Family Law for Paralegals

EIGHTH EDITION

J. Shoshanna Ehrlich

The **Eighth Edition** of **Family Law for Paralegals** continues to provide complete coverage of traditional family law topics with historical context and dynamic cutting-edge issues—such as nonmarital families, child abuse and neglect, and same-sex marriage. **J. Shoshanna Ehrlich's** balanced approach prepares students to handle the work of a paralegal through examples, assignments, and sample forms that mirror legal practice.

***Family Law for Paralegals* features:**

- **A balance of traditional and cutting-edge topics**
- **Brief historical overviews** that place family law in meaningful context
- **Chapter summaries, key terms, and questions for review and discussion**
- **Cases for analysis** that develop critical thinking and writing skills
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The Eighth Edition is updated throughout with significant developments in Family Law:

- **Marriage coverage now includes** the retroactive application of *Obergefell v. Hodges* to backdate marriages of same-sex couples, the debate over whether merchants can refuse to provide wedding-related services and goods to same-sex couples based on religious objections, and whether the marriage consent age should be raised to protect minors.
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- **Economic issues updated** with due process rights of low-income parents in civil contempt cases for nonpayment of child support, discussion of the backlash against "permanent" spousal support awards, the tax treatment of spousal support payments, and inclusion of virtual assets.

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

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Preface

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. Extending beyond that, a fundamental premise of this book is that paralegals are an integral part of the legal community and are entitled to a voice in the ongoing policy debates over contemporary efforts to reconfigure the legal contours of traditional family relationships. To help you enter into these discussions in an informed and engaged way, this book looks at both the historic understandings of the family and the critical legal issues facing us today regarding the future direction and definition of the family. This coverage will deepen your understanding of contemporary family law issues and enable you to consider emerging issues in a thoughtful way.

This book is divided into 13 chapters, each of which follows the same basic format. Most chapters begin with a brief historical overview of the subject matter of that chapter. By grounding your knowledge of the present in the past, you will have a more complete understanding of how the law has developed, which, in turn, will enhance your understanding of contemporary legal issues. In the text of each chapter, key terms are bolded. These terms are listed at the end of the chapter and defined in a glossary at the end of the book. At the end of the chapters, you will also find a chapter summary, review questions, discussion questions, assignments, and cases for analysis. The chapter summary provides you with a quick overview of what was covered in the chapter; it is not intended to be a substitute for the chapter content. 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. Last, each chapter (with the exception of Chapter 10) includes cases for analysis. These cases point to interesting and sometimes controversial aspects of the law. They are included to deepen your knowledge of the law, acquaint you with landmark decisions, and help you to develop your analytical and critical reading skills. Please note that cases have been edited for clarity and brevity. To this end, most internal citations have also been deleted.

Visit the product page at WKLegaledu.com for *Family Law for Paralegals* for additional resources for students and instructors.

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 above 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*

Acknowledgments

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 this book 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 the 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 other 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 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 no longer gender-linked.

Moreover, as we will see in Chapter 4, if a marriage ends, state laws provide a structured framework within which competing claims to support and property 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 option of deciding 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.

Marriage: Regulating the Relationship

The modern legal approach to marriage is to permit spouses to shape the contours of their own relationship, but this is a fairly recent development. Historically, the law carefully defined the mutual rights and obligations of husbands and wives based upon highly gendered notions of appropriate marital conduct.

Common Law Origins

Our original marriage laws were based upon English **common law**.[1] 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.[2]

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.

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. Upon marriage, a woman lost the right to own **personal property**, property she owned at the time of marriage or subsequently acquired became her husband's. As owner, he could sell, destroy, or bequeath it, just as he could his separately acquired property. This property could also be taken by a husband's creditors in order to satisfy his debts. In short, as her person merged into her husband's so too did her property merge into his. **Real property**—land and whatever is grown on or fixed to it—was treated differently, as title did not pass to the husband. The husband did, however, acquire the exclusive right to manage and control the realty together with the right to all rents and profits derived from it. Although the nominal owner, a married woman could not convey her realty without the consent of her husband.

A married woman was regarded as unable to think for herself and thus lacked authority to act as an autonomous legal person. As a result, she lost the right to perform a variety of legal functions. 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.

Of profound consequence, a married woman also lost the right to her own labor. 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. A husband's right to his wife's labor was characterized as a property interest. If his wife was injured by a third party, the husband was considered a victim in his own right and could sue for the loss of his wife's ability to perform her marital responsibilities. Damages frequently included compensation for the loss of her companionship, including sexual companionship, and her domestic services. Married women had no corresponding rights to their husband's services. As explained by Blackstone: "[T]he inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior."[3] 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

common law marital relationship, and this core feature of marriage survived well into the twentieth century, long after other common law marital requirements had been replaced by more modern rules.

Charged with this support duty, the husband was unquestionably considered the legal head of household with the right to make all major family decisions. Of particular significance was his unilateral right to decide where the family should live. A wife was required to follow her husband wherever he chose to go unless his choice was clearly unreasonable or intended as a punishment.

The Civil Law Tradition

Eight states did not follow this English common law model. These states, known as **community property** or civil law states, are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Based upon patterns of colonization and territorial acquisitions, these states were influenced by Spanish civil law and, in the case of Louisiana, by Spanish and French law.

At least in theory, the status of married women was different in these states. 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 marital partners were not regarded as equals. A husband was given complete authority over the community property, including his wife's earnings; he could spend community assets freely, potentially leaving his wife with nothing to show for her contribution. Thus, in terms of her daily reality, the difference for a married woman between the common law and the civil law approaches would not have been as great as the doctrinal distinctions suggest.

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.[4] 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 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. Although individual women had spoken out previously, 1848 marks the birth of the organized women's movement. That was the year women and men came together at Seneca Falls, New York, for the first women's rights convention in this country.

Although winning the right for women to vote soon became their focus, the reformers also sought legal equality for women within the domestic sphere. They attacked marriage laws as an abuse of male power, which relegated women to the status of children. As stated by Elizabeth Cady Stanton, an outspoken leader of the movement:

> . . . A man marrying gives up no right, but, a woman, every right, even the most sacred of all, the right to her own person. . . . So long as our present false marriage relation continues, which in most cases is nothing more or less than legalized prostitution, women can have no self respect. . . . Personal freedom is the first right to be proclaimed, and that does not and cannot now belong to the relation of wife. . . .[5]

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 copartnership; and (4) equal guardianship of their children."[6] 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. Bit by bit, laws were passed extending property rights to married women and lifting many of the common law disabilities, although no state, with the exception of Maine, gave married women full control over their property. By the turn of the twentieth 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. Some states also passed "earnings" laws, giving a married woman a property right in the labor she performed outside the domestic realm, thus entitling her, rather than her husband, to the earnings. Despite these reforms, in no state were married women considered the legal equals of married men. Significantly, despite the passage of the earnings statutes, husbands still had a property right in their wives' domestic services,[7] and they remained firmly ensconced as

the legal head of the household. Thus, the essential nature of the marital relationship remained unaltered by these Acts; the reformers' vision of true legal equality between husband and wife remained but a distant dream.

The Move to Legal Equality

As discussed in the previous section, historically our marriage laws reflect a highly gendered vision of the marital relationship. Rights and responsibilities were assigned based on deeply held beliefs about the proper role of women and their subordinate status. Although these underlying beliefs were challenged in the nineteenth century, leading to some legal reforms, the defining exchange of services for support continued to structure the marital relationship.

So powerful was this vision of woman as homemaker and man as provider that couples were unable to legally redistribute their roles through private, consensual agreements. By way of illustration, 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:

> 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.[8]

Beginning in the late 1960s, this gendered approach to marriage was again challenged. With the emergence of the second women's rights movement, women again began to fight against laws that limited their rights based on fixed notions of appropriate female behavior. Reformers sought to eliminate all remaining common law marital restrictions, including laws that required a woman to take her husband's last name and to follow him in his choice of domicile, and that limited a married woman's right to freely dispose of her property or carry on a trade. Additionally, as married women assumed a greater role in the workplace, reformers challenged the still powerful exchange of support for services requirement, arguing that it confined women to the home and fostered economic dependency.

Gradually, courts began striking down most of the remaining gender-specific marital laws. Based mainly on the **equal protection clause** of the

fourteenth amendment to the Constitution, courts held that it was improper for states to assign rights and responsibilities based on fixed assumptions about the proper roles of men and women. Illustrative of this approach, in 1979, the United States Supreme Court invalidated Alabama's alimony law because it only imposed a support obligation 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.[9]

In reviewing these marital laws that fixed the rights and obligations of spouses based on gender, courts were also influenced by the Supreme Court's decision in Griswold v. Connecticut. This 1965 case, which struck down a Connecticut statute prohibiting the use of contraceptives by married couples, enunciated a broad right of marital privacy.[10] Drawing on this right of privacy, courts limited the authority of states to structure the terms of the marital relationship. This was now regarded as a matter to be determined by individual spouses based on their own needs and desires.

Today, marriage is no longer considered a status relationship where marital roles are assigned by law without regard for individual choice, and the law no longer assigns married women a subordinate role. Legally, marriage now more closely resembles a contractual relationship in which rights and obligations are chosen according to the needs and desires of the particular couple. Of course, legal or formal equality does not necessarily result in actual equality, and many still view marriage as an institution that has not escaped the legacy of a highly gendered past.

Entrance into Marriage: Choosing a Spouse

Although state laws no longer define marital rights and obligations based upon assumptions regarding the proper role of men and women, the law still plays a role in shaping our understanding of marriage by imposing certain restrictions on an individual's choice of marital partner. Some of the most common restrictive laws, such as those that ban marriage between

relatives or impose a "one-spouse-at-a-time" requirement, have stood the test of time based on the view that they serve important state interests. However, other state limitations, specifically those that prohibited interracial marriage and those banning same-sex partners from marrying, have been struck down by the Supreme Court.

We begin this section by looking at the Supreme Court's landmark 1967 Loving v. Virginia decision[11] invalidating Virginia's anti-miscegenation law on both due process and equal protection grounds. From there, we look at the struggle of same-sex couples for marriage equality, which ultimately culminated in the Court's landmark 2015 Obergefell v. Hodges decision.[12] We then turn our attention to the most common marriage restriction laws that remain in effect today.

Loving v. Virginia

In 1967, the United States Supreme Court, in the case of Loving v. Virginia,[13] 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 authority over marriage, and that Virginia could legitimately seek to "preserve the racial integrity of its citizens" and prevent "the corruption of blood" and a "mongrel breed of citizens."[14] The Supreme Court disagreed. Focusing on the racial hatred that had motivated 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.

The *Loving* Court also held that, under the **due process clause** of the fourteenth amendment, marriage is a *fundamental right*. Accordingly, it made clear that "the freedom of choice to marry [may] not be restricted by invidious race discrimination. Under the Constitution, the freedom to marry, or not marry a person of another race resides with the individual and cannot be infringed by the State."[15] Given this tight link between the freedom to marry and invidious *race* discrimination, which the Court stressed was "subversive of the principle of equality at the heart of the

Fourteenth Amendment," 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.[16]

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 does not extend to same-sex partners because marriage has always been between a man and a woman, thus placing same-sex partners outside the reach of the due process clause. The courts similarly concluded that because same-sex couples are critically different from male-female couples, particularly with respect to procreative potential, denying same-sex couples marital rights did not violate the equal protection clause because this clause only requires like treatment of persons who are similarly situated. Courts also made clear that a number of important state interests—such as encouraging procreation and protecting the traditional family—were of sufficient magnitude to offset any potential limitation of rights. Rejecting the *Loving* analogy, courts refused to consider the possibility that the exclusion was based on anything other than legitimate differences, such as bias against gay men and lesbians.[17]

Following these defeats, gay rights activists turned to other approaches, such as domestic partnership initiatives (discussed below), 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 legal system, marriage-rights 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.[18]

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 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, in 1996, Congress, fearing the potential spread of marital rights for gay and lesbian couples from the shores of Hawaii to the mainland, enacted the Defense of Marriage Act (DOMA).[19] DOMA included two distinct sections. One section of the Act authorized states to withhold recognition from same-sex marriages that were celebrated in states where they were permitted. The other section declared that for purposes of federal law, marriage was to be strictly defined as a legal union between one man and one 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. Frequently referred to as "mini-DOMAs," these measures, in addition to banning marriage between same-sex partners, also generally withheld recognition from marriages that were validly entered into in a sister state that permitted these unions.

Marriage Equality in the States

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.[20] Refusing to disaggregate the tangible benefits of marriage from its symbolic value, 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.[21]

In deciding for the plaintiffs, the court rejected the state's assertion that the marriage ban was 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 destroy "the institution of marriage as it has historically been fashioned" stating instead 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."[22] In order to remedy the discrimination, the court concluded that the common law definition of marriage should be modified to mean "the voluntary union of two persons, as spouses, to the exclusion of all others," thus making Massachusetts the first state in the nation to permit same-sex couples to marry.[23]

Making it clear that Massachusetts was not an outlier, in less than a decade after the *Goodridge* decision was handed down, 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,[24] 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. As the basis of

its decision, the Court concluded that the denial of federal recognition to 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 they were seeking to protect by placing "same-sex couples in an unstable position of being in a second-tier marriage."[25] 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."[26]

Although *Windsor* did not speak directly to the constitutionality of state marriage bans, the decision nonetheless accelerated the pace of change as state and federal courts relied upon its powerful language to strike down 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.[27] In a similar vein, in striking down that state's marriage ban, the federal trial court in Colorado cited *Windsor* for the underlying principle that laws that "degrade or demean" same-sex couples by withholding recognition of their marriages violate the constitutional guarantee of equal protection.[28] Accordingly, by the time the *Obergefell* case reached the Supreme Court a majority of states had embraced marriage equality.

The groundbreaking 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. They argued that their rights had been violated under the fourteenth amendment of the United States Constitution 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 the same-sex marriage ban 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. Because John was so ill, they married inside of the plane while it sat on the tarmac. After his death three months later, the state of Ohio refused to list James as the surviving spouse on the death certificate, which meant, as the Supreme Court put it, that they "must remain strangers" even in death.[29]

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."[30] 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."[31] 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."[32]

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 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 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"; and
4. "marriage is the keystone of our social order."[33]

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.' "[34] 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 violates 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.[35]

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."[36] 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."[37] 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.[38]

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.[39]

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,"[40] 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."[41]

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."[42] 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."[43] 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.[44]

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

All states have criminal **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 currently only about half of the states have a complete bar on first cousin marriages. Most of the remaining states permit such marriages, although some only allow it under certain circumstances, such as where the parties are above reproductive age.[45]

This gradual trend in favor of allowing first cousin marriages 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."[46] Nonetheless, some states permit first cousins to marry only where the parties are over procreative age or provide evidence of genetic counseling.

Although incest laws are religious in origin, other explanations have been advanced to support such restrictions, which, at least with respect to the parent/child and sibling relationship, have near universal reach. From a sociological perspective, these restrictions have been explained as necessary to preserve the family unit by preventing it from being torn apart by sexual rivalries. From a political perspective, these restrictions have been explained as necessary to early survival and community building, as they compelled families to establish alliances outside their own immediate kin group. Genetic concerns about the dangers of inbreeding and the transmission of negative recessive traits also have played a significant role in

the continuation of incest restrictions. Child advocates see these rules as necessary to protect children from sexual exploitation by family members and to provide them with a safe, sexually neutral environment in which to mature. Finally, there is the "yuck" factor—most people react with disgust at the thought of crossing the incest bar, although it is hard to know if this reaction is a cause or a result of the taboo.

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.[47]

Although there has been some loosening of incest-based restrictions, as in the case of first-cousin marriages, there does not appear to be a growing trend in favor of eliminating this category of marriage restriction laws.

Consideration

Despite the internal logic of this argument, it is hard to imagine that states would eliminate incest prohibitions in order to enhance individual autonomy. What role do you think morality or public repugnance should play in the preservation of legal proscriptions that limit a fundamental right?

Multiple Marriages

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 other 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. Other concerns include the potential coercion of women, the neglect of children, and the Mormon practice of older men taking girls as young as 14 to be one of their multiple wives.

In light of the Supreme Court's ruling in *Loving* that marriage is a fundamental right, some commentators have questioned the continued validity of the state's interest in prohibiting individuals from having more than one spouse at a time. For example, they point out that these laws do not really promote the state's interest in protecting the integrity of families, 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

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 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 older minors to marry with the consent of a parent, but for younger minors, the consent of a parent and a judge may be necessary. In some states, if a parent withholds permission, a minor may petition the court for approval. 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 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."[48] 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.

Despite the fact that the law has moved in the direction of granting minors greater legal autonomy, challenges to these laws have not generally been successful. One important reason for this is that unlike other decisions, such as whether to terminate a pregnancy, the marriage decision can be postponed without any lasting, negative consequences. Moreover, unlike anti-miscegenation laws, or laws prohibiting marriages 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.[49] 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.'"[50]

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 minor into marriage against her wishes as abusive behavior, which may entitle her 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.[51]

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.[52]

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 and the rationale behind the requirements.

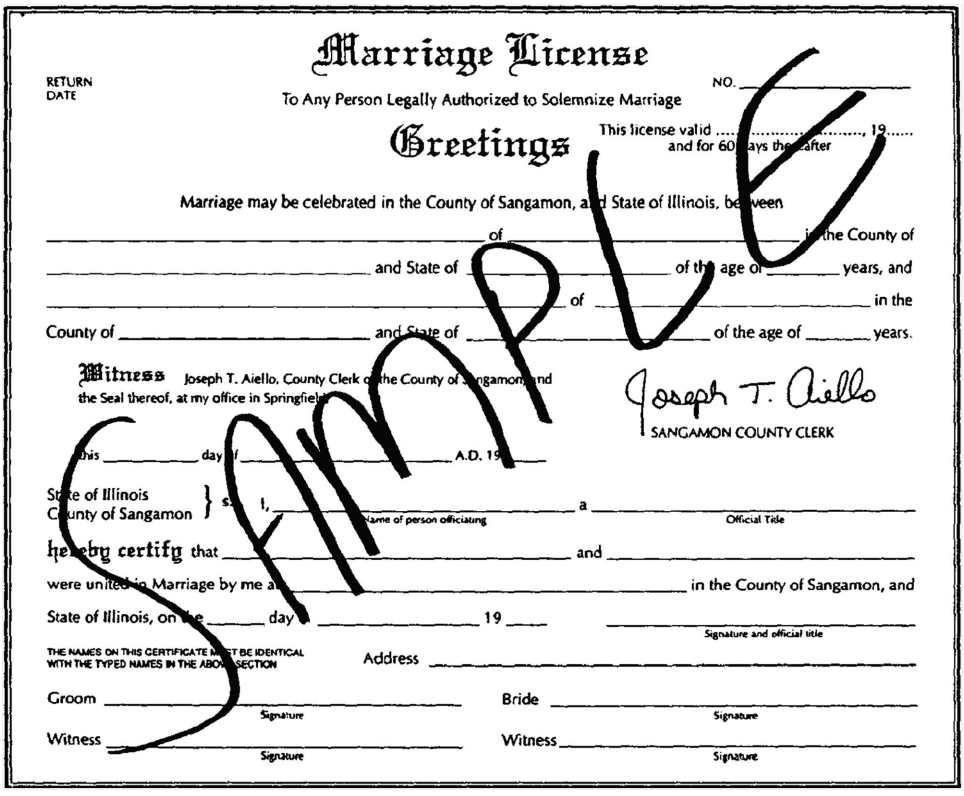
First, a couple must obtain a marriage license (Exhibit 1.1). Licenses are usually issued by a county or municipal officer, such as a clerk. Application is made by providing information under oath about age, prior marriages, and possibly also the legal relationship between the intended spouses. In some 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 noninfected spouse and potential offspring. The measure assumes, however, that the parties have not had premarital intercourse and in recognition of changed social reality, many 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 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.

Exhibit 1.1 Marriage License



Marriage License

RETURN DATE

NO. _____

To Any Person Legally Authorized to Solemnize Marriage

Greetings

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

Marriage may be celebrated in the County of Sangamon, and State of Illinois, between

_____ of _____ in the County of

_____ and State of _____ of the age of _____ years, and

_____ of _____ in the

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

Witness Joseph T. Aiello, County Clerk of the County of Sangamon and the Seal thereof, at my office in Springfield

Joseph T. Aiello

SANGAMON COUNTY CLERK

this _____ day of _____ A.D. 19____

State of Illinois } ss. I, _____ a _____
County of Sangamon } Name of person officiating Official Title

hereby certify that _____ and _____

were united in Marriage by me at _____ in the County of Sangamon, and

State of Illinois, on the _____ 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

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 below, 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, most

American colonies accepted common law marriage 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.

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.[53] 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 a common law 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 as valid 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 marriages 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.[54]

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.

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,[55] 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."[56]

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 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.

Presently, virtually all states have opened the door to the courthouse to cohabitating partners who are seeking to resolve support and property disputes at the dissolution of their relationships.[57] In resolving disputes between cohabiting parties, courts typically look to see if they had entered into some kind of agreement about property and support rights, although courts in some states have not limited themselves to a contractual remedy. For example, trust theories have been used 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.

Most couples do not sit down and negotiate a contract regarding the support and property rights they will have if they break up; courts therefore often infer agreements based on the conduct of the parties 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.[58] 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 because 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