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February 8, 2017

Kansas House Committee on Judiciary
Representative Blaine Finch, Chair

RE: 2017 HB 2201: Abolition of common law marriage

Hearing Date: February 8, 2017

TESTIMONY OF RONALD W. NELSON OPPOSING HB 2201

Chairman Finch and Members of the Committee:

I am a family law attorney in Johnson County. I've practiced family law for over 30 years. My practice is focused on complex issues in family law, including high conflict child custody litigation. My practice involves representing parents in family law disputes at the trial court level and, frequently, in the Kansas state appellate courts.

Similar to those presenting testimony in favor of abolishing common law marriage, over my 30 years practice, I've handled many cases in which common law marriage was alleged. Sometimes the court determined it existed; other times, the court determined it did not exist. Sometimes, I agreed with the court's conclusion; other times, I disagreed with the court's conclusion. Usually, my agreement or disagreement had to do with whom I represented. And, for a long time, I too thought that Kansas should abolish common law marriage because of the sometimes questionable claims of common law marriage pursued by an adverse party (or, more usually, attorney). During the past 30 years of my family law practice, however, I shifted my position from outright supporting the abolition of common law marriage to support the protection and continuation of common law marriage as a valid way to create marriage. And over the past 20 years, my support of common law marriage has only become stronger, the more instances I've seen where the non-recognition would have created a harsh and unjust result.

Unlike those testifying in favor of the abolition of common law marriage, I have what I believe a unique point of view on the subject – for I entered my current marriage at common law.

The proponents of the abolition of common law marriage cite numerous reasons for their opposition: the supposed perpetuation of fraud on the courts; the supposed difficulty in proving the non-existence of a common law marriage; supposed false claims of common law marriage after one party's death to secure insurance or other benefits – and perhaps most telling – that they have had courts find that a common law marriage existed in a situation they themselves do not believe it did.

RE: 2017 HB2201: Abolition of common law marriage
Ronald W. Nelson Testimony
February 8, 2017

The proposal to abolish common law marriage after a date certain is certainly well meaning. But the abolition of common law marriage would disproportionally hurt women and people with lower economic standing; would not change the public belief that common law marriage could be contracted; and would result in severe and unjust results in situations where the parties intended on entering into a common law relationship despite the legal abolition of the concept. Complicating the situation further is that the abolition of common law marriage in Kansas would also cut out the underpinnings of the ability of courts to make equitable determinations of property division between parties NOT married at common law and who never intended to enter into a common law marriage, creating further unjust results for those who depend on the courts to protect their rights and make sure inappropriate and unjust results don't occur. Further, contrary to the assertions of those supporting the abolition of common law marriage, research shows few cases in which judges aren't able to sort out the facts in a given case to decide whether a common law marriage actually exists. And those cases pointed to as examples of improper determinations of common law marriage seem to be more the view from a disgruntled litigant than from the standpoint of that cases place in overall legal structure. And the cases pointed to as instances where a judge improperly found a common law marriage existed can often be explained by the judge's lack of knowledge about common law marriage, and the lawyer's failure to properly bring out the required elements to show a common law marriage. Finally, instead of being a vestige of the past, the concepts at play in determining common law marriage are what will inform the creation of future binding relationships – as has occurred in a number of European countries.

1. "Common law marriage" as "too easy" to fall into.

One of the arguments used by those seeking the abolition of common law marriage is that it's "too easy" for people to "fall into" a common law marriage relationship. In support, they say that many believe that two people can become married at common law merely by living together for a certain time period (often thought to be 7 years) and that, therefore, it should be abolished. But we don't do away with legal remedies because some people – even a majority of people – misunderstand the legal requirements.

In fact, common law marriage is NOT easy to enter. It cannot be created by mistake, or jest, or lack of intention. The entry into a common law marriage requires a specific intent by *both* parties to enter into a marriage – not a mere "belief" by one of two parties that they "might" or should be married because of their circumstances.

A "common law marriage" is a marriage entered into between two people under "common law" rules. Not all states allow people to become married at "common law" in that state. But every state recognizes a common law marriage entered into by two people in another state. A couple that has entered a "common law marriage" can only divorce by court order. There is no such thing as a "common law divorce."

In Kansas (and most other states), common law marriage is valid if:

A. The couple is of sufficient age (18 years or older) and each has "mental capacity" (understands what they are agreeing to do).

B. The couple each has a "current intent" to be married to the other person (not an intent to "become" married at sometime in the future).

C. The couple each "holds themselves out to the public as husband and wife" (that is, they don't keep their marriage private).

"Living together" is not an element of common law marriage. So the fact that the couple lives together – or does not live together – is irrelevant to the creation of a valid common law marriage.

One person cannot create a valid common law marriage either by believing the couple lives in a "marriage like" relationship, wants to be married to the other person, tells other people that the couple is married, or anything else of the sort. Both parties to the common law marriage must independently form the intent to become common law married, must each satisfy the age and mental capacity requirement to enter into a common law marriage, and must each independently proclaim to "the public" that they are married – not merely that that are a "couple."

Proponents of abolition often say that too often people will file income tax returns claiming to be married. But the mere filing of income tax returns as "married" does not create a common law marriage unless the parties each independently intend that they are common law married. Representing to a third person (orally or in writing) that the couple is married when one or both parties don't actually believe they are married does not create a common law marriage – because all three elements of common law marriage must exist at the same time in order to create the relationship. Further, the abolition of common law marriage will not do away with people filing income tax returns and other documents claiming they are married so that they can obtain a benefit from that assertion.

2. Abolition of common law marriage does not mean the public is aware of the abolition.

Studies show that it is very difficult to keep the general public informed about changes in law. For example, despite the fact that Great Britain abolished common law marriage in 1753 by Lord Hardwicke's Act, a 2001 survey conducted by the British National Centre for Social Research on British Social Attitudes reported that 56% of respondents believed that "common law marriage" then existed and that unmarried people living together had the same rights and responsibilities to each other as those in traditional marriages.

It seems reasonable to expect, therefore, that even if Kansas abolishes common law marriage, Kansans will continue to act under the belief that common law marriage exists, and that they will continue to act under that understanding in ordering their day-to-day relationships.

3. Because the public will believe common law marriage continues, those who intend to enter into it will be harmed.

Eliminating common law marriage could mean litigating each break-up and the only apparent remedies for the parties would be based in case law i.e. *Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606, (1984), which does not provide any bright line rules for how to appropriately handle these situations. In essence, the *Eaton v. Johnston* case provides three methods for the division of property obtained during such a relationship where no marriage exists: division based on equity; division as a business partnership; or, division as the parties request. Whether the legislature continues to recognize common law marriage, couples will continue to enter into these relationships thinking that they are protected by the law – when, in fact, the weaker of the two parties will be disadvantaged by the law.

The right to alimony (spousal maintenance or support under current law), however, although based on the common–law obligation of a husband to support his wife, does not exist unless there is a

marital relationship between the parties and the award is authorized by statute. The Kansas Supreme Court held in *Ediger v. Ediger*, 206 Kan. 447, 454, 479 P.2d 823 (1971):

> Alimony is an allowance for support and maintenance of the divorced wife, or, as has been said, a substitute for marital support. It is an allowance which a husband may be compelled to pay to his former wife for her maintenance after there has been a divorce. (*Hendricks v. Hendricks*, 136 Kan. 69, 12 P.2d 804; *Garver v. Garver*, 184 Kan. 145, 334 P.2d 408; 24 Am.Jur.2d, Divorce and Separation, §514, pp. 640, 641.) Alimony is awarded not as a penalty, but as a substitute for the husband's duty to provide his former wife with adequate support.

And although the right to spousal support is based in the common law right of support between spouses, "the right of the courts . . . to grant alimony is statutory, and the general rule is that courts of equity have no power to decree permanent alimony in the absence of statutory authority." *Hendricks v. Hendricks*, 136 Kan. 69, 70, 12 P.2d 804, 805 (1932). See also *Fuller v. Fuller*, 33 Kan. 582, 585, 586, 587 (1885)("The action is not prosecuted under the statute authorizing alimony, and as the defendant in legal contemplation has never been the wife of the plaintiff, she is not entitled to alimony independent of the statute."); *Pitney v. Pitney*, 151 Kan. 848, 101 P.2d 933 (1940)(where there was no evidence that common law marriage existed, award of separate maintenance was error; judgment reversed with directions to enter judgment for defendant).

Without continued recognition of common law marriage, the dissolution of these relationships will likely result in increased litigation to settle these legal issues and with regard to property division, having three possible remedies will only serve to further muddy these waters.

As noted by a law review article published in 2009 found:

> The abolition of common law marriage often results in substantial injustices to women. In most cases there is genuine inequality between women and men. Women are more often the party seeking alimony or child support and men are often the party trying to avoid the obligation. Men tend to earn higher wages, while women tend to be more economically dependent upon men. Women tend to be very vulnerable in these types of relationships.
>
> J. Thomas, Comment, COMMON LAW MARRIAGE, 22 AAML Journal 151, 162 (2009)

The article notes that this effect doesn't only effect support and property division rights after a relationship breakup, but that women are much more affected in the long term.

Without continued recognition of common law marriage, the dissolution of these relationships will likely result in increased litigation to settle these legal issues and with regard to property division, having three possible remedies will only serve to further muddy these waters.

4. Abolition of common law marriage could weaken underpinnings of established Kansas law on equitable division.

Unmarried, cohabiting parties in Kansas do have the ability to seek equitable distribution of jointly obtained assets under *Eaton v. Johnston*. And if common law marriage is abolished, that will continue. The difference, however, is that if Kansas does away with common law marriage, those couples who intended to enter into a common law marriage will not be able to obtain spousal support and will also

not be able to obtain division of all the properties the couple obtained while they were together. Instead, the couple will have to litigate over each and every item of property and debt obtained during their relationship to determine if that item was "obtained jointly or intended to be obtained jointly" before that item can then be considered by the court in an overall equitable distribution of those properties between the parties. As one Kansas appellate court case instructed:

> (1) As to each piece of property, real or personal, which is involved in the division between the parties, the trial court is instructed to find:
>
> (a) whether the item in question was involved in the original divorce action,
>
> (b) when the property was acquired with regard to the parties' decision to cohabit,
>
> (c) why the property was acquired,
>
> (d) by whom the property was acquired,
>
> (e) in whose name the property is titled if the item in question is susceptible to a formal title document,
>
> (f) whose funds were used to pay for the property,
>
> (g) if the property was not jointly held, whether the parties intended it to be jointly held, indicating the evidence is available on the subject.
>
> In re Marriage of Lambeth, #81076, Unpublished Slip Op at 8 (Kan. App. May 7, 1999)(Attached)

But it is also likely that without the underpinnings provided by Kansas's historic acceptable of common law marriage, that the Kansas courts will interpret the Legislature as having an intent to also do away with court power to equitably divide property between unmarried cohabiting couples – drastically changing the legal rights of cohabiting parties to the extreme detriment of the weaker and less economically secure partner and enabling dependence in a possibly abusive relationship. As noted in Jennifer Thomas's comment on Common Law Marriage:

> For example, consider the negative effects a woman involved in a domestic violent relationship would face if she were living in a state that does not recognize common law marriage. She could leave the relationship, but would not have access to monetary or property rights that would otherwise be provided to her and her children.
>
> J. Thomas, Comment, COMMON LAW MARRIAGE, 22 AAML Journal 151, 162 (2009)

5. Abolition of common law marriage would significantly impair the rights of women surviving their common law partner.

Although the proponents of abolishing common law marriage cite potential fraud in inheritance situations, the effect of abolition would have a much more devastating effect on those who rely on the relationship than those who are inconvenienced by the assertion of common law marriage in after death proceedings.

In her article on common law marriage, Jennifer Thomas puts forward the following effects:

> The non-recognition of common law marriage also has a significant effect on inheritance. Take for instance a couple who has lived their whole life together and then one of them suddenly dies. If they happen to live in one of the states that has abolished common law marriage, the remaining "spouse" would have no inheritance rights. On the other hand, if the couple lives in a state that recognizes common law marriage and the "husband" has not terminated the common law marriage by divorce, the "wife" remains his heir under the state's intestacy laws.
>
> The recognition of common law marriage is also very important for social security and wrongful death benefits. The abolition of common law marriage negatively impacts social security benefits for women for two reasons. First, women have a greater life expectancy than men and second, men earn higher wages than women.136 Women consistently outlive their "husbands" and depend on social security survivor benefits to get by. Women who live in states that have abolished common law marriages will probably not be able to collect benefits, even if they have lived with their deceased "spouse" and held themselves out as being married. The collection of wrongful death benefits also negatively affects women because women are more likely to be economically dependent on men. When a woman loses her "husband," she is left to survive without the high wage earner's support.
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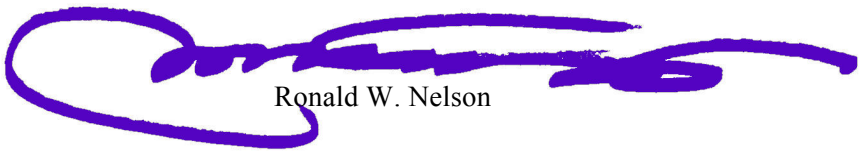
> J. Thomas, Comment, COMMON LAW MARRIAGE, 22 AAML Journal 151, 162 (2009)

For all of these reasons and more, I urge the committee not to advance this bill abolishing common law marriage. There are too many bad effects from the abolition that will befall women, minorities, and the disadvantaged. I have faith in the courts and the ability of individual judges to sort out truth from fiction, and to deal appropriately with allegations of common law marriage. Kansas judges have been doing so for 150 years. There is no reason now not to trust that they can do it for another 150 more.



Ronald W. Nelson

“Common law marriage” and cohabitation

Standard Note: SN/HA/03372
Last updated: 27 May 2010
Author: Catherine Fairbairn
Section Home Affairs Section

Generally, although cohabitants do have some legal protection in several areas, they do not have as many rights and responsibilities as married couples, and there is no specific legal status for what is often referred to as a “common law marriage”. Studies have shown that many cohabiting couples are unaware of this fact. The Labour Government supported and funded two voluntary sector partners to manage a campaign to make cohabitants more aware of their legal status and provide them with practical advice on how they can protect themselves and their families, should they wish to do so.

Some cohabitants enter into a cohabitation agreement and this can act as encouragement for them to consider what they would want to happen if the relationship ends. However, it is unclear how the courts will treat such agreements.

Following consultation, in July 2007 the Law Commission published a report, *Cohabitation: the financial consequences of relationship breakdown*, which made recommendations to Parliament on certain aspects of the law relating to cohabitants. It considered the financial consequences of the ending of cohabiting relationships. The Law Commission recommended the introduction of a new statutory scheme of financial relief on separation based on the contributions made to the relationship by the parties. The scheme would be available to eligible cohabiting couples. Couples who have had a child together or who have lived together for a minimum period would be eligible. Couples would be able to opt out of the scheme by a written agreement to that effect.

In March 2008, the Labour Government announced that it would be taking no action to implement the Law Commission’s recommendations until research on the cost and effectiveness of a similar scheme recently implemented in Scotland could be studied.

In a separate consultation, the Law Commission has recently consulted on whether certain cohabitants should have an automatic right to inherit part of the estate of a deceased partner who dies without leaving a valid will.

Arguments have been advanced both for and against extending new rights to cohabitants.

Unless specified otherwise, this note deals generally with the law in England and Wales.

Contents

1 What is "common law marriage"?

A man and woman living together in a stable sexual relationship are often referred to as "common law spouses", but this is incorrect in law in England and Wales. Although cohabitants do have some legal protection in several areas, cohabitation gives no general legal status to a couple, unlike marriage from which many legal rights and duties flow. Studies have shown that many cohabiting couples are unaware of this fact. According to the Department for Constitutional Affairs (as it was then, now the Ministry of Justice), many cohabitants do not realise that, even though they have lived together for a long time, they do not have the same rights as married couples, and consequently they take no steps to protect themselves.[1]

The Labour Government supported and funded two voluntary sector partners, Advice Services Alliance and One Plus One, to manage the "LivingTogether" campaign. The purpose of the campaign is to make cohabitants more aware of their legal status and provide them with practical advice on how they can protect themselves and their families, should they wish to do so. The campaign was launched on 15th July 2004 and a range of general information is available on the Advicenow website[2] and the Married or not website.[3]

LivingTogether has produced a checklist for couples breaking up,[4] commenting:

> It is often only when your relationship ends that you realise you don't have the rights you assumed you would have.[5]

Community Legal Advice has published a leaflet, *Living together Your rights if you are not married*.[6]

2 Number of cohabitants

In its recent consultation paper, *Cohabitation: the financial consequences of relationship breakdown,* the Law Commission noted the rise in cohabitation and parenthood by cohabitants:

> 2.5 The 2001 Census records just over two million cohabiting couples in England and Wales an increase of 67% on the figures from the 1991 Census.
>
> 2.6 The number of people who live with a partner outside marriage has been increasing significantly since the 1970s. In 1986, 11% of non-married men and 13% of non-married women aged 16-59 in Great Britain were cohabiting. By 2004, the equivalent figures had grown to 24% and 25% respectively. In terms of the overall population (aged 16-59) in Great Britain in 2004, 13% of men and 12% of women were cohabiting.
>
> 2.7 The 2001 Census for England and Wales further records that:
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> (1) 1,278,455 children were dependent on a cohabiting couple;
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> (2) of those, 558,426 children were in cohabiting step-families; and

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1 July 2004 (at 27 May 2010)
2 At 27 May 2010
3 At 27 May 2010
4 At 27 May 2010
5 http://www.advicenow.org.uk/living-together/breaking-up (at 27 May 2010)
6 CLA Information Guide No. C12, February 2009 (at 27 May 2010)

(3) 741,880 cohabiting couples had a dependent child or children;

2.8 The number of children dependent upon a cohabiting couple is reflected in the increasing rate of births outside marriage. In 1970, fewer than 10% of births occurred outside marriage. By 2004, 42% of births were outside marriage. The increase in such births has been accompanied by a similar rise in the proportion of such births in England and Wales that are jointly registered by both parents. In 2004, 76.4% of those registrations were to parents recorded as living at the same address, who may reasonably be assumed to be cohabitants. The proportion of births throughout the United Kingdom that are registered by one parent only has stayed fairly constant, at under 10%.[7]

The Office for National Statistics has produced some more recent estimates relating to cohabitation as part of their *Social Trends* publication. The data published in December 2009 includes the following:

- Overall, the number of cohabiting couples in England and Wales is projected to rise by almost two-thirds, from 2.25 million in 2007 to 3.70 million in 2031.
- It is estimated that, in 2007, around 10 per cent of the population aged 16 and over in England and Wales were cohabiting (4.5 million adults) and that the majority of cohabiting adults (72 per cent of men and 74 per cent of women) had never married.
- In the second quarter of 2009 there were around 13 million dependent children living with at least one parent in the UK. Almost 8.3 million dependent children (63 per cent) lived with married parents and around 1.7 million (13 per cent) lived with cohabiting parents. In comparison, 9.6 million children (72 per cent) lived with married parents in the second quarter of 1997 and 1.0 million (8 per cent) lived with cohabiting parents.
- The number of families with dependent children in the UK in the second quarter of 2009 was around 7.6 million. Of these, 4.6 million (61 per cent) were married couple families. Approximately 1.0 million (13 per cent) were cohabiting couple families.

3 The current position

3.1 Property rights

The law

Unmarried couples have no guaranteed rights to ownership of each other's property on relationship breakdown. If a cohabiting couple separate, the courts have no power to override the strict legal ownership of property and divide it as they may do on divorce. The courts may only make orders based on a determination of shares which have been acquired in the property in circumstances where the legal rules of trusts or proprietary estoppel apply. These rules are technical but essentially, the party who has no *legal* interest in the home may be found to have a *beneficial* (or equitable) interest in the property. The apparent intentions of the parties may be relevant in deciding the proportion of the property owned by each party. The length of time the partners have cohabited is not necessarily relevant.

It is open to cohabiting couples to enter into a contract regulating their relationship and in particular their property rights. In addition, if a house or other property is bought jointly, it would be possible to make clear the basis of the joint ownership, and whether the property is owned equally or (say) in 30/70 shares.

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[7] pp28-29. The consultation paper is discussed in section 6 of this note below

The law relating to cohabitants and property rights is widely seen to be uncertain. However, in its discussion paper, *Sharing Homes,* which was published in 2002, the Law Commission concluded that "it is not possible ... to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered".[8]

Recent cases

In a case in 2004, the Court of Appeal held that, where both partners had contributed to the purchase of a property which was registered in only one name, and there was no evidence of discussion between the parties as to the shares in the property each was to have, the appropriate question for the court was what would be a fair share for each, having regard to the whole course of dealing between them. The appropriate time for assessment of the respective shares of the parties (in the absence of an express agreement) was not at the time when the property was acquired, but when it was sold, taking into account various types of contributions made by each of them.[9]

In 2007, the House of Lords held that the transfer of a property into the joint names of cohabitants gives rise to a presumption that the property is to be held in equal shares unless the contrary is proved by the party claiming to have other than an equal joint beneficial interest and the facts are unusual.[10] Each case will be decided on its own individual facts.

Baroness Hale of Richmond also cautioned about the disproportionate costs which can be involved in resolving property disputes when a relationship breaks down. She set out some of the factors which might be relevant in determining property shares:

> Those included: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why, if it was the case, the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses.

In that particular case it was held that the circumstances were unusual, that the couple had kept their financial affairs largely separate and that the defendant had made good her case for a 65 per cent share.

3.2 Housing

The succession rights of cohabitants in relation to privately rented and social housing are explained in two Library standard notes entitled *Succession rights and privately rented housing*[11] and *Succession rights and social housing.*[12]

3.3 Domestic violence

Cohabitants do benefit, in a broadly similar way to married couples, from the protection available under Part IV of the *Family Law Act 1996*, which is designed to deal with domestic

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8 Law Commission Report No 278, November 2002
9 *Oxley* v *Hiscock* [2004] EWCA Civ 546
10 *Stack v Dowden* [2007] UKHL 17
11 SN/SP/2004
12 SN/SP/1998

violence. The Act allows home-sharers and former home-sharers (including same-sex partners) to apply for non-molestation orders and/or court orders regulating the occupation of the family home. The *Domestic Violence Crime and Victims Act 2004* extended these provisions to allow couples who have never cohabited to apply for non-molestation orders, and to strengthen the position of same-sex partners, particularly with regard to occupation orders. Further information is available in a Library standard note, *Domestic violence*.[13]

3.4 Inheritance

Unmarried partners have no automatic inheritance rights over their partner's assets on death. There are special provisions in the *Law Reform (Succession) Act 1995* allowing certain cohabitants to make a claim against the estate of their partner on his or her death, if no provision (or inadequate provision) has been made for them either by will or by operation of the rules of intestate succession. However, in neither of these cases is the cohabitant treated in exactly the same way as a spouse.

On 29 October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death.*[14] This covers a range of issues and one of the areas highlighted for potential reform is whether certain cohabitants should have a place in the intestacy rules,[15] the conditions which would have to be met, and how much of the estate they should receive. The Law Commission's proposals in relation to cohabitants are summarised in the Executive Summary:

> 15. Where a couple live together without getting married or forming a civil partnership and one of them dies, the survivor has no automatic right under the current intestacy rules to inherit any part of his or her partner's estate. This is the case no matter how long they lived together and even if they had children together. It can lead to significant hardship when longstanding cohabitants are bereaved. Many cohabitants do not realise that, if one of them dies without leaving a will, the other will not automatically inherit anything under the intestacy rules.
>
> 16. In some circumstances, a surviving cohabitant can go to court to challenge the distribution of a deceased partner's estate under the family provision legislation. But that will often be emotionally and financially draining.
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> 17. We therefore propose to reform the intestacy rules so that, in some circumstances at least, a surviving cohabitant can share in a partner's estate without having to go to court. This would extend the existing legal protection afforded to cohabitants when a relationship is cut short by death (existing legislation recognises the needs of cohabitants when a partner is killed in a fatal accident). It would also bring English law into line with the law in other Commonwealth jurisdictions.
>
> 18. While some may find this idea controversial, research indicates that it would match public expectations and attitudes. It would still be open to cohabitants to make a will naming other beneficiaries (subject to the family provision legislation).
>
> 19. We ask two key questions: which cohabitants should qualify for inclusion under the rules, and what should they receive? Although we recognise that there is a huge range of possible answers, we provisionally propose that couples who have had a child together or lived continuously as a couple for more than five years should have the same rights on intestacy as spouses.

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13 SN/HA/3989

14 Law Commission Consulation Paper No. 191

15 The intestacy rules specify who should inherit the property of a deceased person who did not leave a valid will

20. We also consider childless relationships of less than five years. We provisionally propose that where a couple have lived together for more than two (but less than five) years up to the date of death, the survivor should be entitled to half of the share of the estate that a surviving spouse would have received. The surviving cohabitant should not be entitled to the deceased's personal chattels in addition to that share, but should be allowed to choose items up to the value of any cash entitlement. We propose that a cohabitant should not receive anything under the intestacy rules if the deceased was still married or in a civil partnership at the time of death, however long the cohabitation.

21. We make a number of other proposals for changing the family provision legislation which would bring the definition and treatment of cohabitants into line with our proposals for reform of the intestacy rules.[16]

The consultation period ended on 28 February 2010 and the Law Commission hopes to publish a final report in autumn 2011. It will then be for Parliament to decide whether to make any change to the law.

3.5 Social Security

For means-tested benefits and tax credits, the unit of claim is the 'family'. In general this includes the claimant and their husband or wife or civil partner, or someone they live with as husband and wife or civil partner.[17] If two people are treated as a couple, the resources of both partners are added together and taken into account when a claim is made.

The rules governing Income Support and income-based Jobseeker's Allowance also recognise that married couples, and civil partners, have a duty to maintain each other. The Department for Work and Pensions may, for example, seek to recover money from a separated spouse or civil partner if their partner claims benefit. These powers are rarely exercised, however. There are no corresponding provisions for unmarried couples, or for same-sex couples not in a civil partnership.

The system of contributory benefits does not recognise unmarried couples, or same-sex couples not in a civil partnership. So, for example, unmarried partners and same-sex couples who have not registered a civil partnership would not be entitled to Bereavement Benefits.[18] [19] A person in receipt of a contributory benefit such as Incapacity Benefit may be able to secure an 'adult dependency increase' for an unmarried partner or for someone they are not in a civil partnership with, but only if the person is maintained by the claimant and is

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16 Law Commission, *Intestacy and Family Provision Claims on Death Executive Summary*

17 For further details of the 'living together as husband and wife or Civil Partners' test, see Department for Work and Pensions Technical Guide IS20, *A guide to Income Support*: http://www.jobcentreplus.gov.uk/JCP/Partners/Allowancesandbenefits/dev_010024.xml.html (at 8 January 2010)

18 Someone in receipt of Bereavement Benefits can however lose their entitlement if they start living together as husband and wife with someone of the opposite sex, even if they do not remarry; or start living together with someone of the same sex as Civil Partners, even if they do not register their partnership

19 There is however an exception in Scotland. In Scotland a person may be able to claim bereavement benefits if they were married 'by cohabitation with habit and repute' even if they did not go through a formal wedding ceremony [R(G) 1/71]. This is more than simply living together, as there must have been something about the relationship which meant that it could be inferred that the person and their partner consented to marriage and nothing existed which would have prevented a valid marriage taking place (e.g. either party already being married to someone else) [R(G) 5/83]. In addition, their relationship must have been such that other people generally believed that they married [CSG/7/1995].
However, the rule by which marriage could be constituted by cohabitation with habit and repute ceased to have effect from 4 May 2006 (as a result section 3 of *The Family Law (Scotland) Act 2006*). For people to continue to benefit from the rule, their marriage by cohabitation with habit and repute must have started before this date.

looking after his or her child. Someone in this category does not need to be in any relationship with the claimant, however.

3.6 Pensions

A cohabitant cannot rely upon their former partner's contributions for the purposes of state retirement pensions, whereas a person who is or has been married, or in a civil partnership, may be able to do so.[20]

For means-tested benefits, such as Pension Credit, if two people are treated as a couple, the resources of both are added together and may be taken into account in assessing entitlement. Two cohabitants are treated as a couple if they are considered to live together and share their lives in the same way as if they were married or civil partners.[21]

For occupational and personal pensions, a cohabitant whose partner has died may be entitled to benefits from their pension scheme. This will depend on the circumstances at the time of death (including their partner's age), the type of pension arrangement and the rules of the scheme.[22]

3.7 Taxation

Cohabiting couples are treated as unconnected individuals for taxation purposes and as such cannot, for example, benefit from various reliefs and exemptions in the taxation system available for spouses and civil partners.

3.8 Immigration

The legal position of unmarried cohabitants seeking to remain in the UK with their partner largely mirrors that for married couples, as explained in the Library standard note entitled *Immigration: Spouses, Civil Partners and Fiancé(e)s* which is available on the Library intranet.[23] The couple must have been "living together in a relationship akin to marriage which has subsisted for two years or more".[24]

3.9 Registration of death

The list of persons eligible to register a death does not automatically include a cohabitant. This list has, however, been under review: the Labour Government proposed that it be updated and extended. A White Paper, *Civil Registration: Vital Change* was published on 22 January 2002, following consultation, to set out proposals for reforming the civil registration service in England and Wales.[25] It suggested that the "life partner" of the deceased should be added to the list.[26] The timing of any change is uncertain.

3.10 Birth registration

At present, if the parents were married to each other at the time of the birth or conception, either the mother or father can register the birth on their own and details of both parents will be recorded. The law assumes that the mother's husband is her child's father.

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20 Pension Service, *a detailed guide to State Pensions for advisers and others*, NP46, August 2009, p 44-54

21 Pension Service, *a detailed guide to Pension Credit for advisers and others*, PC10S, January 2009, p 69-70

22 See, for example, Pensions Advisory Service website, *Workplace pension schemes – final salary scheme - death benefits* and *Personal and stakeholder pensions - death benefits*. HMRC's Registered Pension Scheme Manual - Members Pages - Death benefits

23 SN/HA/862

24 *Immigration Rules* HC 395 of 1993-94 as amended, para. 295A (at 12 May 2010)

25 Cm 5355

26 Para 2.21

If the parents are not married to one another, generally the father's details may be recorded only if both parents (or the court) acknowledge the father's paternity. The father's particulars may be entered in the register in the following circumstances:

- the mother and father go to the register office and sign the birth register together, or
- the mother alone attends the register office and declares that the father is the father of the child and produces to the registrar a statutory declaration made by the father acknowledging his paternity
- the father alone attends the register office and declares that he is the father of the child and produces to the registrar a statutory declaration made by the mother acknowledging the father's paternity or
- at the request of either parent, on production to the registrar by either parent of a parental responsibility agreement or an appropriate court order; the parent who attends must also make a declaration confirming that the agreement or court order is still in force.[27]

If the father's details are not included in the birth register, it may be possible to re-register at a later date.

Information about registering a birth is included on the Directgov website.[28]

Registration of an unmarried father on the child's birth certificate has relevance for parental responsibility.

Provisions in the *Welfare Reform Act 2009* will, when implemented, make joint birth registration a legal requirement for all unmarried parents in a range of circumstances. Information about the new provisions is included in the Explanatory Notes published with the Act.[29]

In summary, the Act will increase the ways in which an unmarried father may register jointly with the child's mother. It is intended that either parent will be able to initiate the registration (or re-registration) process to include on the birth record details of the second parent. Much of the detail of the new system will be included in regulations.

On 10 November 2009, the Department for Children Schools and Families (DCSF) (as it was then, now Department for Education) launched a consultation on the proposed *Registration of Births (Parents Not Married And Not Acting Together) Regulations 2010*. The consultation period ended on 2 February 2010.

A press notice published by the DCSF anticipated that the regulations will come into effect from January 2011 and stated that the legislation and regulations would be supported by a public awareness campaign, so that parents are clear about what is expected of them. Information and guidance, for both parents and registrars, would be developed in consultation with key parenting organisations and children's charities.[30]

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27 *Births and Deaths Registration Act 1953* Section 10 as amended

28 At 27 May 2010

29 See paragraphs 29-40 and 344-399. Background information is available in Library research paper, RP09/09 *Welfare Reform Bill: disabled people, child maintenance and birth registration*

30 Department for Children Schools and Families, Press Notice 2009/0211, *Dawn Primarolo: Both parents to have the right to register their child's birth,* 10 November 2009

3.11 Parental responsibility

The legal position relating to parental responsibility for unmarried fathers is explained in the Library standard note entitled *Parental responsibility for unmarried fathers and step-parents*.[31]

4 Cohabitation agreements

Cohabitants may wish to enter into a cohabitation agreement and this can act as encouragement for them to consider what they would want to happen if the relationship ends. Cohabitation agreements have yet to be fully tested in court and so it is not entirely clear what weight will be given to them. Both parties should take legal advice on the effect of any proposed agreement.

Advicenow have produced a guide, *Living together agreements,* which includes a template of an agreement.[32]

5 Same-sex couples

The *Civil Partnership Act 2004* established a new legal relationship for same-sex couples which enables those couples who register as civil partners of each other to access many of the rights and responsibilities to which married couples are entitled.

The *Civil Partnership Act 2004* does not apply to cohabiting heterosexual couples. The Labour Government's stated view was that heterosexual couples already have the option of marriage, and the legal consequences of a civil partnership are very similar.[33]

Further information is available in a Library standard note, *Civil Partnerships.*[34]

6 Law Commission report

The Law Commission's report, *Cohabitation: the financial consequences of relationship breakdown,* was published on 31 July 2007.[35] The Report recommended the introduction of a new scheme of financial remedies for cohabitants on separation. The Law Commission did not consider that cohabitants should be given the same rights as married couples and civil partners in the event of their separation.

The Law Commission proposed the introduction of a scheme of financial relief on separation based on the contributions made to the relationship by the parties (rather than on the respective financial needs of the parties as in divorce). First consideration would be given to any dependent children of the couple. Unlike in cases of divorce, cohabitants would not be expected to meet each other's future needs by means of maintenance payments and there would be no principle that the parties should share their assets equally.[36]

Merely moving in with someone would not give rise to any entitlement to a remedy. The scheme would be available to eligible cohabiting couples. Couples who have had a child

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31 SN/SP/2827
32 At 27 May 2010
33 Women and Equality Unit, *Civil Partnership – A framework for the legal recognition of same-sex couples,* June 2003
34 SN/HA/3833
35 CM 7182, LAW COM No 307
36 Law Commission press release, *New remedies for cohabitants – different from divorce,* 31 July 2007, (at 27 May 2010)

together or who have lived together for a minimum period would be eligible. The Commission recommended that the minimum period for couples without children should be set within a range of two to five years.[37]

Couples would be able to opt out of the scheme by a written agreement to that effect.

The key features of the scheme were summarised in the Executive Summary:

> 1.13 We do not think that all cohabitants should be able to obtain financial relief in the event of separation. We recommend that a remedy should only be available where:
>
> - the couple satisfied certain eligibility requirements;
> - the couple had not agreed to disapply the scheme; and
> - the applicant had made qualifying contributions to the relationship giving rise to certain enduring consequences at the point of separation.
>
> Eligibility requirements
>
> 1.14 The recommended scheme would apply only to cohabitants who had had a child together or who had lived together for a specified number of years (a "minimum duration requirement"). The Report does not make a specific recommendation as to what the minimum duration requirement should be, but suggests that a period of between two and five years would be appropriate.
>
> Disapplying the scheme
>
> 1.15 We reject an "opt-in" scheme, which couples would be required to sign up to in order to be able to claim financial remedies on separation. Consultation confirmed our view that an opt-in scheme would not deal effectively with the problems of hardship created by the current law. Vulnerable individuals would be no more likely to protect themselves by registering than they are currently to marry. We are also aware that to introduce an opt-in scheme would effectively create a new status of "registered cohabitant". This would jeopardise the support of many who have expressed support for reform, but who are concerned to protect the institution of marriage, such as the Mission and Public Affairs Council of the Church of England.
>
> 1.16 Instead, we recommend that, as a default position, the scheme should be available between all eligible cohabitants. However, we understand the strongly held view that it is wrong to force cohabitants who have not chosen to marry or form a civil partnership into a particular legal regime against their will. We agree that it is very important to respect the autonomy of couples who wish to determine for themselves the legal consequences of their personal relationships. We therefore recommend that a new scheme should allow couples, subject to necessary protections, to disapply the statute by means of an opt-out agreement, leaving them free to make their own financial arrangements.
>
> Qualifying contributions and their consequences: the basis for remedies
>
> 1.17 It would not be sufficient for applicants simply to demonstrate that they were eligible for financial relief and that the couple had not made a valid opt-out agreement disapplying the scheme. In order to obtain a remedy, applicants would have to prove that they had made qualifying contributions to the parties' relationship which had given rise to certain enduring consequences at the point of separation.

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[37] *Ibid*

> 1.18 The scheme would therefore be very different from that which applies between spouses on divorce. Simply cohabiting, for however long, would not give rise to any presumed entitlement to share in any pool of property. Nor would the scheme grant remedies simply on the basis of a party's needs following separation, whether by making orders for maintenance or otherwise.
>
> 1.19 In broad terms, the scheme would seek to ensure that the pluses and minuses of the relationship were fairly shared between the couple. The applicant would have to show that the respondent retained a benefit, or that the applicant had a continuing economic disadvantage, as a result of contributions made to the relationship. The value of any award would depend on the extent of the retained benefit or continuing economic disadvantage. The court would have discretion to grant such financial relief as might be appropriate to deal with these matters, and in doing so would be required to give first consideration to the welfare of any dependent children.
>
> 1.20 We consider that a scheme based on these principles would provide a sound basis on which to address the hardship and other economic unfairness that can arise when a cohabiting relationship ends. It would respond, more comprehensively than the current law can, to the economic impact of the contributions made by parties to their relationship, and so to needs which arise in consequence. Where there are dependent children, the scheme would enable a remedy to be provided for the benefit of the primary carer, and so better protect those children who share their primary carer's standard of living. By making adequate provision for the adult parties, the scheme would give more leeway to the court than it currently has to apply Schedule 1 to the Children Act 1989 for the benefit of the parties' children.

Stuart Bridge, the Commissioner leading the project, said:

> The scheme we are recommending, in the light of consultation, is distinct from that which applies between spouses on divorce. It would not apply to all cohabitants and where it did apply would only give rise to remedies relating to contributions made to the relationship. We do not accept the argument that such reform would undermine marriage. We consider that our scheme strikes the right balance between the need to alleviate hardship and the need to protect couples' freedom of choice.[38]

7 Government response to Law Commission report

On 6 March 2008, Bridget Prentice, who was then Parliamentary Under-Secretary of State for Justice, announced the Government's response to the Law Commission's report, in a written ministerial statement. She said that no action would be taken to implement the Law Commission's recommendations until research on the cost and effectiveness of the scheme recently implemented in Scotland could be studied:

> Today we are announcing the Government's response to the Law Commission's paper on Cohabitation: The Financial Consequences of Relationship Breakdown.
>
> The Law Commission published their very thorough and high quality report on 31 July 2007. It makes recommendations to Government on certain aspects of the law relating to cohabitants. It considers the financial consequences of cohabiting relationships ending either by separation or death. It follows two years of work by the Law Commission.

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[38] Law Commission press release, *New remedies for cohabitants – different from divorce,* 31 July 2007, (at 27 May 2010)

> The report has been carefully considered and the Government have decided it wishes to seek research findings on the Family Law (Scotland) Act 2006, which came into effect last year. This Act has provisions which are similar in many respects to those which the Commission recommends.
>
> The Scottish Executive intend to undertake research to discover the cost of such a scheme and its efficacy in resolving the issues faced by cohabitants when their relationships end.
>
> The Government propose to await the outcome of this research and extrapolate from it the likely cost to this jurisdiction of bringing into effect the scheme proposed by the Law Commission and the likely benefits it will bring. For the time being, therefore, the Government will take no further action.
>
> The decision has been reached because of the need for Government to obtain accurate estimates of the financial impact of any new legislation and the likelihood that we can obtain a view of financial impact by drawing on the Scottish experience of similar law reform.[39]

On 20 March 2008, a written reply to a Lords Parliamentary question considered the issue of whether further legislation dealing specifically with cohabitants is required:

> Lord Lester of Herne Hill asked Her Majesty's Government:
>
> Whether unmarried cohabiting opposite-sex couples need legislative protection; and
>
> Whether the law that currently applies to resolve property disputes between unmarried cohabiting couples is sufficiently clear and uncomplicated and produces fair outcomes for cohabitants and their children; and
>
> Whether they will introduce legislation to give effect to the recommendations of the Law Commission for England and Wales in its report Cohabitation: The Financial Consequences of Relationship Breakdown to provide a scheme of financial remedies that would lead to fairer outcomes on separation of cohabitants and their families.
>
> The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath): Cohabiting couples do have fewer legal rights than their married counterparts, but that is not to say that they have none. In relation to domestic violence, cohabiting couples have the same rights to protection as married couples.
>
> Financial disputes over maintenance payments for children are governed by the Child Support Agency and by legislation specifically designed to cater for their needs. Neither differentiates between cohabitants and married parents.
>
> The question of whether further legislation dealing specifically with cohabitants is required is a finely balanced one. It was precisely because of the Government's concern that cohabitants might be inadequately protected that the question of whether they should have specific rights was referred to the Law Commission.
>
> Following the Law Commission's report, the Government have decided to consider research on the impact of the Family Law (Scotland) Act 2006 which contains provisions that are similar in many respects to those which the Law Commission recommends before deciding whether to implement the Law Commission's proposals. In particular, the Government wish to consider the likely cost and benefit to this

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[39] HC Deb 6 March 2008 c122WS

jurisdiction of bringing into effect the scheme proposed by the Law Commission, and to see how well the scheme meets the needs of vulnerable individuals.

The Government have funded the "Living Together" campaign to raise public awareness about the legal status of cohabitation. It aims to make people more aware of the differences in the rights and responsibilities applying to married and unmarried relationships, and to provide cohabitants with practical advice on how they can protect themselves and their families, should they wish to do so. Pending the outcome of research, the Government will continue to support this campaign.[40]

8 Scotland

Under the *Family Law (Scotland) Act 2006,* which came into force in May 2006, cohabitants (from opposite and same sex couples) may make limited claims against each other in the event of their relationship terminating or on the death of one of the couple. However, couples living together do not have the same rights as married couples and civil partners. In May 2006, the Scottish Executive produced a leaflet entitled *Family Matters: Living Together in Scotland* which explains the law on cohabitation and the rights introduced by the 2006 Act.[41] This includes the following:

Common law marriage

It is a common misunderstanding that a couple will have established a "common law marriage" after living together for a period of time. This is not the case. Common law marriage does not exist in Scotland. Even if you have lived with your partner for many years, you do not have the same rights in law as a married person does. There was a type of irregular marriage called "marriage by cohabitation with habit and repute" which could apply to couples who had lived together and were thought to be married. This was rarely used in practice and, except for very particular circumstances, was abolished by the 2006 Act.[42]

Cohabitants' rights

The 2006 Act has introduced a set of basic rights to protect cohabitants, either when their relationship breaks down, or when a partner dies. But the law is very clear: couples living together do not have the same rights as married couples and civil partners. It is very important that you understand this when deciding whether to move in with your partner or to make a formal commitment.[43]

9 Other developments

9.1 Cohabitation Bill [HL] 2008-09

On 11 December 2008, the *Cohabitation Bill [HL]* was introduced in the House of Lords as a Private Member's Bill by the Liberal Democrat peer, Lord Lester of Herne Hill.[44] It had its second reading on 13 March 2009, and one day of committee stage on 30 April 2009, in the House of Lords, but did not progress any further. The Bill intended to establish a framework of rights and responsibilities for cohabitants on separation or death and for life insurance purposes. Information about the Bill is available on the public bill page of the Parliamentary website.

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40 HL Deb 20 March 2008 cc58-9WA
41 At 27 May 2010
42 Section 3 deals with the abolition of marriage by cohabitation with habit and repute
43 p2
44 HL Bill 8 of 2008-09

9.2 Cohabitation (No 2) Bill 2008-09

On 25 March 2009, Mary Creagh (Labour) sought leave, under the Ten Minute Rule motion, to introduce the *Cohabitation (No 2) Bill*.[45] Mary Creagh referred to the Bill as the bill introduced by Lord Lester of Herne Hill in the House of Lords.

The Bill did not make any further progress.

9.3 Gresham College lecture by Baroness Deech

On 17 November 2009, the crossbench peer, Baroness Deech delivered a Gresham College lecture, *Cohabitation and the law,* in which she argued against giving new rights to cohabitants:

> The message is one of freedom of choice and respect for rights. Why should we make them pay when young educated people live together, or when a young woman with a good career is deserted by the young man whom she had hoped would marry her but instead demands money from her? What are the expectations of cohabitants? Whatever they are, they know that they are not married, and they have chosen to avoid the married state. There is nothing to stop them marrying, for divorce is easily enough obtained if one is already married. If they are dissatisfied with their legal lot, why not marry in order to obtain marital rights? And if they are dismissive of marriage as a mere piece of paper, or an unnecessary legal bond, then why so keen to turn to the court for compensation in reliance on the law when the free union ends? Couples may be trying out their relationship before taking the step of marriage, and we should not impose the penalties of a failed marriage on those who were experimenting in order to avoid this outcome. There should be a corner of freedom where couples may escape family law with all its difficulties. Cohabitation is not marriage, now or historically, and people ought to have the freedom to try alternative forms of relationship , not to have one form imposed on them, especially one that treats women as perpetual dependants.[46]

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[45] HC Deb 25 March 2009 cc309-11

[46] Baroness Deech of Cumnor, *Cohabitation and the Law*, Gresham College, (at 27 May 2010)

REPORT AND RECOMMENDATIONS OF THE COMMON LAW MARRIAGE TASK FORCE

December, 2007

I. INTRODUCTION AND BACKGROUND

Elizabeth Starrs, while President of the Colorado Bar Association (CBA), 2006-2007, formed a Task Force on Common Law Marriage ("Task Force"). The Task Force was charged with examining the issue of common law marriage as it intersects with many and varied interests in Colorado. The Task Force was asked to make recommendations about whether or not the CBA should take an official position on any proposed legislation, whether the Sections of the CBA should be allowed to lobby for a position on behalf of the individual Section, or whether any other leadership role should be undertaken that may be appropriate for the CBA.

II. TASK FORCE PROCESS

A. Make-Up of Task Force

The Task Force was composed of a broad base of interests, including attorneys specializing in and representing colleagues who specialize in numerous legal areas including bankruptcy, family law, real estate, trust and estates, worker's compensation, immigration, and legal services for the indigent. The Task Force also included representatives from the Office of the State Court Administrator, the Hispanic Bar Association and the Sam Cary Bar Association.

B. Information Gathering Process

The Task Force determined that it was important to research and obtain as much information as possible regarding the benefits, problems, disadvantages, cultural issues, and ramifications of any change to the current status of common law marriage. To that end, members gathered pertinent information such as research papers and articles, including

information from the United Kingdom; relevant case law from Colorado and other states; an informal survey of judicial officers through the Office of the State Court Administrator; individual judicial comments; individual practitioner comments; informal surveys taken by the members of the Task Force; and discussion with legal service counterparts in Idaho, Georgia, and Pennsylvania, where common law marriage has most recently been abolished. Through the CBA, a four-question on-line survey was taken of the Family Law Section and the Trusts and Estates Section. Task Force Members reported positions as representatives of their respective practice specialties and organizations. Task Force Members also presented written and oral pros and cons for the retention or abolition of common law marriage.

C. Definition of Common Law Marriage

A common law marriage is established in Colorado by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. The very nature of a common law marital relationship makes it likely that in many cases express agreements to marry will not exist. The determination of a common law marriage is a matter of intent of the parties and this is a factual question for the courts. The agreement of the parties may only be tacitly expressed and the difficulty of proof is readily apparent. There are opportunities for confusion, corruption and fraud. In addition, there appear to be many misconceptions by the public about the requirements to create a valid common law marriage. Some people mistakenly believe they can claim to be married for some purposes (e.g. health insurance benefits) but deny being married for others (e.g. tax returns). Often people believe they are common law married after they have lived together for a certain number of years. Many do not understand that if they are common law married they must obtain a divorce if the marital relationship is to end.

III. MAJOR ISSUES AND CONCERNS

The status of being married results in numerous state and federal benefits, rights, and responsibilities. We set forth below a brief summary of some of the major issues and concerns brought to light during the Task Force process.

A. General Marriage Issues

The statutory requirements for a ceremonial marriage are relatively simple and inexpensive. A man and a woman may marry each other without a minister or authorized official. The key is the registration process with a county clerk. As a result, some believe that a person should be required to adhere to the requirements of registering a marriage to be assured he or she will be entitled to the many benefits of a marriage. If people knew that common law marriage did not exist, they would know without a doubt whether or not they were married. That would avoid mistaken and potentially detrimental reliance on a belief that one is married when such is not, in fact, true.

There are advantages and disadvantages to a common law marriage depending upon the facts of each situation and whether a person will benefit or not from being married. A common law married couple and their children have the same rights and benefits of a married couple.

It does not appear that the courts are overly burdened with determinations of whether a common law marriage exists. Court dockets alone should not provide a basis for abolishing common law marriage. It can be expensive for parties to litigate a determination of a common law marriage, and that may hinder many from appropriately challenging or pursuing such a claim. Common law marriage is often a mechanism for avoiding significant inequities and helps prevent grave injustices if a ceremonial marriage does not exist.

B. Bankruptcy

Common law marriage does not appear to have a significant impact in the bankruptcy area. If a party is married there is a joint fee for filing, which is currently $300. If there is no marriage, each would individually pay a fee of $300.

C. Family Law Section

The CBA emailed a survey to all members of the Family Law Section. There are approximately 850 members of the Section and 28% responded. Of the responses, 44% responded that common law marriage should be abolished and 49% responded it should not be abolished. Of those members supporting the continuation of common law marriage, 24% responded it should not be further defined by statute, and 39% felt it should be more clearly defined by statute. Seventy-two percent (72%)

responded that the CBA should take a position on any legislation regarding common law marriage that is proposed.

D. Hispanic Bar Association

The Colorado Hispanic Bar Association "(CHBA") opposes the abolition of common law marriage. Colorado has historically been a cultural melting pot. Different cultures recognize and value marriage in different ways. A 1965 study found that Mexican-American mothers born in the United States ("US") were the largest group describing themselves as being common law married. The abolition of common law marriage is not necessary. In the diverse communities of Colorado, its impact will be negative due to the issues of poverty, cultural values, elderly women in particular, and immigrant and refugee family concerns. The CHBA believes there is a significant need for academic-based studies to determine the impact of the abolition of common law marriage.

E. Immigration

The abolition of common law marriage is particularly detrimental to immigrants who have obtained legal presence in the US through common law marriage when it was a proper basis for legal immigration status. Certain immigration benefits are available to persons who are married to United States Citizens ("USC") or Lawful Permanent Residents ("LPR"). The primary benefit of an LPR is the status of a "green card." An LPR most often may work in the US, travel in and out of the US, and may when approved, petition for US citizenship. Immigration benefits to children may depend on, or be affected by, whether the child's parents are married, if the child's USC parent is the father. Immigration through a father could be precluded if the parents were not married and the child had not been legitimated or otherwise met the definition of a child. A child of a USC mother who is born out of wedlock does not suffer the same treatment under immigration laws. The abolition of common law marriage substantially harms legal immigrants who may no longer be able to establish legal status or obtain benefits through proof of marriage. This is true in view of the increasing refusal by county court clerks to issue marriage licenses to undocumented immigrants, which appears to have no basis in the law.

Immigrant women, who have been abused and are able to allege a common law marriage, may file a self-petition for residency under the federal Violence Against Women Act. This non-citizen applicant process not only benefits the woman but also her children, because they do not need to rely upon the abusive spouse for their legal status.

It should be noted that immigration authorities require rigorous proof of common law marriage before awarding a benefit on that basis. When abolition is weighed against the potential harm to immigrants who are legally present in the US, or who may gain legal status through marriage, but may lose or be denied status because of failure to establish a common law marriage, common law marriage should be preserved.

F. Legal Services

Family law practitioners and Executive Directors in legal services offices in Idaho, Georgia and Pennsylvania were contacted, as they practice in the three most recent states to abolish common law marriage. In summary, the information suggests there may not be as many problems due to the abolition of common law marriage as anticipated. Idaho is a single statewide program and the contacts in that State were not able to say they had experienced major problems after the abolition of common law marriage. Georgia has two programs, one services the Atlanta metropolitan area and the other services the remainder of about 200 counties in the state. The contacts in Georgia did not report major problems, although they had expected more issues. Pennsylvania has eight programs. Although there are occasional issues, the contacts have not seen major problems after common law marriage was abolished.

G. Real Estate

A person's marital status does not seem to have a major impact in the real estate area, as ownership issues are determined by title rather than marital status.

H. Sam Cary Bar Association

The Sam Cary Bar Association believes all socio-economic levels would be harmed by the abolition of common law marriage, especially citizens with the fewest amount of resources. Common law marriage protects, encourages and promotes marriage and family as a social institution. African-Americans have an historical distrust of formal institutions and to overcome 300 years of prejudice and bias is a huge task. The Sam Cary Bar Association is concerned that any attempt to abolish common law marriage without an appropriate study of its full impact, or without significant input from the communities most likely to be adversely affected, would create potential long term social and economic problems for those communities. If common law marriage is abolished, women and men who are in a relationship with the intention of being married would

have no ability to have their matter heard by the courts. The result of denying access to the courts would be a bright line, disenfranchising individuals who can afford it least. Common law marriage has allowed equitable receipt of state benefits, social security benefits, veteran's benefits, and workers' compensation benefits for spouses and their children. Abolition would have a negative impact on such families and children already at risk with the loss of a wage earner.

I. Trusts and Estates

The determination of whether a common law marriage exists has significant implications for the common law spouse under the Colorado Probate Code. There are numerous benefits and rights granted to a common law spouse under the Probate Code and Uniform Anatomical Gift Act, including but not limited to the spousal right to intestate share, right to elective share as spouse, exempt property allowance, family allowance, priority for appointment as personal representative, guardian or conservator, priority for right to control disposition of last remains or ceremonial arrangements, and priority to make anatomical gifts. There are also significant implications for federal estate and gift tax purposes and whether a marital deduction is available for lifetime or death transfers to the common law spouse.

The same CBA survey emailed to the Family Law Section was emailed to all members of the Trust and Estate Section. There are approximately 1,000 members, and there was a 21% response rate. Of the 21% who responded, 39% responded that common law marriage should not be abolished and 47% responded it should be abolished. If common law marriage is continued, 36% felt it should be further defined by statute. Fifty-seven percent (57%) responded that the CBA should take an official position on any proposed legislation regarding common law marriage.

J. Workers' Compensation

The Executive Board of the Workers' Compensation Section agreed to take no position on the continuance of common law marriage in Colorado. The existence of common law marriage allows for unpredictable litigation options, in advancing or defending claims for dependent benefits, which some members believe justifies the preservation of common law marriage.

K. The Diversity in the Legal Profession Committee.

The Diversity in the Legal Profession Committee of the Colorado and Denver Bar Associations ("DILP") is concerned about compelling anecdotal evidence suggesting that the abolition of common law marriage may create undue hardship for members of certain minority communities, particularly female members. Therefore, the DILP recommends that the Colorado Bar Association adopt a position opposing any bill proposing to abolish common law marriage in Colorado unless and until a thorough study is undertaken demonstrating that members of such minority communities will not suffer an undue hardship.

IV. RECOMMENDATIONS AND CONCLUSION

Based on its thorough input from various constituencies and practitioners, and its thorough discussion and consideration, the Task Force on Common Law Marriage recommends that the Colorado Bar Association take a position to retain common law marriage in Colorado (if legislation should be introduced).

In conclusion, there are significant advantages and disadvantages of either retaining or abolishing common law marriage and likely always will be. Injustices could occur either way. In view of the cultural aspects and concerns, and the denial of potential benefits for a common law married spouse, the Task Force concludes that common law marriage should be retained. Although individual cases are very fact specific, our court system is charged with and capable of determining which claims are meritorious and which are not.

Thank you for the opportunity to be of service.

Denise K. Mills

Denise K. Mills
Chairperson, Common Law Marriage Task Force

Comment, COMMON LAW MARRIAGE

I. Introduction

Marriage is a term that takes on different meanings. Some couples would say that they are married because they had a wedding ceremony and signed a formal contract. Other couples simply live together and consider themselves to be committed to one another, perhaps even consider themselves to be married, even though they have not entered into a formal marriage contract. The situation where a couple has not obtained a license or participated in a ceremony is better known as common law marriage.

Common law marriages are no longer valid in most states. Currently fifteen states and the District of Columbia recognize common law marriage under some circumstances. States that recognize common law marriage include: Alabama,[1] Colorado,[2] Georgia (if created before January 1, 1997),[3] Idaho (if created before January 1, 1996),[4] Iowa,[5] Kansas,[6] Montana,[7] New Hampshire (for inheritance purposes only),[8] Ohio (if created before October 10, 1991),[9] Oklahoma,[10] Pennsylvania (if created before January 1, 2005),[11] Rhode Island,[12] South Carolina,[13] Texas,[14] and Utah.[15]

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1 Lorren v. Agan, No. 2050520, 2006 WL 3691568, at *2 (Ala. Civ. App. Dec. 15, 2006).

2 In re Marriage of J.M.H., 143 P.3d 1116, 1117 (Colo. Ct. App. 2006).

3 Ga. Code Ann., § 19-3-1.1 (West 2007).

4 Idaho Code Ann. ST § 32-201 (2007).

5 In re Toom, 710 N.W.2d 258 (Iowa Ct. App. 2005).

6 Bahruth v. Jacobus, 154 P.3d 1184 (Kan. Ct. App. Apr. 6, 2007).

7 Snetsinger v. Montana University System, 104 P.3d 445, 451 (Mont. 2004).

8 In re Estate of Buttrick, 597 A.2d 74 (N.H. 1991).

9 Ohio Rev. Code Ann. § 3105.12 (West 2007).

10 Davis v. State, 103 P.3d 70, 82 (Okla. Crim. App. 2004).

11 23 Pa. Cons. Stat. Ann. § 1103 (West 2007).

12 DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004).

13 Callen v Callen, 620 S.E.2d 59 (S.C. 2005).

14 Hart v. Webster, No. 03-05-00282-CV, 2006 WL 1707975, at *2 (Tex. App. June 23, 2006).

15 Utah Code Ann. § 30-1-4.5 (West 2007).

Even in states that recognize common law marriage, there is a restriction on who can enter into a valid marriage. For a person to enter into a valid common law marriage, he/she must be competent to contract[16] or have the capacity to marry.[17] Courts will look at several things to make sure the parties are competent or have the requisite capacity. Some states have statutes that specifically state that a common law marriage will not be recognized if either party to the marriage contract is under a certain age. For example, in Kansas, a common law marriage will not be recognized if either party is under 18 years of age.[18] South Carolina's statute says that a person under the age of 16 is unable to enter into a valid marriage.[19] Not only must a person be of a certain age to enter into a valid common law marriage, a person must also be single. To have the requisite capacity to enter into a common law marriage, a person cannot already be married to someone else.[20] Once this impediment is removed, meaning neither of the parties are married to someone else, a common law marriage is not automatic. Parties must enter into a mutual agreement to enter into a common law marriage after the impediment is removed.[21] Alcoholism is another factor the court might look at when deciding whether someone has the requisite capacity to enter into a valid common law marriage, although it by itself may not be enough.[22]

The general rule is that if a marriage is valid where contracted, then it is valid everywhere.[23] States that follow this rule hold that common law marriages, if valid according to the law of the jurisdiction where entered into, will be recognized as valid in another state, even if that state does not typically recognize common law marriage.[24] States that generally do not recognize com-

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16 FAHRER v. FAHRER, 304 N.E.2d 411, 413 (Ohio Ct. App. 1973).

17 HALL v. DUSTER, 727 So.2d 834, 836 (Ala. Civ. App. 1999).

18 KAN. STAT. ANN. § 23-101 (2005).

19 S.C. CODE ANN. § 20-1-100 (1976).

20 Duster, 727 So.2d at 836.

21 LUKICH v. LUKICH, 627 S.E.2d 754, 757 (S.C. Ct. App. 2006); Callen v. Callen, 620 S.E.2d 59 (S.C. 2005).

22 IN RE ESTATE OF VANDENHOOK, 855 P.2d 518, 520 (Mont. 1993).

23 52 AM. JUR. 2D Marriage § 70 (2007).

24 GRIFFIS v. GRIFFIS, 503 S.E.2d 516, 524 (W. Va. 1998) (holding that while common law marriages may not be formed in this state, we do recognize the validity of common-law marriages formed in states that permit such mar-

mon law marriage vary as to whether a temporary visit to a state that recognizes common law marriage will constitute a valid common law marriage in their state. In Missouri, the answer depends on where the couple was domiciled. Missouri courts hold that even if a couple travels to and stays in a state that recognizes common law marriage, the marriage will not be recognized in Missouri if the couple was domiciled in Missouri throughout the stay in the state that recognized common law marriage.[25] In *Stein v. Stein*,[26] the couple stayed in Pennsylvania while on a three week bus tour.[27] The couple claimed they entered into a valid common law marriage while staying in Pennsylvania.[28] The court held that it would be against public policy to recognize a common law marriage contracted by couples who were Missouri domiciliaries and residents while on a temporary stay in a state that recognized common law marriage.[29] On the other hand, if a couple is domiciled in a state that recognizes common law marriage and then moves to Missouri, courts have held that the marriage will be recognized in Missouri.[30]

This article will first examine the history and development of common law marriage in the United States. Part III will discuss the reasons common law marriage was adopted. Part IV will set out the requirements for a valid common law marriage. Part V will present some of the rationale for abolition of common law marriage. Part VI will discuss the consequences of abolishing common law marriage.

II. History of Common Law Marriage

In Rome, informal marriages were declared valid as early as 1563. On November 11, 1563, the Council of Trent passed the

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riages); In re ESTATE OF YAO YOU-XIN, 246 A.D.2d 721 (N.Y. 1998) (holding that while New York does not recognize common-law marriages, a common-law marriage contracted in another state will be recognized if it is valid under the laws of that jurisdiction).

25 Stein v. Stein, 641 S.W.2d 856 (Mo. App. W.D. 1982) (citing *Hesington v. Hesington*, 640 S.W.2d 824 (Mo. App. S.D. 1982).

26 *Id.*

27 *Id.*

28 *Id.* at 857.

29 *Id.* at 858.

30 Pope v. Pope, 520 S.W.2d 634 (Mo. App. 1975).

Decretum de Reformatione Matrimonni.[31] The decree said that a marriage was not valid unless it was performed before a priest and in the presence of two or three witnesses.[32] The priest was present merely as another witness, it was not necessary that he perform any religious service.[33] The main objective of the decree was to give publicity of the marriage to the Church.[34]

In England, jurisdiction over marriage was divided between the spiritual ecclesiastical courts, which administered canon law pertaining to the capacity for contracting marriage, and the temporal courts, who administered common law pertaining to property rights of the married couple.[35] Under England's canon law, a couple could have a valid informal marriage if the marriage contract was entered into *per verba de praesenti*, meaning words of assent to marriage at the present time.[36]

The doctrine of the canonists continued until 1753 when Lord Harwicke's Act set forth the rule that a ceremony was required for a marriage to be valid.[37] Lord Hardwicke's Act required that the minister sign the marriage contract, that a marriage ceremony be performed by officials of the Church of England, and that a license was issued.[38]

Dissenters from the Church of England fled west because they wanted to escape from the oppression from the church.[39] They opposed the requirement of formal ceremonies, believing that it was wrong to be forced to pay someone to perform a ceremony, just so he can be a guest at the wedding.[40] Their ideals were followed by many of the early American colony settlers. In the United States, some states adopted English common law marriage and others did not. Massachusetts and New York are good examples of two different views of marriage. In Massachu-

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31 OTTO E. KOEGEL, COMMON LAW MARRIAGE and ITS DEVELOPMENT in the UNITED STATES 22 (1922).

32 *Id.*

33 *Id.*

34 *Id.* at 24.

35 *Id.* at 13.

36 Koegel, supra note 31, at 12-13.

37 *Id.* at 18.

38 *Id.* at 32.

39 LAWRENCE M. FRIEDMAN, A HISTORY of AMERICAN LAW 203 (2d ed. 1985).

40 *Id.*

setts, as early as 1644, to have a valid marriage, solemnization was required before a magistrate or other authorized person.[41] States that follow the Massachusetts model believe that the enactment of statutes prescribing the method of entering into marriage should be interpreted as abolishing common law marriage.[42]

New York's model is the majority view and is based on English common law. Colonies, such as New York, that were established before Lord Hardwicke's Act in 1753, assumed that common law marriages were valid.[43] In *Fenton v. Reed*,[44] the court explicitly held that a marriage *per verba de praesenti*, meaning words of assent to the marriage at the present time, was valid in New York.[45]

The U.S. Supreme Court in *Meister v. Moore*[46] held that state marriage regulations requiring a license and ceremony are not mandatory, but rather directory, because marriage is a common right.[47] Common law marriage is left intact, unless the state's legislature has clearly indicated that all marriages not entered into by the precise methods prescribed by statute is invalid.[48]

Common law marriage expanded to western America in the nineteenth century due to the lack of religious officials to perform marriage ceremonies and the difficulty of traveling.[49] The recognition of common law marriage was a way for early settlers to claim property.[50] "Couples" often lived outside of the city, owning a home and farms.[51] These couples were living together as if they were married, but were never officially married.[52] Usu-

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41 COMMONWEALTH v. MUNSON, 127 Mass. 459, 461 (1879).

42 OFFIELD v. DAVIS, 40 S.E. 910, 914 (Va. 1902).

43 Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 720 (1996).

44 4 Johns. 52 (N.Y. Ch. 1809).

45 *Id.*

46 96 U.S. 76 (1877).

47 *Id.* at 81.

48 IN RE MCLAUGHLIN'S ESTATE, 30 P. 651, 654 (Wash. 1892).

49 Friedman, supra note 39, at 203.

50 LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, and the LAW 20 (2004).

51 *Id.*

52 *Id.*

ally the couples had several children to help around the farm.[53] Recognition of common law marriage in western colonies allowed for the passage of property upon death and allowed the children to be legitimized.[54]

In states that were part of Spanish colonies, the validity of common law marriage largely depended on whether the Council of Trent's decree, prohibiting common law marriage, applied in that territory.[55] Spanish colonies in America were non-European colonies; therefore, the decree did not apply, unless the colony promulgated a law that said the decree applied.[56] Some Spanish colonies, such as New Mexico, determined that the Council of Trent decree applied, thus invalidating common law marriage.[57]

III. The Adoption of the Doctrine of Common Law Marriage

The doctrine of common law marriage was adopted in state courts for several reasons. The first and probably most important rationale for the adoption of common law marriage was the belief that marriage derived from a natural right that every human possessed.[58] Marriage is a civil contract between two people that should not be disrupted unless there is a statute specifically stating the common law marriages are invalid.[59]

Another reason courts adopted common law marriage was that public policy favored marriage over illicit relationships.[60] Uncertainty about cohabitants' marital status became resolved in the courts' eyes because common law marriage recognized the cohabitating couple as being legally married.[61]

The third reason common law marriage was adopted was to protect children. Children born to a couple who were not legally married were considered to be illegitimate. With the adoption of

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53 *Id.*
54 *Id.*
55 Bowman, supra note 43, at 725.
56 *Id.*
57 *Id.* (citing *In re Gabaldonn's Estate*, 34 P.2d 672, 673 (N.M. 1934).
58 McLaughlin, 30 P. 651 at 657.
59 *Id.* at 653 (citing *Askew v Dupree*, 30 Ga. 173 (1860)).
60 *Id.*
61 *Id.*

common law marriages, children born of cohabitating couples would be legitimized.[62] Once a couple entered into a civil contract, they would be held responsible for the support, maintenance, and education of their offspring.[63]

There was also a concern about women becoming economically dependent on the state. The adoption of common law marriage was a means for states to privatize the financial dependency of economically unstable women.[64] Common law marriage declared a woman to be a man's wife or widow, thus shielding the public fisc from the potential claims of needy women.[65] Courts wanted families to take care of each other, instead of using public money.

IV. General Requirements

A common misconception about common law marriage is that a couple who has been living together for a certain length of time is presumed to be married. Living together for a set amount of time does not create a common law marriage in any state in the United States. Although states have different requirements, there are several general requirements for a common law marriage to be recognized.

The first requirement is that the couple must live together as husband and wife.[66] This is better known as cohabitation. This requirement is pretty vague because there is no particular time that cohabitation must exist to establish common law marriage.[67] Because the term can take on many different meanings, cohabitation is determined on a case by case basis.[68] States have had to interpret the ambiguity of "cohabitation" when a couple spends a very short time, as little as one night, in a state that recognizes common law marriage. In *Grant v. Superior Court In and For*

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62 *Id.*

63 McLaughlin, 30 P. 651 at 653.

64 Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev. 957, 969 (2000).

65 *Id.*

66 Omodele v. Adams, No. 14-01-00999-CV., 2003 WL 133602, at *3 (Tex. Civ. App. Jan. 16, 2003).

67 In re Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004).

68 Adams, 2003 WL 133602, at *3.

Pima County,[69] the court held that a three-hour stay in a motel in a Texas motel did not satisfy the cohabitation requirement.[70] In *In the Matter of Abbott*,[71] a couple spent one night in Pennsylvania.[72] The couple contended that their one night visit constituted cohabitation, therefore, creating a valid common law marriage; and that New York should recognize the common law marriage.[73] The court held that there was no intent of cohabitation with their one night visit.[74] Unlike the two cases discussed above, when federal widow benefits are involved, the court takes a different stance. *Peart v. T. D. Bross Line Const. Co.*[75] is a case involving death benefits claimed by an alleged widow of a common law marriage.[76] The court held that if there was valid common law marriage in Pennsylvania between claimant and the deceased employee whose death resulted from an accident causally related to his employment, the marriage would be recognized as valid in New York and the claimant would be entitled to widow's benefits.[77] Courts must also determine whether cohabitation exists in a situation where a couple lives together on a regular basis, but one party keeps a place of his/her own. In such a case, the court would not only have to look at whether the couple lived together for a significant amount of time, it would also have to evaluate whether the separate home would nullify a common law marriage because of lack of intent to be married. Courts have determined that this is a question of fact and depends on the circumstances of the particular case.[78]

The second requirement to form a common law marriage is that the couple must hold themselves out to the public as a married couple.[79] Courts have said that "public declaration of marriage is the acid test of common law marriage," meaning that to

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69 555 P.2d 895, 897 (Ariz. Ct. App. 1976).

70 *Id.*

71 592 N.Y.S.2d 729 (N.Y. App. Div. 1993).

72 *Id.*

73 *Id.*

74 *Id.*

75 45 A.D.2d 801 (N.Y. App. Div. 1974).

76 *Id.*

77 *Id.*

78 West Encyclopedia of American Law (1998).

79 SNYDER-MURPHY v. CITY OF CEDAR RAPIDS, 695 N.W.2d 44 (Iowa Ct. App. 2004).

establish a common law marriage, couples cannot have a secret marriage.[80] Pubic declaration or "holding out" by the couple is determined by the conduct and actions of the couple.[81] It is very important for establishing common law marriage that the couple consistently hold themselves out as married with those in which they normally come in contact.[82] Isolated references to a person as husband/wife will not be enough to establish a common law marriage.[83] The couple should hold themselves out as married to the public, use the same last name, file joint tax returns and declare their marriage of documents, such as applications, leases, and birth certificates.

The third requirement of a common law marriage is that the parties must have a present and mutual intent to be married.[84] This requirement reflects the contractual nature of marriage.[85] Mutual consent by the parties to be married is also essential to a common law marriage.[86] There must be an agreement to become husband and wife immediately from the time when the mutual consent is given.[87] The agreement must be an agreement *per verba de praesenti*, meaning words of assent to the marriage at the present time, rather than at some future time.[88] Courts allow implied agreements to serve as a basis for a common law marriage.[89] "An implied agreement may support a common law marriage where one party intends present marriage and the conduct of the other party reflects the same intent."[90] Even though an express agreement is not required,[91] some attorneys recom-

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80 CITY OF CEDAR RAPIDS, 695 N.W.2d at *2.

81 ERIS v. PHARES, 39 S.W.3d 708, 715 (Tex. Ct. App. 2001).

82 BOWSER v. BOWSER, No. M2001-01215-COA-R3CV., 2003 WL 1542148 at *2 (Tenn. Ct. App. March 26, 2003).

83 NICHOLS v. LIGHTLE, 153 S.W.3d 563, 571 (Tex. Ct. App. 2004).

84 Duey v. Duey, 343 So. 2d 896, 897 (Fla. Dist. Ct. App. 1977).

85 MARTIN, 681 N.W.2d at 617.

86 In re Thomas' Estate, 367 N.Y.S.2d 182 (N.Y. Sur. Ct. 1975).

87 Chaves v. Chaves, 84 So. 672, 676 (Fla. 1920).

88 *Id.*

89 McIlveen v. McIlveen, 332 S.W.2d 113, 115 (Tex. Civ. App. 1960) (holding that the agreement to become a husband and wife may be proved circumstantially from evidence that the parties lived together as husband and wife and represented to others that they were married, though the agreement must be specific and mutual).

90 MARTIN, 681 N.W.2d at 617.

91 ID.

mend that couples write, sign, and date a simple statement that says they intend to be married.[92] This statement would offer protection for the couple should the question of intent ever be raised.[93]

V. Why Common Law Marriage has been Abolished

States that have abolished common law marriage have cited several reasons for the abolition. The decline of common law marriage began with the increase in the population that occurred between the Civil War and the end of World War I.[94] At the beginning of the Civil War, only 20 percent of the total population lived in communities of 2,500 or more.[95] By 1920, that population had grown to more than 50 percent.[96] The increased population growth led to urbanization and changed the economy from commerce and agriculture to manufacturing and industry.[97] States began to realize that the rationale behind allowing common law marriages was no longer true. Religious officials could more easily travel to perform marriage ceremonies and therefore, informal marriage recognition was no longer necessary.[98] "Anyone who wanted to be married could enter into a formal marriage with little difficulty."[99]

The abolition of common law marriage also occurred because of the fear of fraudulent claims.[100] As one court stated, "there is no built-in method to determine what marriages are valid and what marriages are phony."[101] Common law marriages were recognized without any formal ceremony, nothing was for-

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92 Dorian Solot and Marshall Miller, *Demystifying Common Law Marriage*, *at* http://www.unmarried.org/commonlaw-marriage.html.

93 *Id.*

94 Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 543-544 (2006).

95 KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 189 (1989).

96 *Id.*

97 *Id.*

98 Garza, supra note 94, at 544.

99 Bowman, supra note 43, at 733.

100 *Id.* at 732.

101 MORONE v. MORONE, 50 N.Y.2d 481, 489 (1980).

mally signed by the parties, and there were no witnesses to the marriage. States became uneasy that couples would defraud and take advantage of the system because documentation was not needed to have a valid marriage. By abolishing common law marriage, states could ensure that more reliable evidence, by which the marriage could be proved, would be available to prevent fraud and litigation.[102] Even states that currently recognize common law marriage take the possibility of fraud seriously. For example, in Pennsylvania, to make sure couples are not committing fraud or perjury, the court examines each case with great scrutiny to see if there was an actual agreement.[103]

Another reason for the abolition of common law marriage is states desired to protect the institution of marriage and family.[104] The court in *Sorenson v. Sorenson*[105] held that recognition of common law marriage would "weaken the public estimate of the sanctity of the marriage relation."[106] Lack of commitment was a paramount concern. In *Dunphy v. Gregor,*[107] the court acknowledged that a reason for the abolition of common law marriage was that lack of commitment might give rise to a short lived relationship.[108] With such a random commitment, the court reasoned that common law marriage would be detrimental because economic support and dependency could be withheld at any point.[109] State legislatures wanted to protect the institution of marriage, family, and commitment. They felt that requiring certain formalities for marriage were not unreasonable because marriage was sacred and should not be entered into lightly.[110] They reasoned that formalities were required for simple transactions, such as transferring personal property, and that marriage should not be any different.[111] By requiring formalities, states

102 McLaughlin, 30 P. at 655.

103 Baker v. Mitchell, 17 A.2d 738, 741 (Pa. 1941).

104 Furth v. Furth, 133 S.W. 1037, 1039 (Ark. 1911).

105 100 N.W. 930 (Neb. 1904).

106 *Id.* at 932.

107 642 A.2d 372 (N.J. 1994).

108 *Id.* at 382.

109 *Id.*

110 McLaughlin, 30 P. at 658.

111 McLaughlin, 30 P. at 655.

encouraged couples to consider the importance of marriage, family, and commitment before entering into a marriage.[112]

The enforcement of public policy is also a reason states give for abolishing common law marriage.[113] Many states disfavor illicit relationships and cohabitation.[114] There is also a societal concern with leaving common law marriage practices unregulated.[115] Historically, relationships such as those between interracial couples, or involving the mentally impaired, or alcoholics, were viewed as undesirable.[116] Abolishing common law marriage was a way for the states to reduce the number of illicit relationships and cohabitation among couples.[117] States believed statutory requirements for a valid marriage would also minimize the social stigma placed on cohabitating couples and couples such as the ones mentioned above.[118]

VI. Consequences of the Abolishment of Common Law Marriage

A. *Negative Consequences*

1. *Impact on Women*

The abolition of common law marriage often results in substantial injustices to women.[119] In most cases there is genuine inequality between women and men. Women are more often the party seeking alimony or child support and men are often the party trying to avoid the obligation.[120] Men tend to earn higher wages, while women tend to be more economically dependent upon men.[121] Women tend to be very vulnerable in these types of relationships.

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112 *Id.* at 658.

113 John E. Wallace, *The Afterlife of the Meretricious Relationship Doctrine*, 29 SEATTLE UNIV. L. REV. 243, 248 (2005).

114 *Id.* (citing *In re Estate of McLaughlin*, 30 P. 651, 656 (Wash. 1892)).

115 Katherine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN's L.J. 189, 195 (2005).

116 Garza, supra note 94, at 544.

117 MCLAUGHLIN, 30 P. at 658.

118 Wallace, supra note 113 at 248.

119 Bowman, supra note 43, at 755.

120 *Id.*

121 *Id.*

By abolishing common law marriage, states have greatly affected a woman's ability to collect alimony, child, and other support once the relationship ends. For example, consider the negative effects a woman involved in a domestic violent relationship would face if she were living in a state that does not recognize common law marriage. She could leave the relationship, but would not have access to monetary or property rights that would otherwise be provided to her and her children. In *Henderson v. Henderson*,[122] the couple had lived together as husband and wife for about a year in the District of Columbia, therefore entering into a valid common law marriage in the District of Columbia.[123] Nannie moved to Maryland when Nathan left for the military.[124] Nathan moved in with Nannie when he was discharged.[125] The relationship was violent and Nathan threatened to kill Nannie if she returned home.[126] Although Maryland was not a state that recognized common law marriages, it recognized the validity of marriages that were valid in the state in which it was entered.[127] The court granted the divorce and awarded Nannie support.[128] Had the couple been residents of Maryland, there would not have been a remedy for Nannie.

The non-recognition of common law marriage also has a significant effect on inheritance. Take for instance a couple who has lived their whole life together and then one of them suddenly dies. If they happen to live in one of the states that has abolished common law marriage, the remaining "spouse" would have no inheritance rights. On the other hand, if the couple lives in a state that recognizes common law marriage and the "husband" has not terminated the common law marriage by divorce, the "wife" remains his heir under the state's intestacy laws.[129] In *In re Estate of Wagner*,[130] the couple were married for twenty years, then divorced.[131] The couple then began living together, holding

122 87 A.2d 403 (Md. 1952).
123 *Id.* at 458.
124 *Id.* at 457.
125 *Id.*
126 *Id.* at 450.
127 Henderson, 87 A.2d at 458.
128 *Id.*
129 Bowman, supra note 43, at 761.
130 159 A.2d 495 (Pa. 1960).
131 *Id.* at 534-35.

themselves out as husband and wife, therefore entering into a common law marriage.[132] Eventually Mrs. Wagner left her husband after years of abuse.[133] When Mr. Wagner died, he left nothing to Ms. Wagner in his will.[134] The court held that the marriage was valid and because there was not a legal divorce, Ms. Wagner was entitled to a share of the will.[135]

The recognition of common law marriage is also very important for social security and wrongful death benefits. The abolition of common law marriage negatively impacts social security benefits for women for two reasons. First, women have a greater life expectancy than men and second, men earn higher wages than women.[136] Women consistently outlive their "husbands" and depend on social security survivor benefits to get by. Women who live in states that have abolished common law marriages will probably not be able to collect benefits, even if they have lived with their deceased "spouse" and held themselves out as being married. The collection of wrongful death benefits also negatively affects women because women are more likely to be economically dependent on men. When a woman loses her "husband," she is left to survive without the high wage earner's support. Some courts have tried to remedy the harsh consequences that women face in a wrongful death suit. In *Bulloch v. United States*,[137] even though common law marriage was not recognized in the state of New Jersey, the court held that the "wife" could collect loss of consortium benefits because proof of a legal marriage was not an essential element of a consortium claim.[138]

2. *Impact on the Poorly Educated & those with Low Income*

The likelihood that a person with low income can or will seek out the assistance of an attorney is very small. Unfortunately, many of these individuals are poorly educated and many do not understand the law. A "poor" couple may think they are

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132 *Id.* at 535.
133 *Id.* at 539.
134 *Id.* at 532.
135 Wagner, 159 A.2d at 540.
136 Bowman, supra note 43, at 765.
137 487 F. Supp. 1078 (D. N.J. 1980).
138 *Id.* at 1085.

married, but, unbeknownst to them, be living in a state that does not recognize common law marriage. When one of the "spouses" passes away, the other "spouse" may be financially dependent on the death benefits and social security benefits. If the couple lives in a state that recognizes common law marriages, the surviving spouse will be able to receive benefits. If the couple lives in a state that has abolished common law marriage, the surviving spouse is in a different situation. It will be difficult, if not impossible for that person to get any of his/her "spouse's" benefits.

3. *Impact on Minorities*

Common law marriage is frequent among African-American, Indian, Eskimo, and racially mixed marriages.[139] Like people with low income, some minorities may not have a clear understanding of what constitutes a valid marriage in the United States. For example, informal legal relationships are recognized in large parts of Mexico.[140] Couples who come to the United States may not understand that their marriage will not be recognized if they happen to end up in a state that has abolished common law marriage. These couples will probably not seek legal advice because they are unaware that there is a problem. The only way these couples will figure out that their marriage is invalid is if one of them dies and by this point it will be too late for the surviving "spouse" to get any death benefits.

There is also a concern that by abolishing common law marriage, states are imposing white middle-class values of marriage on minorities.[141] Minority families are often centered around the mother.[142] The permanent mother-child relationship, based on ties of blood, prevail over the arrangement between husband and wife.[143] With the abolishment of common law marriage, states are requiring couples to go through formal ceremonies, instead of letting them focus on the ties within their family.

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139 Bowman, supra note 43, at 767.

140 ROSALES v. BATTLE, 7 Cal. Rptr. 3d 13, 17 (Cal. Ct. App. 2004).

141 Bowman, supra note 43, at 767 (citing WALTER O. WEYRAUCH, INFORMAL MARRIAGE AND COMMON LAW MARRIAGE, 323-26 (1965).

142 *Id.* (citing Weyrauch, at 324).

143 *Id.*

4. *Impact on Children*

Children born to parents out of wedlock may be stigmatized by society. Although states have statutes legitimizing children born out of wedlock, society has not been so accepting of these children. The word "bastard" is still used to describe a child born out of wedlock. Common law marriage was a way to prevent the branding of bastardy.[144] By abolishing common law marriage, states have actually intensified the pressure children feel. No child wants to feel different or like he doesn't belong. States that recognize common law marriage, allow children to be born into a legitimate family and provide a feeling of belongingness.[145]

B. *Positive Consequence*

The abolition of common law marriage has created certainty in what constitutes a legal relationship. Statutes set out exactly what is required for a marriage to be valid. Ambiguous terms, such as "cohabitation," are replaced with formalities. If a couple resides in a state that does not recognize common law marriage, they must adhere to the formalities. These formalities protect the home and sacredness of the family.

VII. Conclusion

The abolition of common law marriage has allowed states to put pressure on citizens to formalize their relationships in the form of marriage. Sanctity of marriage, family, and commitment has been brought to the forefront of people's minds. Unfortunately, even though states have tried to encourage formal marriages, there are more and more unmarried couples living together. The 2000 census shows that 5.5 million couples are living together, unmarried.[146] This number is up from the 3.2 million unmarried couples that were living together in 1990.[147]

The abolition of common law marriage has had many negative effects on numerous groups. The only positive aspect that

144 Lucken v. Wichman, 1874 WL 5335 at *3 (S.C. Nov. 9, 1874).

145 Dubler, supra note 64, at 969.

146 Martin O'Connell and Tavia Simmons, Married-Couple and Unmarried-Partner Households: 2000, February 2003, http://www.census.gov/prod/2003pubs/censr-5.pdf.

147 *Id.*

has come out of the abolition of common law marriage is that states now have concrete requirements that a couple must meet before their marriage will be recognized. Maybe the abolition of common law marriage is not the answer. Protection against fraudulent claims should not be a reason for not allowing the recognition of common law marriage. As discussed above, there are requirements for a common law marriage to be held valid. With these requirements, states can monitor who is legitimately married and who is not.

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