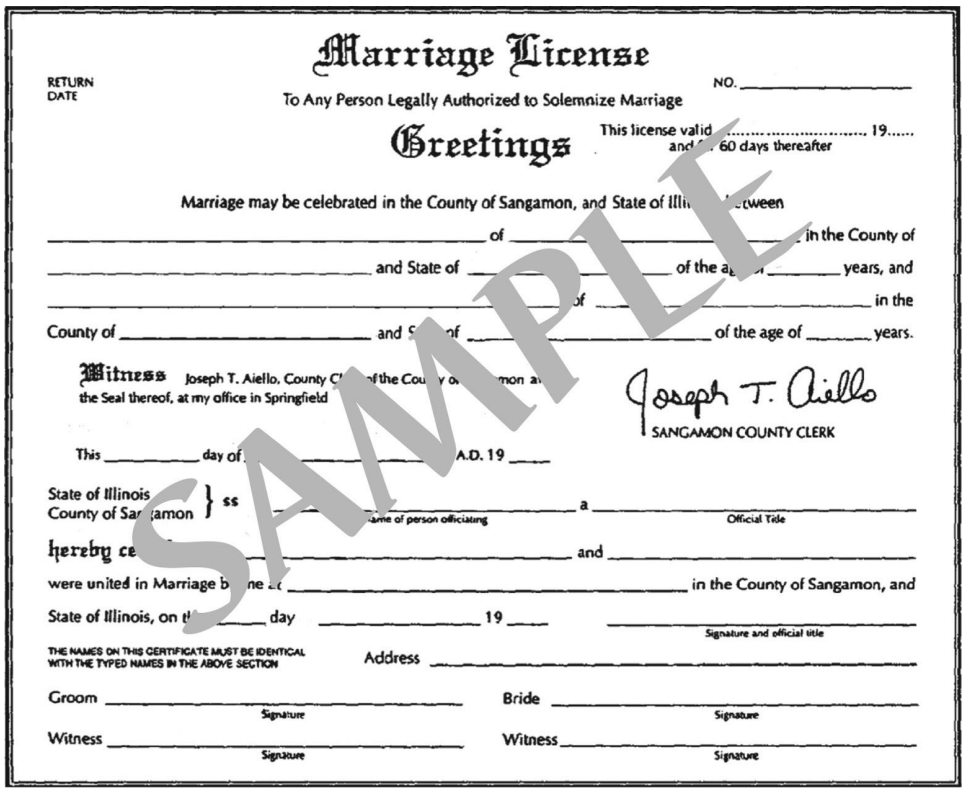
First, a couple must obtain a marriage license (Exhibit 1.1). Licenses are usually issued by a county or municipal officer, such as a clerk. Application is made by providing information under oath about age, prior marriages, and possibly also the legal relationship between the intended spouses. In some states, the clerk simply approves or denies the license based on the information as it appears on the face of the application. In other states, the clerk has some responsibility to assess whether the information provided is correct—for example, by requiring the production of a birth certificate or a divorce decree. This application process is a mechanism for enforcing a state's substantive restrictions on who can marry, as the information enables a clerk to determine if, for example, the applicants are underage, married to someone else, or close relatives. Disclosure of these circumstances would result in denial of the license. It also enables a state to collect vital statistics about its citizens as it does with birth and death certificates. Additionally, all states now require both parties to provide their Social Security numbers, which, in the event of divorce or separation, can be used to track down an absent parent for child support collection purposes.

Most states impose a waiting period, ranging from 24 hours to five days, between the time of application and the issuance of the license, although in some states, the waiting period is between issuance of the license and performance of the ceremony. It is hoped that this pause will deter couples from rushing into marriage, as it gives them time to reflect on the seriousness of their decision.

As a condition of eligibility for a marriage license, a few states also require that a doctor perform a blood test and certify that neither party has a venereal disease. The rationale of this requirement is to protect the health of the non-infected spouse and potential offspring. The measure assumes, however, that the parties have not had premarital intercourse, and in recognition of changed social reality, most states have abandoned this requirement. Other less common requirements include the provision of birth control information, premarital counseling for couples under a certain age, and the distribution of information regarding the availability of AIDS and HIV testing.

Once the license is issued, a marriage ceremony must be performed by an authorized person. States usually authorize religious leaders as well as civil officers, such as justices of the peace, to perform marriage ceremonies. Beyond perhaps requiring an oath or acknowledgment of consent

Exhibit 1.1
Marriage License



Marriage License

RETURN DATE

NO. _____

To Any Person Legally Authorized to Solemnize Marriage

Greetings

This license valid ..... 19..... and 60 days thereafter

Marriage may be celebrated in the County of Sangamon, and State of Illi... tween

_____ of _____ in the County of

_____ and State of _____ of the a... _____ years, and

_____ of _____ in the

County of _____ and S... of _____ of the age of _____ years.

Witness Joseph T. Aiello, County C... of the Cou... mon a... the Seal thereof, at my office in Springfield

Joseph T. Aiello

SANGAMON COUNTY CLERK

This _____ day of _____ A.D. 19 ____

State of Illinois } ss
County of Sa...amon }

_____ a _____
Name of person officiating — Official Title

hereby ce... _____ and _____

were united in Marriage b... ne ... _____ in the County of Sangamon, and

State of Illinois, on t... _____ day _____ 19 ____

_____
Signature and official title

THE NAMES ON THIS CERTIFICATE MUST BE IDENTICAL WITH THE TYPED NAMES IN THE ABOVE SECTION

Address _____

Groom _____ Bride _____
Signature — Signature

Witness _____ Witness _____
Signature — Signature

SAMPLE

to become husband and wife, the presence of witnesses, and a statement by the officiator to the effect that the parties are now lawfully wed, states do not generally regulate the form, content, or manner of the ceremony. Following the ceremony, the license must be recorded in a timely manner. This is usually done by the person who officiated at the wedding.

Consequences of Failing to Comply with Licensing Requirements

In most states, a technical failure to comply with an entry requirement (e.g., if the ceremony is performed by someone claiming to be authorized to perform weddings but who, in fact, lacked such authority) will not invalidate the marriage. The public policy in favor of marriage will usually override any such procedural flaw. In states that recognize common law marriages, a common law marriage rather than a formal marriage may be the result, but, as discussed next, this distinction has no real practical significance.

Common Law Marriage

A **common law marriage** is created by the conduct of the parties in the absence of a formal ceremony. A well-established English practice, common law marriage was accepted by most American colonies as a practical reality in a new country whose scattered populace made access to religious and civil officials difficult. But by the close of the nineteenth century, common law marriage came under increasing attack. Reformers complained that the modern American family had lost its moral footing and that overly relaxed marriage and divorce laws were leading to social decay and promiscuity. They feared that by treating these "irregular" relationships like true marriages, the law was condoning immoral conduct, especially on the part of women, as it was mostly economically dependent wives who sought to establish the existence of a common law marriage following the death of their spouses. As a result of these challenges and increased urbanization, most, but not all, states abolished common law marriages.

Common Law Marriage: A marriage created by the conduct of the parties rather than through a formal ceremony

Formation Requirements and Consequences

Typically, the following elements must be shown in order to establish a valid common law marriage:

- the existence of a mutual agreement to become "husband and wife" (see below);
- cohabitation; and
- reputation in the community as husband and wife or the parties holding themselves out as "husband and wife."

Because it can be difficult to prove that the parties agreed to become spouses, especially since many disputes over whether a valid common law marriage existed arise after the death of one partner, some courts will infer agreement from the fact of cohabitation and reputation, thus obviating the need for direct proof. It should also be noted that even if these elements are present, a common law marriage cannot be established if there is an existing legal impediment to marriage formation, such as that one of the parties is already married to someone else.

Although the above elements have traditionally been framed in terms of becoming a "husband and wife," in the wake of the *Obergefell* decision state courts that have considered the issue have concluded that common law marriages between same-sex partners must be afforded recognition on the same basis as those between heterosexual partners. Taking this a step further, some courts have applied *Obergefell* retroactively in order to backdate a couple's common law marriage to the time of its inception.

For example, a South Carolina court held that two women who had lived together for almost three decades had in fact entered into a valid common law marriage in the late 1980s despite the existence of a marriage ban. In reaching this result, the judge reasoned that since *Obergefell* invalidated the same-sex marriage ban on constitutional grounds, the prohibition should not be regarded as a legitimate legal impediment to the formation of a common law marriage.[43] In short, as discussed above, the court regarded the marriage ban as void from its inception.

Once a valid common law marriage is established in a state that permits entry into such marriages, the parties are considered married for all intents and purposes. As a result, they are entitled to all of the benefits afforded to spouses, and dissolution of the relationship cannot be accomplished informally, but rather requires the filing of a divorce action. Accordingly, it is very important to distinguish common law marriage from "mere" cohabiting relationships; cohabitation may give rise to certain entitlements, but it does not lead to the creation of a spousal relationship.

Interstate Recognition

What happens if a couple establishes a common law marriage in a state that allows them and then moves to a jurisdiction in which one cannot establish such a marriage? Will their marriage be accepted in the second state, or will they be considered married in their home state and unmarried in the second state? Almost all states will recognize the marriage so long as the parties satisfied the requirements of the state in which they were originally domiciled. This comports with the general rule that a validly contracted marriage will be recognized in all states, including a state that it could not have been entered into in the first place, unless it is in breach of that state's public policy.

The question of recognition becomes more complex when a couple from a state that does not allow common law marriage spends time in a second state that does, satisfies the requirements for establishing a common law marriage there, and then returns home. Some states will not recognize the marriage unless the parties have established a new domicile in the second state. Other states are looser and will extend recognition simply based on visits made to a jurisdiction that allows common law marriage. Other states take a middle position and will accept the marriage if the parties had sufficient contact with the second state to give rise to evidence of their relationship and reputation in that community.

The Legal Rights of Cohabiting Couples

As noted in the introduction to this chapter, states traditionally have drawn a bright line between marriage and other forms of intimate association. This fixed demarcation has long been considered necessary in order to safeguard the state's interest in marriage as a vital social institution. Placed outside the realm of sanctioned family life, unwed couples have accordingly been excluded from the rights and privileges of marriage. Needless to say, this exclusion had the greatest impact on same-sex couples who, until recently, did not have the option of formalizing their relationships through marriage.[44]

Even though, as we have seen in this chapter, marriage equality is now the law of the land, many couples, both same-sex and heterosexual, choose not to marry for a variety of reasons. Sometimes **cohabitation** is simply a trial run for marriage, but some people may opt to cohabit because they wish to keep the state out of their relationship, or because they wish to avoid the trappings of a historically paternalistic relationship. There may also be financial advantages to cohabitation over marriage, such as the preservation of Social Security benefits from a prior marriage.

Cohabitation: Two unmarried persons living together in an intimate relationship; the term applies to both same-sex and heterosexual couples

Although the moral and corresponding legal opprobrium that once attached to cohabitation has faded to a pale shadow of its former self, and the courthouse is no longer closed to cohabiting partners seeking relief following the dissolution of their relationship, as discussed in this final section of the chapter, the law continues to privilege marriage over cohabitation.

Opening the Door to the Courthouse: The Landmark Case of Marvin v. Marvin

Before 1976, courts generally refused to get involved in dissolution disputes between cohabiting partners over money and the allocation of accumulated property. Judges did not want to appear to be sanctioning nonmarital sexual relationships, and they worried that recognizing rights between cohabiting partners would diminish the importance of marriage. However, in 1976, in the landmark case of Marvin v. Marvin,[45] the door to the courthouse was opened for the first time to cohabiting partners seeking to sort out their affairs upon the dissolution of a relationship.

Actor Lee Marvin and Michelle Triola lived together for more than seven years, accumulating assets worth more than $1 million in the name of Marvin alone. Following their breakup, Triola sued for support and a share of accumulated assets, based on what she said was an express agreement between the parties that she would give up her musical career and provide domestic services to Marvin in exchange for his financial support and a shared interest in accumulated assets. Marvin, on the other hand,

argued that any agreement between the parties was void because it was inextricably bound up with the sexual aspect of their relationship—a traditional barrier to the enforcement of these claims.

Focusing on what it saw as the inherent unfairness of Marvin's position, the California Supreme Court held that unless sexual services are the sole contribution that one party makes to the relationship (thus making the relationship akin to prostitution), the fact that cohabiting partners are engaged in a nonmarital sexual relationship should not prevent the enforcement of agreements between them: "Although we recognize the well-established public policy to foster and promote the institution of marriage, perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy."[46]

Presently, virtually all states have opened the door to the courthouse to cohabiting partners who are seeking to resolve support and property disputes upon the dissolution of their relationships.[47] However, some courts have remained reluctant to hear cases involving disputes between same-sex partners—a reluctance that in some instances may have been attributable to the influence of a state's marriage ban. However, now that marriage equality is the law of the land, it seems unlikely that courts will persist in this approach.

In *Marvin*, Triola based her claim to support and a division of assets on the fact that the parties had entered into an express contract, which is an actual, articulated agreement. In holding that these agreements should be honored, the *Marvin* court also recognized that most cohabiting couples do not formalize their relational expectations, and it urged other courts to consider a variety of contractual and equitable approaches when seeking to resolve claims stemming from a failed cohabiting relationship.

Accordingly, in addition to upholding express agreements, many courts will infer that there was a sharing agreement between the parties based on their conduct during their relationship, much as a court might infer an agreement to pay based on the acceptance of a paper that is delivered to one's door on a daily basis.[48] In contract parlance, an agreement that is inferred from conduct is referred to as an implied-in-fact contract. In the context of cohabitation, a court might find an implied agreement to share accumulated assets based on the fact that a couple made purchases from a shared account or commingled their possessions. Some courts might also consider a partner's nonfinancial contribution (e.g., homemaking services) that preserves and enhances the value of the couple's property as evidence of an intent to share in the accumulation.

Courts have been more reluctant to find implied support agreements based on two traditional barriers. First, it has long been assumed that household services have no real monetary worth. Second, there is a long-standing legal presumption that household services are provided

gratuitously or as a gift, without expectation of compensation. These barriers, however, are breaking down. Based in part on the work of economists who have estimated what it would cost to purchase the services of a homemaker in the marketplace, courts have begun to recognize that household services have economic value and that they usually are not provided as a gift but rather, as acknowledged by the *Marvin* court, with the expectation that the parties intended a fair exchange.

Finally, some courts have gone beyond contract law to resolve disputes between cohabiting parties. For example, some have relied upon trust theories to distribute property from one partner to the other based on a showing that the titled partner was either actually holding it for the benefit of his or her partner or had engaged in some kind of fraud or overreaching. Others have treated the relationship like a business partnership that is winding down its affairs and distributing the accumulated assets.

In resolving disputes between cohabiting couples, most courts have been reluctant to treat cohabitation as a status relationship. Accordingly, in contrast to a divorce case where the post-dissolution rights and obligations flow from the existence of the relationship itself, in most states, a cohabitant who seeks support or a share of accumulated assets must establish that his or her claim is grounded in contract or some other legal approach, such as trust or partnership theories. In short, rather than creating a formal legal status for cohabitants, what courts have done is to have removed "a relationship-based impediment to their contractual freedom."[49] However, a distinct minority of jurisdictions have taken this extra step and now treat cohabitation as a status relationship. Accordingly, as with marriage, parties may be found to have post-dissolution obligations to one another based on the existence of the relationship itself.

Although the majority of states continue to use "contract as the conceptual underpinning for claims between intimate partners,"[50] in 2002 the prestigious American Law Institute (ALI) recommended, in its influential *Principles of the Law of Family Dissolution* ("Principles"), that status replace contract as the dominant paradigm. Accordingly, upon dissolution, cohabitants who have shared a "primary residence and a life together as a couple" for a significant period of time would be treated like a married couple with respect to post-relationship rights and obligations.[51]

Family law experts are divided over the ALI recommendation.[52] Supporters argue that a status approach is a fairer way to resolve disputes because most couples simply do not think about their relationship in contractual terms. As a consequence, if there is no agreement to enforce, the economically more vulnerable partner may end up with nothing—a particularly harsh result in the context of a long-term relationship structured along traditional gender lines. Supporters also argue that this approach advances the goal of equality by honoring a broader range of relationship choices in accordance with how people are actually living their lives,

rather than simply privileging marriage above all other forms of intimate association.

Others, however, worry that recognizing cohabitation as a formal status will weaken the institution of marriage. One fear is that recognition will blur the distinction between cohabitation and marriage, thus detracting from the unique nature of the marital bond and making it more likely that couples will simply choose to live together because marriage will no longer seem so special. Another concern is that the imposition of post-relationship obligations may contravene the actual intentions of the parties, who, in choosing cohabitation over marriage, may have purposefully been seeking to avoid the legal consequences of marriage.

Chapter Summary

Although we generally think of marriage as a purely private matter, states have actively sought to shape and preserve marriage as a vital social institution. Although laws no longer mandate prescribed roles based on highly gendered notions of proper marital conduct, states still regulate who can marry and the formalities that must be complied with to establish a valid marriage. However, marriage is now recognized as a fundamental right, and laws that burden an individual's right to marry will be subjected to careful judicial review. Laws limiting the marital rights of minors have typically withstood constitutional scrutiny, but based on concerns about forced child marriages, states are revisiting entry into marriage requirements with a view toward protecting young women from coercion.

Since the 1970s, gay men and lesbians have actively fought for the right to marry, and in 2003, in a historic first, the Massachusetts Supreme Judicial Court ruled that it was unconstitutional to bar same-sex couples from marrying. A majority of other states soon followed suit, and in the landmark 2015 *Obergefell* decision, the United States Supreme Court made marriage equality the law of the land. In an effort to avoid the effect of the ruling, some merchants have refused to offer wedding-related services to same-sex couples, thus triggering legal battles that pit the right to equality against first amendment rights of religion and free speech.

Most states have abolished common law marriage. However, most, if not all, states will recognize a common law marriage that was entered into in a state that still permits them. Post-*Obergefell*, same-sex couples should have the same rights vis-à-vis common law marriage that are extended to heterosexual couples.

States continue to draw clear lines between marriage and cohabitation; however, in contrast to the past when the courthouse door was shut to cohabiting couples, virtually all states allow a partner to seek support and property rights upon the dissolution of a cohabiting relationship. Recovery is typically rooted in contract theories.

Key Terms

Marital Unity
Personal Property
Real Property
Contracts
Testamentary Capacity
Common Law
Community Property
Married Women's Property Acts
Equal Protection Clause
Due Process Clause
Retroactivity
Incest
Bigamy
Polygamy
Age of Capacity
Age of Consent
Common Law Marriage
Cohabitation

Review Questions

1. What was the status of married women under common law?
2. What were a husband's legal responsibilities under common law?
3. How was marriage seen in community property states?
4. What prompted the passage of the Married Women's Property Acts?
5. What reforms did the Acts accomplish? What aspects of the common law marital relationship did they leave untouched?
6. When and how was the transition to gender-neutral marriage laws accomplished?
7. What did the Supreme Court decide in the case of Loving v. Virginia? Why is this case so important?

8. What kinds of marriage restriction laws are in effect today?
9. What arguments have same-sex couples made in support of their position that they are legally entitled to marry?
10. What did the U.S. Supreme Court decide in the *Obergefell* case?
11. What marital entry restrictions remain in effect today?
12. What steps must a couple follow to create a formal marriage? What purposes are served by these requirements?
13. What is the effect of a technical failure to comply with these requirements?
14. What is a common law marriage?
15. What elements are necessary to establish a valid common law marriage?
16. Why did courts traditionally deny relief to cohabiting couples upon dissolution of their relationship?
17. What was the result of the *Marvin* decision?
18. What is an implied-in-fact agreement, and under what circumstances might one arise in the cohabitation context?
19. What is the ALI approach to resolving dissolution disputes between cohabitants? Explain how this approach differs from the approach that most states use in resolving these disputes.

Discussion Questions

1. Some commentators have suggested that all restrictions on an individual's right to marry are unconstitutional. Do you think states should be able to impose restrictions on a person's choice of a marital partner? If so, what restrictions do you think are appropriate? What arguments support your position?
2. What do you think of the Supreme Court's decision in *Obergefell*?
3. Do you think someone who owns a business that offers services, such as baking cakes, catering, and creating floral arrangements, should be permitted to refuse service to same-sex couples seeking to get married? Support your position.
4. Should the law extend marital-like rights to cohabiting couples, or should they be required to marry if they want legal recognition of their relationships? What concerns are at stake in this debate?

Assignments

1. Locate your state's marriage statutes and answer the following questions:
   a. What restrictions, such as closeness of relationship, does your state use to limit entry into marriage?
   b. What steps must a couple take in order to establish a formal marriage?
   c. What are the consequences of failing to comply with these requirements?
2. Assume that a client who is in the process of ending a long-term cohabiting relationship has come into the firm where you work. Your supervising attorney has asked you to research the laws in your state regarding the rights of cohabiting partners and then write up your results in a short in-house memorandum. The purpose of the memo is to provide the attorney with an overview of the law in your jurisdiction.
3. Assume your firm has agreed to represent a lesbian couple in their action against a florist who has refused to sell them flowers for their wedding. Your supervising attorney is pretty clear about the arguments she can raise on their behalf, but she would like a clearer sense of the arguments that the florist might be able to raise. Since this is a case of first impression in your state, she would like you to look into the cases that have been decided in other jurisdictions as the basis of your analysis.

Endnotes

1. William Blackstone, Commentaries on the Laws of England 441-442 (15th ed. A. Strahan ed., 1809) (citations omitted).

2. It should be noted that in Louisiana, the law was shaped by both Spanish and French civil law principles.

3. This section is based mainly on the following works: Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982), and Elizabeth Bowles Warbassee, The Changing Legal Rights of Married Women 1800-1861 ch. 1 (1987).

4. Warbassee, *supra* note 3, at 273.

5. Graham v. Graham, 33 F. Supp. 936, 938-939 (E.D. Mich. 1940).

6. Orr v. Orr, 440 U.S. 268, 279-280, 283 (1979), quoting Stanton v. Stanton, 421 U.S. 7, 10, 14-15 (1975).

7. Griswold v. Connecticut, 381 U.S. 479 (1965).

8. 135 S. Ct. 2584 (2015).

9. Loving v. Virginia, 388 U.S. 1 (1967).

10. *Id*. at 7, citing Naim v. Naim, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955).

11. *Id.* at 13, citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

12. Turner v. Safley, 428 U.S. 78 (1987).

13. 440 Mass. 309, 798 N.E.2d 941 (2003).

14. *Id*. at 955-956 (internal citations omitted).

15. *Id.* at 966.

16. United States v. Windsor, 570 U.S. 744, 827 (2013).

17. *Id.* at 772.

18. Bostic v. Schaefer, 760 F.3d 352, 367, 399 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014).

19. *Obergefell*, 135 S. Ct. at 2594.

20. *Id.*

21. *Id.* at 2959.

22. *Id.* at 2596.

23. *Id.* at 2599-2601.

24. *Id.* at 2602.

25. *Id.* at 2604.

26. Peter Nicholas, Backdating Marriage, 105 Calif. L. Rev. 395, 400 (2017). The discussion here focuses on the retroactivity of the *Obergefell* decision, but the same issue of retroactivity could potentially arise under state law in those jurisdictions that had previously invalidated the ban on marriages between same-sex partners.

27. Lee-Ford Tritt, Moving Forward by Looking Back: The Retroactive Application of *Obergefell*, 2016 Wis. L. Rev. 873, 891.

28. *Id.* at 893-905.

29. Ranolls v. Dewling, 223 F. Supp. 3d 613, 624 (2016).

30. *Obergefell*, 135 S. Ct. at 638-639. Dissenting opinion of Chief Justice Roberts, joined by Justices Scalia and Thomas.

31. Craig v. Masterpiece Cakeshop, 370 P.3d 272 (Colo. Ct. App. 2015). This case ended up before the Supreme Court, which ruled for the bakery on very narrow grounds that have little precedential value. *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

32. Brush & Nib Studio, LC v. City of Phoenix, CA-CV16-0602, 25 (2018).

33. State of Washington v. Arlene's Flowers, 389 P.3d 543, 566 (Wash. 2017).

34. Following its decision in *Masterpiece Cakeshop*, *see supra* note 31, the Supreme Court vacated the Washington Supreme Court's decision in State of Washington v. Arlene's Flowers in favor of the two men, and remanded the case back to the court for further consideration in light of its ruling in *Masterpiece Cakeshop*.

35. Robin L. Bennett et al., Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors, 11 J. Genetic Counseling 97 (2002).

36. Carolyn Bratt, Is Oedipus Free to Marry?, 18 Fam. L.Q. 267, 288-289 (1984) (citations omitted).

37. Teri Dobbins Baxter, Child Marriage as Constitutional Violation, 19 Nev. L.J. 40, 47 (2018). *See also* Lisa V. Martin, Restraining Forced Marriage, 18 Nev. L.J. 919 (2018).

38. *See, e.g.*, Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982).

39. Tahirih Justice Ctr., Falling Through the Cracks 4 (2017), http://www.tahirih.org/wpcontent/uploads/2017/08/TahirihChildMarriageReport-1.pdf [https://perma.cc/63WN-YC9E], 3.

40. Baxter, *supra* note 37, at 49, quoting Ashley Belanger, Child Marriage and Religion in the United States, Teen Vogue (Sept. 7, 2017 8:00 AM), https://www.teenvogue.com/story/child-marriage-and-religion-in-the-united-states.

41. *Id.* at 50-52.

42. For further detail, *see id.* at 77-80.

43. Parks v. Lee, York County Family Court 2016-DR-45-1061 (2016).

44. As a way of alleviating some of the hardships imposed on same-sex couples prior to the advent of marital equality, some states and municipalities created domestic partnership or civil union registries, which typically offered limited relationship rights and recognition to registered couples. Going a step beyond this, some states offered equal benefits to couples in a civil union, minus, of course, the status recognition of marriage.

45. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

46. *Id.* at 122.

47. The state of Illinois remains an outlier in this regard. *See* Stefanie L. Ferrari, Cohabitation in Illinois: The Need for Legislative Intervention, 93 Chi.-Kent L. Rev. 561 (2018).

48. Some couples do enter into formal cohabitation agreements in order to structure their post-dissolution rights and obligations. Some couples also execute a variety of additional legal documents, such as wills and durable powers of attorney, in order to create rights between them similar to those that the law grants to married couples.

49. Margaret M. Mahoney, Forces Shaping the Law of Cohabitation for Opposite Sex Couples, 7 J.L. Fam. Stud. 135, 161 (2005). Cohabitation is treated as a formal legal status in a few states. As with marriage, then, rights and obligations flow from the existence of the relationship itself, thus eliminating the need to prove the existence of an agreement.

50. Mark Ellman, Unmarried Partners and the Legacy of Marvin v. Marvin: "Contract Thinking" Was Marvin's, 76 Notre Dame L. Rev. 1365 (2001).

51. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), §6.03(1). The Principles provide detailed guidelines for "identifying those nonmarital relationships which bear a sufficient resemblance to marriage to justify and require similar post-relationship obligations between the parties," whom the Institute refers to as "domestic partners." Ellman, *supra* note 50, at 1378-1379.

52. In addition to Ellman, *see* Nancy D. Polikoff, Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction, 2004 U. Chi. Legal F. 353; Marsha Garrison, Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation, 52 UCLA L. Rev. 815 (2005).