In addition to its personal and private meanings, and its importance in religious communities, marriage is a legal institution, shaped and defined by state and federal laws that define the rights and obligations that flow from marital status, and determine when and how individuals may enter into or exit from a marriage. Although all governments seek to shape marriage and family life, contemporary discourse frames the right to marry as a fundamental human right, protected by the United States Constitution and the Universal Declaration of Human Rights.

This chapter begins with an exploration of the constitutional framework for marriage and private life, and then considers the role of private ordering of marriage relationships through contracts. It continues with coverage of the process for entering into marriage, including requirements for licensing and solemnization, and restrictions on who may marry. Because state law controls these questions in the United States, and there are significant variations among the state laws, marriage regulation generates significant conflict of laws problems. These are particularly complex in the context of same-sex marriage. This chapter also considers new institutions such as civil union and domestic partnerships, and the legal response to unmarried cohabitation relationships.

A. Marriage and Privacy Rights

Early decisions of the Supreme Court affirmed the broad plenary power of the state and federal governments to regulate marriage. In Reynolds v. United States, 98 U.S. 145 (1878), the Court rejected the argument that the First Amendment limited legislation criminalizing the practice of polygamy, concluding that it was
“impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.” Similarly, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court upheld a legislative divorce issued to a husband with no notice to his wife, writing: “Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”

During the 1960s, however, the Supreme Court began to fix limits on the power over marriage. The Court looked to several earlier cases that had extended protection under the Due Process Clause of the Fourteenth Amendment to aspects of private and family life. These earlier cases included several that protected parents’ rights to determine how their children would be educated, and the decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) which described marriage and procreation as among the “basic civil rights of man” and “fundamental to the very existence and survival of the race.”

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**Fourteenth Amendment, U.S. Constitution, Section 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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**Griswold v. Connecticut**

381 U.S. 479 (1965)

Mr. Justice Douglas delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School.
who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

“Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”

Section 54–196 provides:

“Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.”

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A.2d 479 (1964). We noted probable jurisdiction.

* * *

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), should be our guide. But we decline that invitation. * * * We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.

**Take Note**

Justice Douglas distinguishes the Court’s analysis here from its famous opinion in *Lochner*, which held that protective labor legislation in New York violated the liberty of contract protected by the Due Process Clause.
The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, [268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)] the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, [262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)] the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172 (1958), we protected the “freedom to associate and privacy in one's associations,” noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid “as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.” In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of “association” that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button*, 371 U.S. 415, 430–431, 83 S.Ct. 328, 336–337 (1963). In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's “association with that Party” was not shown to be “anything more than a political faith in a political party” and was not action of a kind proving bad moral character.

Those cases involved more than the “right of assembly”—a right that extends to all irrespective of their race or ideology. The right of “association,” like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.
The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516–522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.” We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961), to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.” * * *

We have had many controversies over these penumbral rights of “privacy and repose.” * * * These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964). Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

Mr. Justice Goldberg, whom The Chief Justice and Mr. Justice Brennan join, concurring.

I agree with the Court that Connecticut’s birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that “due process” as used in the Fourteenth Amendment incorporates all of the first eight Amendments * * *, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. * * *

The Court stated many years ago that the Due Process Clause protects those liberties that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). * * *

* * *

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and
passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

* * *

The Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.

While this Court has had little occasion to interpret the Ninth Amendment, “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803). In interpreting the Constitution, “real effect should be given to all the words it uses.” *Myers v. United States*, 272 U.S. 52, 151, 47 S.Ct. 21, 37, 71 L.Ed. 160 (1926). The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” (Emphasis added.)

* * *

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] * * * as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934). The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ * * *.” *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932). “Liberty” also “gains content from the emanations of * * * specific [constitutional] guarantees” and “from experience with the requirements of a free society.” *Poe v. Ullman*, 367 U.S. 497, 517, 81 S.Ct. 1752, 1763, 6 L.Ed. 2d 989 (1961) (dissenting opinion of Mr. Justice Douglas).
I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating “from the totality of the constitutional scheme under which we live.”

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home.

* * *

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

* * *

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be “silly,” no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same

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Think About It

Is Justice Goldberg’s analogy to mandatory sterilization persuasive? How could a mandatory sterilization law be distinguished from a law prohibiting access to contraception?
reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. “Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,” Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960). The law must be shown “necessary, and not merely rationally related, to the accomplishment of a permissible state policy.” McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964).

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any “subordinating [state] interest which is compelling” or that it is “necessary * * * to the accomplishment of a permissible state policy.” The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942). But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. * * * The State of Connecticut does have statutes, the constitutionality of which is beyond
doubt, which prohibit adultery and fornication. See Conn.Gen.Stat. §§ 53–218, 53–219 et seq. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to “invade the area of protected freedoms.” * * *

Finally, it should be said of the Court’s holding today that it in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct. * * *

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right “retained by the people” within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners’ convictions must therefore be reversed.

Points for Discussion

a. Constitutional Balancing

Griswold raises significant questions of constitutional law. What is the liberty interest protected by the Court in this case? What is Connecticut’s interest in regulating contraception? Why is that interest not sufficient for the state to prevail in this case? After Griswold, when and how can a state regulate contraceptives?

How far can Griswold be extended? Does the decision in Griswold suggest that other laws regulating marriage or contraceptive use are invalid? See Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980).

b. Role of History

Marriage has been heavily regulated by the state throughout our history, but the opinions of Justices Douglas and Goldberg do not discuss this fact. The Court acknowledged this pervasive state regulation in Boddie v. Connecticut, 401 U.S. 371, 376, 389 (1971), when it held that a state may not deny access to divorce to those who cannot pay court fees. State and federal legislation restricting access to contraception was extremely
widespread from the late nineteenth century to the mid-twentieth century. How might the history be relevant to the constitutional arguments in Griswold?

c. Marital Privacy

Before Griswold, the courts relied on the concept of marital privacy in refusing to address domestic violence or resolve disputes between husbands and wives. See Chapter 4. Is this different from the marital privacy norm invoked in Griswold?

Loving v. Commonwealth of Virginia

388 U.S. 1 (1967)

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia’s ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.’
After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the convictions. [206 Va. 924, 147 S.E.2d 78 (1966).] The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

‘Leaving State to evade law.-If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.’

Section 20-59, which defines the penalty for miscegenation, provides:

‘Punishment for marriage.-If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.’

Take Note!

The sections of the Virginia Code cited here state that the term white person: “shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood shall be deemed to be white persons.” For a history of this statute, see Walter Wadlington, The Loving Case; Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189 (1966).
Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding, and §§ 20-54 and 1-14 which, respectively, define ‘white persons’ and ‘colored persons and Indians’ for purposes of the statutory prohibitions. The Lovings have never disputed in the course of this litigation that Mrs. Loving is a ‘colored person’ or that Mr. Loving is a ‘white person’ within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.\(^2\) Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a ‘white person’ marrying other than another ‘white person,’ a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants’ statements as to their race are correct, certificates of ‘racial composition’ to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In Naim, the state court concluded that the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’ obviously an endorsement of the doctrine of White Supremacy. The court also reasoned that marriage has traditionally been subject to state regulation without


Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948).
federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in *New York City, Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), or an exemption in Ohio’s ad valorem tax for merchandise

**Think About It**

What are Virginia’s arguments in defense of this statute? What does the Court conclude regarding the purposes of the law?
owned by a non-resident in a storage warehouse, *Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

* * *

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated ‘(d)istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’ *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny,’ *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they ‘cannot conceive of a valid legislative purpose * * * which makes the color of a person’s skin the test of whether his conduct is a criminal offense.’ *McLaughlin v. Florida, supra*, 379 U.S. at 198, 85 S.Ct. at 292, (Stewart, J., joined by Douglas, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). See also *Maynard v Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. It is so ordered.

Reversed.

Mr. Justice STEWART, concurring.

I have previously expressed the belief that ‘it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.’ *McLaughlin v. State of Florida*, 379 U.S. 184, 198, 85 S.Ct. 283, 292, 13 L.Ed.2d 222 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

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**Points for Discussion**

**a. Equal Protection and Due Process**

The decision in Loving concluded that the Virginia law enacted a racial classification that violated the Equal Protection Clause, and that it infringed the Lovings’ fundamental freedom to marry in violation of the Due Process Clause. Are each of these grounds independently sufficient to support the Court’s ruling?
b. Right to Marry

Under the federal income tax laws, two spouses sometimes pay more in income tax when they are married than they would if they were single and filed separately. Given the constitutional stature of the right to marry considered in Loving, are these provisions of the Internal Revenue Code unconstitutional? See *Druker v. Commissioner*, 697 F.2d 46 (2d Cir.1982).

The Supreme Court considered the right to marry again in *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). Zablocki involved a challenge to a Wisconsin statute that denied marriage licenses to individuals with outstanding unpaid child support obligations. Redhail, who had fathered a child out of wedlock while still in high school, was unemployed and unable to make child support payments. When he sought permission to marry under the statute, there was a substantial arrearage, and the child was receiving benefits under the Aid to Families with Dependent Children program.

Reiterating its conclusion in *Loving* that the freedom to marry is a fundamental right, and its holding in *Griswold* that protection for marital privacy is implicit in the Due Process Clause, the court found that the Wisconsin statute unnecessarily infringed Redhail’s right to marry and was therefore unconstitutional. The majority opinion included this caveat, however:

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

434 U.S. at 386.

In *Turner*, the Court considered Missouri prison regulations requiring that inmates have the prison superintendent’s permission to marry, which permission was available only in limited circumstances. Recognizing that the right to marry was “subject to substantial restrictions as a result of incarceration,” the majority nevertheless concluded that the right recognized in *Loving* and *Zablocki* extended to prisoners as well. The Court held that the Missouri regulations were unconstitutional, on the basis that they were too broad to be sustained by the state’s legitimate security and rehabilitation concerns.
Global View: Marriage and the Family in International Human Rights Law

According to Article 16 of the Universal Declaration of Human Rights (1948):

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group until of society and is entitled to protection by society and the State.

These provisions are implemented in other human rights instruments, including the United Nations International Covenant on Civil and Political Rights, ratified by the United States in 1992.

Problem 1-1

Heather is a U.S. citizen who lives with her partner Jose and their son in the United States. Jose is a Mexican citizen who entered the United States without authorization. When Heather and Jose apply for a marriage license, the local registrar refuses to grant the license unless Jose can present a U.S. Permanent Resident Card (also known as a “Green Card”) along with other valid identification documents. Can Heather and Jose challenge this policy? (See Buck v. Stankovic, 485 F. Supp. 2d 576 (M.D. Pa. 2007).)
Chapter 1  Marriage and Its Alternatives

Eisenstadt v. Baird

405 U.S. 438 (1972)

Mr. Justice Brennan delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address. The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird’s First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969). Baird subsequently filed a petition for a federal writ of habeas corpus, which the District Court dismissed. 310 F.Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. 429 F.2d 1398 (1970). This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. We affirm.

Massachusetts General Laws Ann., c. 272, § 21, under which Baird was convicted, provides a maximum five-year term of imprisonment for “whoever ... gives away ... any drug, medicine, instrument or article whatever for the prevention of conception,” except as authorized in § 21A. Under § 21A, “(a) registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. (And a) registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.” As interpreted by the State Supreme Judicial Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of § 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees—first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second,
single persons may not obtain contraceptives from anyone to prevent pregnancy; and, third, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease. This construction of state law is, of course, binding on us. * * *

The legislative purposes that the statute is meant to serve are not altogether clear. In Commonwealth v. Baird, supra, the Supreme Judicial Court noted only the State’s interest in protecting the health of its citizens: “(T)he prohibition in § 21,” the court declared, “is directly related to” the State’s goal of “preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences.” In a subsequent decision, Sturgis v. Attorney General, 358 Mass. 37, 260 N.E.2d 687, 690 (1970), the court, however, found “a second and more compelling ground for upholding the statute”—namely, to protect morals through “regulating the private sexual lives of single persons.” 3

The Court of Appeals, for reasons that will appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself—a purpose that the court held conflicted “with fundamental human rights” under Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), where this Court struck down Connecticut’s prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy.

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of §§ 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

* * *

3 Appellant suggests that the purpose of the Massachusetts statute is to promote marital fidelity as well as to discourage premarital sex. Under § 21A, however, contraceptives may be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put. Plainly the legislation has no deterrent effect on extramarital sexual relations.
The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As The Chief Justice only recently explained in *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971):

“In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to State the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1884); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); *Railway Express Agency v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to State the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920).”

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under *Massachusetts General Laws Ann.*, c. 272, §§ 21 and 21A. For the reasons that follow, we conclude that no such ground exists.

*First. Section 21* stems from *Mass. Stat.1879, c. 159, § 1*, which prohibited without exception, distribution of articles intended to be used as contraceptives. In *Commonwealth v. Allison*, 227 Mass. 57, 62, 116 N.E. 265, 266 (1917), the Massachusetts Supreme Judicial Court explained that the law’s “plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.” Although the State clearly abandoned that purpose with the enactment of § 21A, at least insofar as the illicit sexual activities of married persons are concerned, see n. 3, *supra*, the court reiterated in *Sturgis v. Attorney General, supra*, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with

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7 Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. E.g., *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 23 L.Ed.2d 600 (1969); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). But just as in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 301 L.Ed.2d 225 (1971), we do not have to address the statute’s validity under that test because the law fails to satisfy even the more lenient equal protection standard.
the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as “(e)vils ... of different dimensions and proportions, requiring different remedies,” *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955), we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts General Laws Ann., c. 272, § 18. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective. What Mr. Justice Goldberg said in *Griswold v. Connecticut*, supra, 381 U.S., at 498, 85 S.Ct., at 1689, 14 L.Ed.2d 510 (concurring opinion), concerning the effect of Connecticut’s prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. “The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception.” See also *id.*, at 505-507, 85 S.Ct., at 1689 (White, J., concurring in judgment). Like Connecticut’s laws, §§ 21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. *Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940), cited with approval in *Commonwealth v. Baird*, 355 Mass., at 754, 247 N.E.2d, at 579. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, §§ 21 and 21A on their face have a dubious relation to the State’s criminal prohibition on fornication. As the Court of Appeals explained, “Fornication is a misdemeanor (in Massachusetts), entailing a thirty dollar fine, or three months in jail. Massachusetts General Laws Ann., c. 272, § 18. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective,
deterrence of the commission of a ninety-day misdemeanor.” Even conceding the legislature a full measure of discretion in fashioning means to prevent fornication, and recognizing that the State may seek to deter prohibited conduct by punishing more severely those who facilitate than those who actually engage in its commission, we, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply gives away a contraceptive to 20 times the 90–day sentence of the offender himself. The very terms of the State’s criminal statutes, coupled with the de minimis effect of §§ 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.

Second. Section 21A was added to the Massachusetts General Laws by Stat. 1966, c. 265, § 1. The Supreme Judicial Court in Commonwealth v. Baird, supra, held that the purpose of the amendment was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such purpose in mind before the enactment of § 21A. As the Court of Appeals remarked, “Consistent with the fact that the statute was contained in a chapter dealing with ‘Crimes Against Chastity, Morality, Decency and Good Order,’ it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Commonwealth v. Gardner, 1938, 300 Mass. 372, 15 N.E.2d 222.” Nor did the Court of Appeals “believe that the legislature (in enacting § 21A) suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the Griswold ruling.” Ibid.

Again, we must agree with the Court of Appeals. If health were the rationale of § 21A, the statute would be both discriminatory and overbroad. Dissenting in Commonwealth v. Baird, 355 Mass., at 758, 247 N.E.2d, at 581, Justices Whittmore and Cutter stated that they saw “in § 21 and § 21A, read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons.” The Court of Appeals added: “If the prohibition (on distribution to unmarried persons) ... is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality.”

Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.
of Appeals in noting that not all contraceptives are potentially dangerous.\(^9\) As a result, if the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married, a fact that the Supreme Judicial Court itself seems to have conceded in *Sturgis v. Attorney General*, Mass., where it noted that “it may well be that certain contraceptive medication and devices constitute no hazard to health, in which event it could be argued that the statute swept too broadly in its prohibition.” “In this posture,” as the Court of Appeals concluded, “it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married.”

But if further proof that the Massachusetts statute is not a health measure is necessary, the argument of Justice Spiegel, who also dissented in *Commonwealth v. Baird*, 355 Mass. at 759, 247 N.E.2d, at 582, is conclusive: “It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles ‘which may have undesirable, if not dangerous, physical consequences.’ If that was the Legislature’s goal, § 21 is not required” in view of the federal and state laws already regulating the distribution of harmful drugs. See Federal Food, Drug, and Cosmetic Act, § 503, 52 Stat. 1051, as amended, 21 U.S.C. § 353; Mass.Gen. Laws Ann., c. 94, § 187A, as amended. We conclude, accordingly, that, despite the statute’s superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.

Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis “led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that Griswold will permit such a declaration.” The Court of Appeals went on to hold:

“To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation, we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.”

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\(^9\) The Court of Appeals stated, 429 F.2d, at 1401: “[W]e must take notice that not all contraceptive devices risk ‘undesirable … (or) dangerous physical consequences.’ It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a ‘redingote anglais.’ The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products.”
We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). See also *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643 (1905).

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. Mr. Justice Jackson, concurring in *Railway Express Agency v. New York*, 336 U.S. 106, 112-113, 69 S.Ct. 463, 466, 93 L.Ed. 533 (1949), made the point:

“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”

Justice Powell and Justice Rehnquist took no part in this case. Justice Douglas filed a concurring opinion, arguing that Baird’s conviction violated the First Amendment. Justice White, joined by Justice Blackmun, also concurred in the result. Noting that contraceptive foam was widely available without prescription, and that there was no evidence of hazards from use of the foam, Justice White concluded that the record did not support the state’s claim that restrictions on distribution of vaginal foam were essential to achieving an important public health purpose. Justice Burger dissented.
Although Mr. Justice Jackson’s comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws Ann., c. 272, §§ 21 and 21A, violate the Equal Protection Clause. The judgment of the Court of Appeals is Affirmed.

Points for Discussion

a. Rights of Unmarried Adults

_Eisenstadt_ was widely understood as extending to unmarried adults the same sexual privacy rights that _Griswold_ recognized for married couples. See Kenneth Karst, _The Freedom of Intimate Association_, 89 Yale. L.J. 624 (1980). A more narrow reading of the case holds that it concerns only the right of access to contraceptives. See Bruce Hafen, _The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests_, 81 Mich. L. Rev. 463 (1983). Justice Brennan’s opinion in _Eisenstadt_ concludes that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the married and the unmarried alike.” Why is this? Does this suggest a constitutional problem with other rights that are extended only to married people?

b. Families or Individuals?

Professor Janet Dolgin has argued that _Eisenstadt_ is “singularly important” as evidence of an important ideological shift, which she describes as “the transformation of the American family into an association of separate individuals.” Janet Dolgin, _The Family in Transition: From Griswold to Eisenstadt and Beyond_, 82 Geo. L. J. 1519 (1994). Would you agree? Can you identify other indications of this transformation?

Make the Connection

Does the Constitution protect family relationships beyond those of marital couples or parents and children? These issues are considered in Chapter 4.
Chapter 1  Marriage and Its Alternatives

Lawrence v. Texas


Justice KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).” The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The statute defines “[d]eviate sexual intercourse” as follows:

“(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
“(B) the penetration of the genitals or the anus of another person with an object.” § 21.01(1).

The petitioners exercised their right to a trial de novo in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution.
Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined $200 and assessed court costs of $141.25.

The Court of Appeals for the Texas Fourteenth District considered the petitioners’ federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. *41 S.W.3d 349 (Tex.App.2001)*. The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari to consider three questions:

1. Whether Petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?
2. Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court’s holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).
In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights. The Court quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

“It is true that in *Griswold* the right of privacy in question inhered in the marital relationship.... If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman’s rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int’l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in
his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U.S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.); id., at 214 (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in Bowers as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Think About It
What is the constitutional liberty interest the Court identifies in this case?
Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the Bowers Court said: “Proscriptions against that conduct have ancient roots.” In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in Bowers. Brief for Cato Institute as Amicus Curiae 16–17; Brief for American Civil Liberties Union et al. as Amici Curiae 15–21; Brief for Professors of History et al. as Amici Curiae 3–10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which Bowers placed such reliance.

* * *

In summary, the historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

Chief Justice Burger joined the opinion for the Court in Bowers and further explained his views as follows: “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo–Christian
moral and ethical standards.” 478 U.S., at 196. As with Justice White’s assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, e.g., Eskridge. Hardwick and Historiography, 1999 U. Ill. L.Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” County of Sacramento v. Lewis, 523 U.S. 833, 857, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (Kennedy, J., concurring).

* * *

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. State v. Morales, 869 S.W.2d 941, 943.

Two principal cases decided after Bowers cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of
existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right.

The second post-Bowers case of principal relevance is Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado’s constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships,” and deprived them of protection under state antidiscrimination laws. We concluded that the provision was “born of animosity toward the class of persons affected” and further that it had no rational relation to a legitimate governmental purpose.

As an alternative argument in this case, counsel for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. * * * Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.
The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, e.g., C. Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81–84 (1991); R. Posner, *Sex and Reason* 341–350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18, 24 (1998); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn.App.1996); *Commonwealth v. Watson*, 842 S.W.2d 487 (Ky.1992).


The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (“*Stare decisis* is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision’ “) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940)). In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. 505 U.S., at 855–856, 112 S.Ct. 2791; see also *id.*, at 844, 112 S.Ct. 2791 (“Liberty finds no refuge in a jurisprudence of doubt”). The holding in Bowers, however, has not induced detrimental reliance comparable to some instances where recognized
individual rights are involved. Indeed, there has been no individual or societal reliance on Bowers of the sort that could counsel against overturning its holding once there are compelling reasons to do so. Bowers itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of Bowers does not withstand careful analysis. In his dissenting opinion in Bowers Justice Stevens came to these conclusions:

“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”

Justice Stevens’ analysis, in our view, should have been controlling in Bowers and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.
Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Points for Discussion

a. Constitutional Liberty and Privacy

Consider the line of cases beginning with *Griswold* and *Loving* and running through *Eisenstadt* to *Lawrence*. Are there common themes uniting these cases? How has the Court’s analysis changed over the period covered by these decisions?

b. Morals Legislation.

Does the reasoning in *Lawrence* invalidate other state laws prohibiting private, consensual sexual conduct? After *Lawrence*, can states continue to prohibit adultery or fornication? *Marcum v. McWhorter*, 308 F.3d 635 (6th Cir. 2002) upheld the termination

Make the Connection

In *Griswold*, *Eisenstadt*, *Loving* and *Baird*, the Supreme Court struck down state statutes that criminalized various types of behavior: contraceptive use, interracial marriage, and homosexual sex. Why did states enact these types of criminal laws? How significant was the fact that these cases involved criminal convictions to the result in each case? On the broader question of whether the criminal law is an appropriate vehicle to regulate the intimate activities of mature persons, see Jennifer M. Collins, Ethan J. Leib and Dan Markel, *Punishing Family Status*, 88 B.U. L. Rev. 1327, 1390-1416 (2008).
of sheriff’s department employee for an extramarital cohabitation relationship. Does Lawrence cast doubt on the validity of this ruling?

Does Lawrence go far enough? What about privacy rights for sexual conduct that does not promote emotional intimacy? See Laura A. Rosenbury & Jennifer E. Rothman, Sex In and Out of Intimacy, 59 Emory L.J. 810 (2010).

c. Heterosexual Couples.

Prior to the decision in Lawrence, courts considered whether state statutes criminalizing sodomy or “lewd and lascivious acts” by married or unmarried heterosexual couples violated the privacy rights recognized in Griswold and Eisenstadt. Has Lawrence changed the analysis applicable to these cases?

d. Same-sex Marriage.

Based on Loving and Lawrence, what are the constitutional arguments for recognition of same-sex marriage?

Although Justice Scalia’s dissenting opinion in Lawrence addresses the question of same-sex marriage at some length, the majority opinion notes the issue only indirectly. Scalia argues that the majority opinion “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.” Is Justice Scalia correct on this point?

Further Reading: Bowers and Lawrence

B. Marital Agreements

Although marriage is often described as a contract, marriage relationships have been subject to extensive regulation by the state. In this sense, marriage is a legal status, giving rise to many rights and obligations as a matter of law. Despite the important financial and legal consequences of marriage for individuals and their families, many of these consequences could not be readily negotiated by the parties to the marriage.

During the past generation, laws and customs have shifted to allow individuals greater freedom to determine the terms of their private lives. Courts have begun to permit and enforce marital and premarital agreements, and agreements to divorce. Couples are more likely to live together without marriage, and most states enforce agreements between unmarried cohabitants concerning their property and support rights. The legal rules applied to these contracts are distinct from the rules that govern business or commercial contracts, however. Even as the law has opened more room for private ordering of relationships, the state interest in regulating family life still plays a noticeable role. See generally Jana Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443.

Premarital agreements, also referred to as prenuptial or antenuptial agreements, have long been used in the United States by older persons planning to marry who wish to adjust spousal inheritance rights, typically in order to provide for children of former marriages or other obligations. Until 1970, however, state courts nearly unanimously held that the financial and property aspects of divorce could not be the subject of prenuptial agreements. The court in *Fricke v. Fricke*, 42 N.W.2d 500 (Wis. 1950), explained the policy in these terms: “At least a majority, if not all of the courts which have considered the matter have held that any antenuptial contract which provides for, or facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy and is therefore void. Quite generally the courts have said that the contract itself invites dispute, encourages separation and incites divorce proceedings.”
Chapter 1  Marriage and Its Alternatives

Starting with the Florida Supreme Court decision in Posner v. Posner, 233 So.2d 381 (Fla.1970), the law began to shift direction. Courts in the United States now conclude that premarital agreements determining alimony and property rights on divorce do not violate public policy, and many states have enacted legislation to define the circumstances in which premarital agreements will be enforced. Twenty-two states and the District of Columbia have enacted some version of the Uniform Premarital Agreement Act (UPAA), 9C U.L.A. 48 (2001), discussed below.

In general, a premarital agreement will be enforced against an individual who entered into it freely, without fraud, duress, coercion or overreaching, and if that individual had either full disclosure or knowledge of the other spouse’s property before entering into the agreement. The test of validity is framed differently in different states, however, with some states much more likely to scrutinize the reasonableness of the agreement when it was entered into or at the time of the marriage ends in death or divorce. States also take notably different positions on whether married couples may enter into postmarital agreements regarding their property and support rights.

Simeone v. Simeone

581 A.2d 162 (Pa. 1990)
Flaherty, Justice.

At issue in this appeal is the validity of a prenuptial agreement executed between the appellant, Catherine E. Walsh Simeone, and the appellee, Frederick A. Simeone. At the time of their marriage, in 1975, appellant was a twenty-three year old nurse and appellee was a thirty-nine year old neurosurgeon. Appellee had an income of approximately $90,000 per year, and appellant was unemployed. Appellee also had assets worth approximately $300,000. On the eve of the parties’ wedding, appellee’s attorney presented appellant with a prenuptial agreement to be signed. Appellant, without the benefit of counsel, signed the agreement. Appellee’s attorney had not advised appellant regarding any legal rights that the agreement surrendered. The parties are in disagreement as to whether appellant knew in advance of that date that such an agreement would be presented for signature. Appellant denies having had such knowledge and claims to have signed under adverse circumstances, which, she contends, provide a basis for declaring it void.

The agreement limited appellant to support payments of $200 per week in the event of separation or divorce, subject to a maximum total payment of $25,000. The parties separated in 1982, and, in 1984, divorce proceedings were commenced. Between 1982 and 1984 appellee made payments which satisfied

We granted allowance of appeal because uncertainty was expressed by the Superior Court regarding the meaning of our plurality decision in *Estate of Geyer*, 516 Pa. 492, 533 A.2d 423 (1987). The Superior Court viewed Geyer as permitting a prenuptial agreement to be upheld if it *either* made a reasonable provision for the spouse *or* was entered after a full and fair disclosure of the general financial positions of the parties and the statutory rights being relinquished. Appellant contends that this interpretation of Geyer is in error insofar as it requires disclosure of statutory rights *only* in cases where there has not been made a reasonable provision for the spouse. Inasmuch as the courts below held that the provision made for appellant was a reasonable one, appellant's efforts to overturn the agreement have focused upon an assertion that there was an inadequate disclosure of statutory rights. Appellant continues to assert, however, that the payments provided in the agreement were less than reasonable.

* * *

While the decision of the Superior Court reflects, perhaps, a reasonable interpretation of Geyer, we do not view this case as a vehicle to affirm that interpretation. Rather, there is need for a reexamination of the foundations upon which Geyer and earlier decisions rested, and a need for clarification of the standards by which the validity of prenuptial agreements will be judged.

There is no longer validity in the implicit presumption that supplied the basis for Geyer and similar earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the “weaker” party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.
Accordingly, the law has advanced to recognize the equal status of men and women in our society. See, e.g., Pa.Const. art. 1, § 28 (constitutional prohibition of sex discrimination in laws of the Commonwealth). Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. It would be inconsistent, therefore, to perpetuate the standards governing prenuptial agreements that were described in Geyer and similar decisions, as these reflected a paternalistic approach that is now insupportable.

Further, Geyer and its predecessors embodied substantial departures from traditional rules of contract law, to the extent that they allowed consideration of the knowledge of the contracting parties and reasonableness of their bargain as factors governing whether to uphold an agreement. Traditional principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation, or duress. Consideration of other factors, such as the knowledge of the parties and the reasonableness of their bargain, is inappropriate. Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.

Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. Based upon these principles, the terms of the present prenuptial agreement must be regarded as binding, without regard to whether the terms were fully understood by appellant. Ignorantia non excusat.

Accordingly, we find no merit in a contention raised by appellant that the agreement should be declared void on the ground that she did not consult with independent legal counsel. To impose a per se requirement that parties entering a prenuptial agreement must obtain independent legal counsel would be contrary to traditional principles of contract law, and would constitute a paternalistic and unwarranted interference with the parties’ freedom to enter contracts.

Further, the reasonableness of a prenuptial bargain is not a proper subject for judicial review. Geyer and earlier decisions required that, at least where there had been an inadequate disclosure made by the parties, the bargain must have been reasonable at its inception. Some have even suggested that prenuptial agreements
should be examined with regard to whether their terms remain reasonable at the
time of dissolution of the parties’ marriage.

By invoking inquiries into reasonableness, however, the functioning and reli-
ability of prenuptial agreements is severely undermined. Parties would not have
entered such agreements, and, indeed, might not have entered their marriages, if
they did not expect their agreements to be strictly enforced. If parties viewed an
agreement as reasonable at the time of its inception, as evidenced by their having
signed the agreement, they should be foreclosed from later trying to evade its
terms by asserting that it was not in fact reasonable. Pertinently, the present agree-
ment contained a clause reciting that “each of the parties considers this agreement
fair, just and reasonable. * * * “

Further, everyone who enters a long-term agreement knows that circum-
stances can change during its term, so that what initially appeared desirable might
prove to be an unfavorable bargain. Such are the risks that contracting parties
routinely assume. Certainly, the possibilities of illness, birth of children, reliance
upon a spouse, career change, financial gain or loss, and numerous other events
that can occur in the course of a marriage cannot be regarded as unforeseeable.
If parties choose not to address such matters in their prenuptial agreements, they
must be regarded as having contracted to bear the risk of events that alter the
value of their bargains.

We are reluctant to interfere with the power of persons contemplating mar-
riage to agree upon, and to act in reliance upon, what they regard as an accept-
able distribution scheme for their property. A court should not ignore the parties’
expressed intent by proceeding to determine whether a prenuptial agreement was,
in the court’s view, reasonable at the time of its inception or the time of divorce.
These are exactly the sorts of judicial determinations that such agreements are
designed to avoid. Rare indeed is the agreement that is beyond possible challenge
when reasonableness is placed at issue. Parties can routinely assert some lack of
fairness relating to the inception of the agreement, thereby placing the validity
of the agreement at risk. And if reasonableness at the time of divorce were to be
taken into account an additional problem would arise. Virtually nonexistent is the
marriage in which there has been absolutely no change in the circumstances of
either spouse during the course of the marriage. Every change in circumstance,
foreseeable or not, and substantial or not, might be asserted as a basis for finding
that an agreement is no longer reasonable.

In discarding the approach of Geyer that permitted examination of the rea-
sonableness of prenuptial agreements and allowed inquiries into whether parties
had attained informed understandings of the rights they were surrendering, we do
not depart from the longstanding principle that a full and fair disclosure of the
financial positions of the parties is required. Absent this disclosure, a material misrepresentation in the inducement for entering a prenuptial agreement may be asserted. Parties to these agreements do not quite deal at arm’s length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust that calls for disclosure of their financial resources. It is well settled that this disclosure need not be exact, so long as it is “full and fair.” In essence therefore, the duty of disclosure under these circumstances is consistent with traditional principles of contract law.

If an agreement provides that full disclosure has been made, a presumption of full disclosure arises. If a spouse attempts to rebut this presumption through an assertion of fraud or misrepresentation then this presumption can be rebutted if it is proven by clear and convincing evidence.

The present agreement recited that full disclosure had been made, and included a list of appellee’s assets totalling approximately $300,000. Appellant contends that this list understated by roughly $183,000 the value of a classic car collection which appellee had included at a value of $200,000. The master, reviewing the parties’ conflicting testimony regarding the value of the car collection, found that appellant failed to prove by clear and convincing evidence that the value of the collection had been understated. The courts below affirmed that finding. We have examined the record and find ample basis for concluding that the value of the car collection was fully disclosed. Appellee offered expert witnesses who testified to a value of approximately $200,000. Further, appellee’s disclosure included numerous cars that appellee did not even own but which he merely hoped to inherit from his mother at some time in the future. Appellant’s contention is plainly without merit.

Appellant’s final contention is that the agreement was executed under conditions of duress in that it was presented to her at 5 p.m. on the eve of her wedding, a time when she could not seek counsel without the trauma, expense, and embarrassment of postponing the wedding. The master found this claim not credible. The courts below affirmed that finding, upon an ample evidentiary basis.

Although appellant testified that she did not discover until the eve of her wedding that there was going to be a prenuptial agreement, testimony from a number of other witnesses was to the contrary. Appellee testified that, although the final version of the agreement was indeed presented to appellant on the eve of the wedding, he had engaged in several discussions with appellant regarding

Think About It

What does it mean to say that the parties “stand in a relation of mutual confidence and trust”? How does this affect the legal test for validity of prenuptial agreement?
the contents of the agreement during the six month period preceding that date. Another witness testified that appellant mentioned, approximately two or three weeks before the wedding, that she was going to enter a prenuptial agreement. Yet another witness confirmed that, during the months preceding the wedding, appellant participated in several discussions of prenuptial agreements. And the legal counsel who prepared the agreement for appellee testified that, prior to the eve of the wedding, changes were made in the agreement to increase the sums payable to appellant in the event of separation or divorce. He also stated that he was present when the agreement was signed and that appellant expressed absolutely no reluctance about signing. It should be noted, too, that during the months when the agreement was being discussed appellant had more than sufficient time to consult with independent legal counsel if she had so desired. Under these circumstances, there was plainly no error in finding that appellant failed to prove duress.

Hence, the courts below properly held that the present agreement is valid and enforceable. Appellant is barred, therefore, from receiving alimony *pendente lite*.

Order affirmed.

PAPADAKOS, JUSTICE, concurring.

Although I continue to adhere to the principles enunciated in *Estate of Geyer*, 516 Pa. 492, 533 A.2d 423 (1987), I concur in the result because the facts fully support the existence of a valid and enforceable agreement between the parties and any suggestion of duress is totally negated by the facts. The full and fair disclosure, as well as the lack of unfairness and inequity, standards reiterated in *Geyer* are supported by the facts in this case so that I can concur in the result.

However, I cannot join the opinion authored by Mr. Justice Flaherty, because, it must be clear to all readers, it contains a number of unnecessary and unwarranted declarations regarding the “equality” of women. Mr. Justice Flaherty believes that, with the hard-fought victory of the Equal Rights Amendment in Pennsylvania, all vestiges of inequality between the sexes have been erased and women are now treated equally under the law. I fear my colleague does not live in the real world. If I did not know him better I would think that his statements smack of male chauvinism, an attitude that “you women asked for it, now live with it.” If you want to know about equality of women, just ask them about comparable wages for comparable work. Just ask them about sexual harassment in the workplace. Just ask them about the sexual discrimination in the Executive Suites of big business. And the list of discrimination based on sex goes on and on.

I view prenuptial agreements as being in the nature of contracts of adhesion with one party generally having greater authority than the other who deals in a
subservient role. I believe the law protects the subservient party, regardless of that party's sex, to insure equal protection and treatment under the law.

The present case does not involve the broader issues to which the gratuitous declarations in question are addressed, and it is injudicious to offer declarations in a case which does not involve those issues. Especially when those declarations are inconsistent with reality.

McDermott, Justice, dissenting.

I dissent. I would reverse and remand to the trial court for further consideration of the validity of the prenuptial agreement executed by the appellee, Dr. Frederick Simeone, and Catherine Simeone, on the eve of their wedding.

Let me begin by setting forth a common ground between my position in this matter and that of the majority. There can be no question that, in the law and in society, men and women must be accorded equal status. * * *

* * *

In my view, one seeking to avoid the operation of an executed pre-nuptial agreement must first establish, by clear and convincing evidence, that a full and fair disclosure of the worth of the intended spouse was not made at the time of the execution of the agreement. This Court has recognized that full and fair disclosure is needed because, at the time of the execution of a pre-nuptial agreement, the parties do not stand in the usual arm's length posture attendant to most other types of contractual undertakings, but "stand in a relation of mutual confidence and trust that calls for the highest degree of good faith." See Gelb Estate, 425 Pa. 117, 123, 228 A.2d 367, 369 (1967). In addition to a full and fair disclosure of the general financial pictures of the parties, I would find a pre-nuptial agreement voidable where it is established that the parties were not aware, at the time of contracting, of existing statutory rights which they were relinquishing upon the signing of the agreement. * * *

At the time of dissolution of the marriage, a spouse should be able to avoid the operation of a pre-nuptial agreement upon clear and convincing proof that, despite the existence of full and fair disclosure at the time of the execution of the agreement, the agreement is nevertheless so inequitable and unfair that it should not be enforced in a court of this state. * * *

Thus, I believe that the door should remain open for a spouse to avoid the application of a pre-nuptial agreement where clear and convincing proof establishes that the result will be inequity and unfairness under the circumstances of the particular case and the public policy of this state. Some pre-nuptial agreements will be unfair and inequitable from their beginning. * * *
I would emphasize that there are circumstances at the inception of marriage that render a pre-nuptial agreement not only fair and equitable, but a knowing and acceptable reservation of ownership. Such are usually the circumstances surrounding a second marriage. * * *

It is also apparent that, although a pre-nuptial agreement is quite valid when drafted, the passage of time accompanied by the intervening events of a marriage, may render the terms of the agreement completely unfair and inequitable. While parties to a pre-nuptial agreement may indeed foresee, generally, the events which may come to pass during their marriage, one spouse should not be made to suffer for failing to foresee all of the surrounding circumstances which may attend the dissolution of the marriage. Although it should not be the role of the courts to void pre-nuptial agreements merely because one spouse may receive a better result in an action under the Divorce Code to recover alimony or equitable distribution, it should be the role of the courts to guard against the enforcement of pre-nuptial agreements where such enforcement will bring about only inequity and hardship. * * *

* * *

I can likewise conceive of a situation where, after a long marriage, the value of property may have increased through the direct efforts of the spouse who agreed not to claim it upon divorce or death. In such a situation, the court should be able to decide whether it is against the public policy of the state, and thus inequitable and unfair, for a spouse to be precluded from receiving that increase in the value of property which he or she had, at least in part, directly induced. I marvel at the majority’s apparent willingness to enforce a pre-nuptial agreement in the interest of freedom to contract at any cost, even where unforeseen and untoward illness has rendered one spouse unable, despite his own best efforts, to provide reasonable support for himself. I would further recognize that a spouse should be given the opportunity to prove, through clear and convincing evidence, that the amount of time and energy necessary for that spouse to shelter and care for the children of the marriage has rendered the terms of a pre-nuptial agreement inequitable, and unjust and thus, avoidable.

* * *

I would remand this matter to provide the appellant with an opportunity to challenge the validity of the pre-nuptial agreement on two grounds. Although
alimony \textit{pendente lite} was mentioned in the pre-nuptial agreement,\footnote{The agreement stated in relevant part: “Frederick’s obligation to make payments to Catherine for her support and maintenance or as alimony (including, without limitation, alimony pendente lite) shall be limited to and shall not exceed the $200 per week as above provided, and Catherine does hereby acknowledge that the foregoing provision for the payment of $200 per week is fair, just and reasonable.”} appellant should have an opportunity to establish that the mere recitation of this legal term did not advise her of the general nature of the statutory right she was relinquishing with the signing of the agreement.\footnote{This would not apply to any claim for alimony, as the statutory right to alimony did not arise until the enactment of the Divorce Code of 1980.} Appellant must establish this lack of full and fair disclosure of her statutory rights with clear and convincing evidence. Further, I would allow appellant the opportunity, with the same standard of proof, to challenge the validity of the pre-nuptial agreement’s support provisions, relating to alimony \textit{pendente lite} and alimony, for undue unfairness and inequity. I would express no opinion, however, on the appropriate final resolution of these issues. An appellate court should defer to the trial court in these determinations, and the trial court order should not be reversed absent an error of law or an abuse of discretion.

\begin{boxeditem}
\textbf{Points for Discussion}
\end{boxeditem}

\begin{boxeditem}
a. Confidential Relationships
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\textit{Simeone} holds that the parties to prenuptial agreements are in relationships of “mutual confidence and trust that calls for a disclosure of their financial resources.” The disclosure need not be exact so long as it is “full and fair.”\footnote{The position of \textit{Simeone}, that there is a confidential relationship between the parties to a prenuptial agreement, is generally but not universally shared by other courts. After marriage, the husband and wife relationship is treated like other relationships the law characterizes as confidential, such as trustee and beneficiary, guardian and ward, lawyer and client, or principal and agent. What factors justify extending the concept of the confidential relationship to prospective spouses prior to marriage?} Does this mean that it would be sufficient if the prospective wife knew in general that her fiancé was quite wealthy and had a large annual income?

The position of \textit{Simeone}, that there is a confidential relationship between the parties to a prenuptial agreement, is generally but not universally shared by other courts. After marriage, the husband and wife relationship is treated like other relationships the law characterizes as confidential, such as trustee and beneficiary, guardian and ward, lawyer and client, or principal and agent. What factors justify extending the concept of the confidential relationship to prospective spouses prior to marriage?

\begin{boxeditem}
\textbf{Make the Connection}

According to \textit{Simeone}, “Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.” What does the contemporary law of contracts tell us about such questions as unfairness, overreaching, or unconscionability? Would the \textit{Simeone} facts warrant a finding of unconscionability pursuant to authorities such as \textit{Uniform Commercial Code} § 2–302 or \textit{Restatement (Second) Contracts} § 208 (1981)?
\end{boxeditem}
b. Agreements Concerning Inheritance Rights

Before 1970, the case law on premarital agreements focused primarily on their consequences for inheritance rights. Premarital and marital agreements still routinely include provisions concerning spouses’ rights in the event the marriage ends in the death of one partner. Disclosure requirements usually apply in this context; see, e.g., Uniform Probate Code § 2–213, but see Stregack v. Moldofsky, 474 So.2d 206 (Fla. 1985) (disclosure not required under Florida law for waiver of elective share). Should the test for validity of a premarital agreement be different depending whether a waiver of divorce or inheritance rights is at issue?

A premarital agreement must clearly address inheritance rights in order to be effective as a waiver of these rights. See, e.g., Pysell v. Pysell, 559 S.E.2d 677 (Va. 2002); Matter of Estate of Zimmerman, 579 N.W.2d 591 (N.D. 1998). In this context, the parties to the agreement should have sufficient understanding of their inheritance rights to make a knowing and enforceable waiver of those rights. In most cases, clients should also be advised to write or revise wills soon after their marriage. In many cases, more extensive estate planning will be required.

c. Postnuptial Agreements

Laws in many states permit married couples to enter contracts concerning their property and financial rights in the event of divorce. In these states, the test for enforceability of postnuptial agreements is similar to that applied to prenuptial agreements. In some states, postnuptial agreements are not enforceable, or they are subject to more stringent fairness review. See, e.g., Bedrick v. Bedrick, 17 A.3d 17 (Conn. 2011); Ansin v. Craven-Ansin, 929 N.E.2d 955 (Mass. 2010); Marriage of Grossman, 106 P.3d 618 (Or. 2005). What considerations might justify taking a stricter approach to postnuptial agreements? How might the court in Simeone respond to this question?

The Uniform Premarital and Marital Agreements Act (UPMAA), adopted in 2012 by the Uniform Law Commission, addresses agreements entered into by spouses during their marriage that modify or waive rights that would otherwise arise at the time of separation, divorce or the death of one of the spouses. The threshold requirements for enforcement are higher under the UPMAA than under the 1983 Uniform Premarital Agreement Act, discussed in the following case.

d. Statutes of Frauds

Prenuptial agreements are subject to the Statute of Frauds, which requires promises made in contemplation of marriage, other than promises to marry, to be in writing and signed by the party to be charged. New York requires that pre-and postnuptial agreements be signed and acknowledged; see Matisoff v. Dobi, 681 N.E.2d 376 (N.Y. 1997). A couple’s oral prenuptial agreement to keep their
finances separate, fully performed during the marriage, was enforced under the part-performance exception to the statute of frauds in *Dewberry v. George*, 62 P.3d 525 (Wash Ct. App. 2003).

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**Practice Pointer: Pension Benefits**

In some situations, the disposition of an older person's pension benefits upon death may be the primary issue that a prenuptial agreement seeks to address. Specifically, the agreement may be intended to preserve some portion of these benefits for the spouse or children from a previous marriage.

The rights of a surviving spouse to benefits from a private pension plan are governed by the federal Employees Retirement Income Security Act (ERISA), discussed in Chapter 6. If, as part of a prenuptial agreement, a soon-to-be spouse agrees to waive rights to the surviving spouse's benefits in a private pension plan, the waiver must comply with ERISA. On the malpractice risks for lawyers in attempting to navigate these complex rules, see *Merchant v. Kelly, Haglund, Garnsey and Kahn*, 874 F.Supp. 300 (D.Colo.1995) (malpractice claim against law firm for drafting post-nuptial agreement dividing pension benefits in violation of federal tax law.)

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**Marriage of Rudder and Rudder**

217 P.3d 183 (Or. Ct. App. 2009)

ARMSTRONG, J.

Husband appeals a judgment of dissolution, contending that the trial court erred in failing to enforce the parties’ premarital agreement relating to property and spousal support. Alternatively, he asserts that, even if the agreement was unenforceable, the court erred in treating as marital assets property acquired after the parties began cohabitating but before they were married. Wife cross-appeals, arguing that the court erred in awarding her maintenance spousal support of $1,000 per month for 60 months rather than indefinite support in a greater amount. We conclude that the trial court did not err in concluding that the pre-
Husband and wife began cohabitating in 1986 and were married on August 12, 1989. Both had been married previously; wife has one child from her previous marriage, and husband has two children from his previous marriage. They have no joint children. In 2006, husband petitioned for dissolution of the marriage. At the time of the dissolution judgment, husband was 55 years old and wife was 49.

Husband, who is generally in good health, is a journeyman electrician and has worked for Bay Area Hospital since 1991. At the time of the dissolution, he was earning approximately $5,648 per month. Wife, after dropping out of high school, became a licensed cosmetologist. She purchased a two-chair beauty salon in 1984; she sold the business in 1994, but took it back and ran it again until January 2001, when she sold it for the final time. Wife continued to work part time in the salon after it was sold until approximately 2004. She suffers from debilitating migraines and, at the time of the dissolution, she reported zero income.

Before they were married, the parties entered into a premarital agreement, under which they each purported to waive any present or future interest in the separate real and personal property of the other and any claim to spousal support. The trial court ruled that the premarital agreement was unenforceable under ORS § 108.725, and divided the parties' property and awarded spousal support without regard to its terms. The court also concluded that property and any appreciation in property acquired during the period of the parties' cohabitation—from 1986 to 1989—was to be considered a marital asset, subject to the presumption of equal contribution under ORS § 107.105(1)(f).

On appeal, husband contends that the court erred in failing to enforce the prenuptial agreement, under which "each party keeps the property in his or her own name, and there can be no spousal support." Failing that, husband argues that the court erred in determining that 1986—the date of cohabitation—rather than
1989—the date of the marriage—was the relevant date for determining whether an asset was a marital asset for the purpose of dividing the parties’ property. Wife cross-appeals, contending that the court erred in failing to award her indefinite spousal support.

I. HUSBAND’S FIRST ASSIGNMENT OF ERROR: THE PREMARITAL AGREEMENT

The validity of the premarital agreement was the primary issue at trial. As noted, the parties began living together in 1986. Both parties were somewhat reluctant to remarry; however, in July 1989, they decided they would get married the following month in Las Vegas. The parties executed a premarital agreement on August 10, 1989, the day before they were scheduled to fly to Las Vegas for their wedding on August 12.

The agreement specifies, in part:

“1. Each party does hereby release and waive all common-law and statutory rights of every kind and nature now existing or which hereafter may exist, which may be created in the separate property of the other party, which either party, as husband or wife, may have or could have arising during the marriage of the parties, as a result of their marriage or during the prior period of cohabitation between them, or upon the termination of the marriage of the parties prior to death.”

As relevant here, the parties also purported to waive any claim for spousal support and “any and all rights or claims existing now or hereafter, with reference to their extended period of cohabitation prior to their intended marriage, * * * including, but not limited to, any claim for real property, personal property, personal services or otherwise[.]” Exhibit A of the agreement listed the major assets of the parties; the agreement states that the listing “is not intended by them to be complete, only to set forth[,] in writing, the parties’ respective assets which both agree have significant value” and that, “by reason of their extended period of cohabitation,” “they are each fully aware of these listed assets as well as all other assets and obligations of them each.” The Garden Lane property and vacant lot, the Michigan Street property, the Cascade Fund, the NEBF, and a certificate of deposit were listed as husband’s assets. Wife’s assets were her beauty salon business, including the business’s bank accounts, and a savings account that she held in the name of herself and her minor son. No values were listed for either party’s assets.

Husband and wife presented conflicting testimony about the circumstances surrounding the preparation and execution of the premarital agreement. According to husband, the idea of being married and the idea of a premarital agreement came up at the same time, about a month before they were married. He testified that he had contacted Hedges, the attorney who had handled his earlier divorce,
to draft the agreement, and that, two weeks before the wedding, a draft of that agreement had been made available to wife. According to husband, wife never indicated that she needed more time to consult with an attorney about it, and she had a “very clear picture” of his business affairs and assets. Wife, on the other hand, testified that she had seen the agreement for the first time the day that she had signed it; that she had asked husband, when he announced that he was going to have Hedges prepare the agreement, to “make sure that Nick Nylander [wife’s attorney] is there”; that Nylander had not been present when she arrived at Hedges’ office to sign the agreement the day before they were to leave for their wedding; and that, when she asked husband where Nylander was and expressed doubts about signing the agreement without having him present, husband had responded, “Go ahead and sign it. [Hedges] can take care of this for both of us.” Wife testified that she had then “read through it again, and I just knew I was giving up my house and giving everything up. And I just knew it wasn’t right.” When she said again, “I think I should call [Nylander],” she testified that husband “just kept saying, ‘The wedding’s on. You’ve told everyone you’re getting married. We’re leaving tomorrow morning. Go ahead and just sign it. The wedding is on.’ ” She further testified that husband had reassured her that she “was his whole world, and that he loved me forever.”

The trial court made extensive findings relating to the premarital agreement, essentially adopting wife’s version of events. Given that those findings were based on the trial court’s assessment of the parties’ respective credibility, we defer to them.

Given those circumstances, the court ruled that the agreement was invalid, stating:

“ORS 108.725(1)(b) required Husband to make a fair and reasonable disclosure of the property to Wife. Wife testified that she was not aware of the specifics of Husband’s property affairs. The agreement does include a schedule of ‘major assets’ of Husband, but no values accompany the list of major assets. Furthermore, the schedule does not list the IBEW pension which was acquired in 1979. The court does not believe that the disclosure of assets on the schedule was sufficient for Wife to make an informed decision based upon her limited knowledge of the financial holdings of husband. A meaningful disclosure of assets is required. An opportunity to review with independent counsel is required. These are not present in this case.

“ * * * The court is also concerned that the agreement effectively forfeits Wife’s interest in any property she may have acquired during the term
of the parties’ domestic partnership. The court finds it unconscionable that Wife was asked to sign the agreement on short notice without a meaningful opportunity to consult with her attorney which resulted in forfeiture of potential property interests."

ORS 108.725, which governs the enforceability of the premarital agreement in this case, is part of the Oregon Uniform Premarital Agreement Act, ORS 108.700 to 108.740, enacted in 1987 (the Act). ORS 108.725 provides:

“(1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
“(a) That party did not execute the agreement voluntarily; or
“(b) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
“(A) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
“(B) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
“(C) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

“(3) An issue of whether a premarital agreement is unconscionable shall be decided by the court as a matter of law.”

Husband argues that the case turns solely on whether the agreement fails as “unconscionable” under subsection (1)(b). As to that point, he argues that, under the plain text of the statute, an agreement may be invalidated only if it is unconscionable and all three of the following conditions are satisfied: (1) the party against whom it is being enforced was not provided reasonable disclosure of the other party’s property; (2) the party did not waive the disclosure requirement; and (3) the party “did not have or reasonably could not have had an adequate knowledge of the property of the other party.” In husband’s view, none of those conditions was met in this case, and the trial court erred by instead applying obsolete case law to invalidate the agreement. Wife responds that, because the legislative history of the Act demonstrates that it “was enacted as an inclusive codification of the common law that existed at that time,” the statute must be read in harmony with that case law. To do so, as we understand wife’s argument, requires reading the conditions set forth in subparagraphs (A), (B), and

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**Take Note**

Oregon allows for property division based on general equitable principles at the end of long-term cohabitation. See, e.g., Beal v. Beal, 577 P.2d 507 (Or. 1978).
(C) of subsection (1)(b) as a “listing [of] actions or omissions that tend to support a finding of unconscionability and/or involuntariness.” (Emphasis added.)

Although it has been over 20 years since Oregon’s adoption of the Act, Oregon courts have yet to construe the meaning of ORS 108.725. We do so now by first examining the statutory text and context; we also consider the legislative history underlying the statute where that history appears helpful in discerning the legislature’s intent, even if there is no ambiguity in the statute’s text. ORS 174.020(1)(b); State v. Gaines, 346 Or. 160, 171-72, 206 P.3d 1042 (2009).

We first dispose of wife’s argument that the disclosure conditions listed in subparagraphs (A), (B), and (C) of subsection (1)(b) are merely considerations supporting either “involuntariness” under subsection (1)(a) or “unconscionability” under subsection (1)(b). Frankly, that reading simply cannot be reconciled with the language and structure of the statute. First, the use of the disjunctive “or” in subsection (1) connotes two alternate ways of proving that an agreement is unenforceable—either if it was not voluntarily executed (paragraph (a)) or if it was unconscionable when executed (paragraph (b)). The use of the conjunctive “and” at the end of paragraph (b) then establishes additional conditions that must be satisfied before an “unconscionable” agreement will be invalidated. Those additional conditions—set forth in subparagraphs (A), (B), and (C)—are also stated in the conjunctive—that is, as husband argues, all three must be satisfied if an agreement is to be set aside under subsection (1)(b). In sum, the text of the statute clearly supports husband’s reading of the statute.

The legislative history confirms that understanding. The Act was proposed by the Uniform State Laws Committee of the Oregon State Bar and followed essentially verbatim the Uniform Premarital Agreement Act (U.P.A.A.), drafted by the National Conference of Commissioners on Uniform State Laws in 1983. In explaining section 6(a)(2) of the U.P.A.A.—the provision that eventually was codified in Oregon as ORS 108.725(1)(b)—at a hearing before a subcommittee of the House Judiciary Committee, Lawrence Young, former chair of the Oregon Uniform State Laws Committee, explained that unconscionability alone is insufficient to render an agreement unenforceable. In other words, under that provision, an agreement that is “merely” unconscionable—that is, one that is unconscionable, but the other factors of subsection (1)(b) have not been proved—will not be invalidated.

The history of the U.P.A.A. itself is also relevant in determining legislative intent. * * *

The California Supreme Court analyzed the history of the U.P.A.A. in great detail in In re Marriage of Bonds, 24 Cal.4th 1, 99 Cal.Rptr.2d 252, 5 P.3d 815
Chapter 1  Marriage and Its Alternatives

The court describes a vigorous debate surrounding the adoption of the “unconscionability” prong of the statute. Bonds, 24 Cal.4th at 16, 99 Cal.Rptr.2d at 261, 5 P.3d at 823-24 (citing National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, Uniform Premarital Agreement Act, July 23-26, 1983, pp. 49-97 (Proceedings, Uniform Act)). Apparently, a minority of commissioners were of the view that “substantive fairness” should be the primary consideration in determining enforceability; the majority, however, placed more emphasis on certainty of enforcement. In the end, as the court explained,

“eventually it was settled that the party against whom enforcement of a premarital agreement was sought only could raise the issue of unconscionability, that is, the substantive unfairness of an agreement, if he or she also could demonstrate lack of disclosure of assets, lack of waiver of disclosure, and lack of imputed knowledge of assets.”

(citing Proceedings, Uniform Act, pp. 52, 54, 75, 76, 80, 100, 101) (emphasis in original). See also Uniform Premarital Agreement Act, Prefatory Note, 9C U.L.A. 36 (2001) (noting that the U.P.A.A. was designed to address problems caused by substantial uncertainty and nonuniformity among the states about the enforceability of premarital agreements).

Thus, to be unenforceable under ORS 108.725(1), wife must prove either that she did not enter into the agreement voluntarily or that it was unconscionable when it was executed and, before execution, she was not provided fair and reasonable financial disclosure, did not voluntarily waive that disclosure, and did not have, or reasonably could not have had, adequate knowledge of those matters. We begin with the question of voluntariness.

The term “voluntarily” is not defined in the statute; accordingly we apply its ordinary meaning. The word “voluntarily” ordinarily means “in a voluntary manner: of one’s own free will: SPONTANEOUSLY.” Webster’s Third New Int’l Dictionary 2564 (unabridged ed. 2002). The definition of “voluntary,” in turn, includes “proceeding from the will: produced in or by an act of choice,” “acting of oneself: not constrained, impelled, or influenced by another.” Similarly, in law, “voluntarily” is understood to mean “[i]ntentionally; without coercion,” and the meaning of “voluntary” includes “[u]nconstrained by interference; not impelled by outside influence.” Black’s Law Dictionary 1605 (8th ed. 1999). Those definitions suggest independent action, free from coercion and intimidation; an element of “choice” is evident.

The history of the adoption of the U.P.A.A. again provides some additional guidance. Although the meaning of the term itself apparently did not generate much explicit discussion during the debate, Bonds, 24 Cal.4th at 17, 99 Cal.
Domestic Relationships  A Contemporary Approach

Rptr.2d at 262, 5 P.3d at 824, the official comment relates that the conditions of enforceability—including voluntariness—“are comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions,” Uniform Premarital Agreement Act, § 6 Comment, 9C U.L.A. 49 (2001). As the California court explained in Bonds, the cases cited for that proposition

“demonstrate the commissioners’ belief that a number of factors are relevant to the issue of voluntariness. In considering defenses proffered against enforcement of a premarital agreement, the court should consider whether the evidence indicates coercion or lack of knowledge * * *. Specifically, the cases cited in the comment to [section 6 of the U.P.A.A.] direct consideration of the impact upon the parties of such factors as the coercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement; the presence or absence of independent counsel or of an opportunity to consult independent counsel; inequality of bargaining power—in some cases indicated by the relative age and sophistication of the parties; whether there was full disclosure of assets; and the parties’ understanding of the rights being waived under the agreement or at least their awareness of the intent of the agreement.” (footnote omitted). The commissioners also clearly anticipated that ordinary contract defenses, “such as lack of capacity, fraud, duress, and undue influence,” would apply in assessing the voluntariness of an agreement. (citing Proceedings, Uniform Act, p. 131).

Iowa, by contrast, has taken a different tack. ***

First, it bears noting that Iowa did not adopt the U.P.A.A. verbatim; among other modifications, it bifurcated the unconscionability and disclosure requirements. Thus, under Iowa’s version of the U.P.A.A., courts have “somewhat greater latitude” to scrutinize the substantive fairness of an agreement under the unconscionability requirement than is the case under the U.P.A.A. As noted above, the U.P.A.A. drafters specifically rejected the approach taken by Iowa, in part because, in the drafters’ view, the separate requirement that the contract be executed voluntarily “provided adequate protection to the weaker party.” Bonds, 24 Cal.4th at 19, 99 Cal.Rptr.2d at 263, 5 P.3d at 825 (citing Proceedings, Uniform Act, pp. 71-73). It follows that the drafters of the U.P.A.A. intended a broader meaning of voluntariness to apply.

More importantly, that reading of the U.P.A.A. can be understood to be consistent with the intent of the Oregon legislature in enacting the Act. An examination of the history of the Act’s passage in Oregon reveals that there was very little discussion of the specific meaning of the term “voluntarily.” Representing the proponent of the bill before a House subcommittee, Young stated, “An agreement is not enforceable if it wasn’t entered into voluntarily. Now, what voluntarily is
is a good question. That's something for a judge to determine.” No discussion followed. The legislature understood, however, that the U.P.A. was essentially a codification of existing Oregon law. Young explained to the judiciary committees of the House and the Senate that the only real change from then-current Oregon law was a shift in the burden of proof; in other respects, it was codifying Oregon case law.

A review of the pre-Act case law is therefore in order. Premarital agreements have long been recognized as valid in Oregon. See Moore v. Schermerhorn, 210 Or. 23, 308 P.2d 180 (1957). As we noted in Bauer v. Bauer, 1 Or.App. 504, 507, 464 P.2d 710 (1970) (citing Taylor v. United States National Bank, 248 Or. 538, 436 P.2d 256 (1968)), the validity of a premarital agreement “depends upon the circumstances of the particular case and all circumstances, including those attending its execution will be rigidly scrutinized.” At the time of the enactment of the Act, it was also firmly established in Oregon law that the relationship between the parties to a premarital agreement is “fiduciary in character” if entered into in contemplation of marriage. Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969); see also Merrill v. Merrill, 275 Or. 653, 552 P.2d 249 (1976).

In Kosik, the court held that the husband breached his fiduciary obligation to the wife—thus rendering the agreement invalid—when he did not give the wife a reasonable opportunity to be informed of the consequences of the agreement. There, the parties were married within about a week of their first date. The husband had his attorney prepare the agreement. The wife, who had a high school education and very limited business experience, was not advised to get her own attorney and had virtually no time to consider it before she signed it. They signed it on a Friday evening and were married the following Monday.

As we explained more fully in Bauer, the fiduciary relationship between parties to a premarital agreement

“requires the utmost good faith and a full and frank disclosure of all circumstances materially bearing on the contemplated agreement, generally including full disclosure of assets[.]”

Bauer illustrates how that principle is helpful in determining what the legislature intended, given its express intent to codify existing case law, by its use of the term “voluntarily” in ORS 108.725(1)(a). In Bauer, the wife did not know about the proposed agreement until the morning she and her intended husband were leaving for their wedding, when the husband took her to his attorney’s office to sign it. He did not tell her anything about his assets, nor did it appear that the wife had that knowledge. In light of those circumstances, we upheld the trial court’s determination that the agreement was void, concluding that the wife was “under the type of pressure and implied coercion which is inconsistent with good faith on the part of her intended husband.” (emphasis added).
Later cases echo that theme. * * *

In sum, under the case law existing at the time of the enactment of the Act in Oregon, in determining the validity of a premarital agreement, courts primarily considered the sophistication of the party against whom the agreement was being enforced, whether the party had a reasonable opportunity to review the agreement and to seek independent counsel, whether the party was aware of the purpose of the agreement, and, finally, whether the party was aware or should have been aware of the nature and extent of the property that would be affected.9 See Baxter, 139 Or.App. at 36-37, 911 P.2d 343 (applying common law and upholding premarital agreement executed before enactment of the Act). It thus follows that the Oregon legislature, like California’s, understood the term “voluntarily” as used in ORS 108.725(1)(a) to imply a lack of coercion, intimidation, or undue pressure, as well as some modicum of knowledge of the terms of the agreement and the property affected. The timing of the agreement in relation to the wedding, an adequate opportunity to consult with independent counsel, the relative sophistication of the parties, and sufficient disclosure of assets are among the factors bearing on that question.10

Applying those factors in this case, we readily conclude that wife has met her burden of proving that the premarital agreement was not voluntarily entered into. The trial court found, and the evidence demonstrates, that the parties first discussed a premarital agreement a few weeks before their wedding, and then only in general terms. When husband said that he was going to have his attorney arrange it, wife told him to be sure that her attorney was also there. The first time wife that saw the agreement, or, indeed, had any indication of its specific terms, was the day before the parties were scheduled to fly out of town for their wedding. On that day, husband called wife and told her to come to his attorney’s office to review and sign the agreement. When wife arrived and was surprised to find that her own attorney was not present as she had requested, husband reassured her that his attorney could take care of it for both of them. When she continued to express reluctance to sign, wife testified that husband “just kept saying, ‘The wed-

9 It bears emphasizing that the assistance of independent counsel for both parties was not a strict prerequisite to enforceability under Oregon common law, but, rather, was a significant factor in the analysis. That, too, is consistent with the U.P.A.A. The official comment to the U.P.A.A. states:

“Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed.”


10 That is not to say that some of those factors may not also reasonably pertain to a determination that an agreement is unenforceable under ORS 108.725(1)(b). We need not unravel that question here, however, because we conclude that wife met her burden of proving that she did not enter into the agreement voluntarily.
...ding’s on. You’ve told everyone you’re getting married. We’re leaving tomorrow morning. Go ahead and just sign it. The wedding is on.’ " Wife then read and signed the agreement in the presence of husband and his attorney. The entire meeting lasted no more than 30 minutes.

The evidence also demonstrates that wife lacked sufficient knowledge of the extent of the property affected by the agreement. The list of husband’s assets that was attached to the agreement was incomplete, and no values were included. The trial court found that wife had limited knowledge of husband’s financial holdings. For example, wife testified that she had general knowledge of the existence of husband’s pensions, but not of their value; similarly, she was unaware at the time of the agreement of the existence of his certificate of deposit. She also testified that husband took care of all of the couple’s financial affairs even before they were married. Moreover, although, as the trial court found, wife had some experience in business matters, that experience was limited and she was relatively unsophisticated in financial matters. We conclude that those circumstances created a sufficiently coercive environment so as to render wife’s agreement involuntary. The trial court did not err in refusing to enforce the premarital agreement.

* * *

Points for Discussion:

a. Voluntariness

As discussed in Rudder, there are two grounds for challenging an agreement under the Uniform Premarital Agreement Act (UPAA). How does Rudder interpret the term “voluntary” in the UPAA? What made the wife’s execution involuntary?
b. Uniform (and non-uniform) Premarital Agreement Act

The Uniform Premarital Agreement Act (UPAA) has been adopted, with some modifications, by twenty-two states and the District of Columbia. Current information on the UPAA is available from the web site of the Uniform Law Commission. Would the Simeone case have been decided differently if the Act had been in force? Would the adoption of the UPAA affect the outcome of the cases stated in the problems below?

After the California decision in In re the Marriage of Bonds, 5 P.3d 815 (Cal. 2000), cited in Rudder, California’s legislature amended its version of the UPAA to provide greater safeguards. As amended, the California UPAA now requires “fair, reasonable and full disclosure” instead of “fair and reasonable disclosure.” The California statute also includes a new subsection providing that a premarital agreement shall not be deemed to have been executed voluntarily unless two requirements are met. The court must find that the party against whom enforcement was sought had seven days between the time the agreement was first presented and the time it was signed, and must also find that the party against whom enforcement is sought was represented by independent legal counsel or expressly waived representation and was fully informed in writing of the terms and basic effect of the agreement and the rights being released. Cal. Fam. Code § 1615 (c) (2012). If applicable, would this statute have changed the outcome of either Simeone or Rudder?

As noted by the Court in Rudder, Iowa’s version of the UPAA provides that a premarital agreement is not enforceable if a party proves any one of three things: that he or she did not execute the agreement voluntarily, that it was unconscionable when executed, or that the party did not receive fair and reasonable disclosure or have an adequate knowledge of the other party’s assets. See Iowa Code § 596.8 (2012). In addition, the Iowa version of the UPAA states that “The right of a spouse or child to support shall not be adversely affected by a premarital agreement.” Iowa Code § 596.5. How does this approach compare with the provision in UPAA §6(b), reprinted below?

The 2012 Uniform Premarital and Marital Agreements Act (UPMAA) applies both to premarital agreements and agreements entered into during a marriage, and includes somewhat more stringent requirements for enforceability than the earlier uniform act, including a requirement that the party have access to independent legal representation or, in the alternative, that the agreement includes a notice of waiver of rights or “an explanation in plain language of the marital rights or obligations being modified or waived by the agreement.” UPMAA § 9.
Chapter 1 Marriage and Its Alternatives

Uniform Premarital Agreement Act § 6

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or
(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
   (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
   (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
   (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.


c. Disclosure Obligations

One of the wife’s arguments in Rudder was that she had only limited knowledge about her husband’s financial circumstances at the time she signed the agreement. How was this relevant to the court’s conclusion in the case? Could this factor be sufficient standing alone as a basis to set aside a premarital agreement under the Oregon statute? Under the California statute? See generally Friezo v. Friezo, 914 A.2d 533 (Conn., 2007) (discussing what is “fair and reasonable” disclosure). See also UPMAA § 9(d).
d. Changes in Circumstances and Spousal Support

Courts in some jurisdictions consider whether enforcement of a premarital agreement would be unconscionable based upon circumstances existing at the time of a divorce. These courts are particularly concerned with changes that would leave a spouse “without sufficient property, maintenance, or appropriate employment to support herself.” DeMatteo v. DeMatteo, 762 N.E.2d 797, 811-13 (Mass. 2002). California’s version of the UPAA, as amended after the decision in Pendleton v. Fireman, 5 P.3d 839 (Cal. 2000), states that premarital agreements concerning spousal support are not enforceable if the party against whom enforcement is sought was not represented by independent counsel at the time the agreement was signed or if the provision is unconscionable at the time of enforcement. Cal. Fam. Code § 1612 (c) (2012). What are the arguments for treating support rights differently from property rights in this context? What does the court in Simeone have to say on this question?

If a couple’s standard of living improved significantly after the time they executed a premarital or marital agreement, due to a large increase in one spouse’s earnings, so that the effect of the agreement would be to reduce the other spouse’s standard of living dramatically in the event of a divorce, should that be a sufficient change of circumstances to justify a court in refusing to enforce the agreement? Compare Gross v. Gross, 464 N.E.2d 500 (Ohio 1984) (finding maintenance provided by agreement to be unconscionable in view of husband’s greatly increased earnings and property), with In re Marriage of Drag, 762 N.E.2d 1111 (Ill. 2002) (change in parties’ economic fortunes during marriage is not sufficient basis to modify prenuptial agreement).

Represented and Unrepresented Parties

If the attorney in the Rudder case was representing the husband, what obligations did he have to the wife? Is it enough if he tells the wife he is representing only the husband? See American Bar Association Model Rules of Professional Conduct Rule 4.3; American Academy of Matrimonial Lawyers, Bounds of Advocacy 3.2 (requiring that a lawyer tell the client’s spouse that the lawyer cannot also advise the spouse and recommend that he or she consult another attorney).
e. Choice of Law

In light of the different legal standards applied to premarital and postmarital agreements in different states, how should courts treat cases in which spouses enter into an agreement in one state and subsequently divorce in another? See Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988) (applying Hawaii law to a New York premarital agreement because Hawaii had the most significant contact with the parties at the time of divorce); Estate of Davis, 184 S.W.3d 231 (Tenn.Ct.App.2004) (applying Tennessee law to Florida prenuptial agreement where Florida law, which does not require disclosure of assets in the estate context, violated Tennessee’s public policy).

If the agreement were held invalid in this situation, should the attorney who drafted it be held liable for malpractice? If so, to whom? Note that in many jurisdictions, lawyers do not have malpractice liability to third parties unless the client intended that the third party be the beneficiary of the legal services. See, e.g., Pelham v. Griesheimer, 440 N.E.2d 96 (Ill. 1982) (children have no cause of action for malpractice against mother’s divorce lawyer).

To assure that the law of a particular state will govern the agreement, the drafter can include a choice of law provision, which will usually be given effect. Restatement (Second) of Conflict of Laws §§ 187, 188 (1971). E.g. DeLorean v. DeLorean, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986); Gamache v. Smurro, 904 A.2d 91 (Vt. 2006). See also Fernandez v. Fernandez, 15 Cal.Rptr. 374 (Cap. Ct. App. 1961) (upholding validity of Mexican premarital agreement in California divorce). However, absolute assurance on the choice of law question at the time of execution does not appear possible under the Restatement approach. See Gustafson v. Jensen, 515 So.2d 1298 (Fla.1987).
f. Scope of Marital Agreements

Even as courts began to allow parties autonomy in regulating their support and property obligations on divorce or death, they still hesitated to enforce agreements dealing with support or other conduct during the marriage. In Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981), the court was careful to say that “We express no opinion on the validity of antenuptial contracts that purport to limit the duty of each spouse to support the other during the marriage.” This reflects a longstanding practice of courts declining to adjudicate marital disputes; see Kilgrow v. Kilgrow, 107 So.2d 885 (Ala. 1958) (dispute over child’s school enrollment); McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (dispute over marital finances).

Section 3(a) of the Uniform Premarital Agreement Act lists a variety of subjects that parties may address in a premarital agreement including “any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.” (Under § 3(b), however, “The right of a child to support may not be adversely affected by a premarital agreement.” See also UPMAA § 10(b)(1)) The UPAA Commissioner’s Comment states that “[A]n agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on.” The UPAA does not address the question of what remedies might be available for the breach of such provisions, and its section on enforcement makes no distinctions between the different kinds of provisions that may be included in premarital agreements.

How should a court in a jurisdiction with the UPAA in force approach a marital contract dispute concerning an agreement as to where the couple will reside, the number and spacing of children, or the sharing of financial obligations and household chores? Should courts lend their assistance to spouses who wish to structure their married life by means of contract? How should a court evaluate a marital agreement articulating an obligation of “emotional and sexual fidelity” between the parties, and providing for payment of liquidated damages in the event of a breach of this provision? See Diosdado v. Diosdado, 118 Cal.Rptr.2d 494 (Cal. Ct. App. 2002). What about a contract that specifies that neither party will be allowed to obtain a no-fault divorce? See Coggins v. Coggins, 601 So.2d 109 (Ala.Civ.App.1992), cert. denied.

UPMAA § 10 treats a number of these potential terms as unenforceable, including provisions that would limit or restrict a remedy available to a victim of domestic violence, modify the grounds on which a separation or divorce may be obtained, or penalize a party for initiating divorce or separation proceedings.

Agreements regarding custodial rights are always subject to review by a court with appropriate jurisdiction in order to protect the best interests of any minor
children. See, e.g., In re Marriage of Littlefield, 940 P.2d 1362 (Wash. 1997). This limitation is made clear in UPMAA §10(c), which provides that: “A term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding custodial responsibility is not binding on the court.”

**Global View: Religious Marital Agreements**

Courts in many states have considered enforcement of premarital agreements entered into by Muslim or Jewish couples, either in the United States or in another country where marriage and divorce issues are governed by religious law. In those religious and legal traditions, husbands have broad rights to divorce their wives, and wives have relatively few property or support rights. Agreements signed at the time of a marriage provide some financial security to a wife in the event of her husband’s death or the dissolution of their marriage. Depending on the circumstances, a traditional marital agreement might provide a wife with more or less than what she would be entitled to receive under the law that would apply in the state where the divorce takes place. Compare In re Marriage of Noghrey, 215 Cal.Rptr. 153 (Cal. Ct. App. 1985) with In re Marriage of Shaban, 105 Cal.Rptr.2d 863 (Cal. Ct. App. 2001). How should a state court determine whether to enforce these agreements? How do the Establishment and Free Exercise Clauses of the First Amendment affect this question?

Problem 1-2

Robert and Christie decided to get married when Christie became pregnant. She was eighteen and a recent graduate from high school. She had no property, but Robert had property worth $151,000. Several days before the wedding Robert had his lawyer draft a prenuptial agreement and told Christie that if she did not sign it there would be no wedding. She signed in the lawyer’s office, although she was suffering from morning sickness. The agreement released all claims to Robert’s property that Christie might have as a result of their marriage and contained a list of his property, with its value, stating that this was a full and complete disclosure of all his property. The lawyer did not advise Christie about the effect of the agreement, but Robert told her that it would protect her from his debts if the marriage ended. Eleven months later Robert drowned, dying intestate. Robert’s father filed an application to be appointed administrator of his estate, opposed by Christie, who sought a decree that the agreement was invalid. Was Christie coerced? Does your answer change if Robert did not know Christie was pregnant? (See Rowland v. Rowland, 599 N.E.2d 315 (Ohio Ct. App. 1991).)

Problem 1-3

While they were engaged, A.J. told Sara his financial advisors had said that he needed a prenuptial agreement to protect his construction business. In fact, A.J.’s statement was false. When Sara refused to sign any prenuptial agreement, A.J. dropped the matter, and they set a wedding date. Without telling Sara, A.J. had his lawyer draft an agreement in which they both agreed that any property acquired by either during the marriage would belong to the party acquiring it, and that in the event of divorce neither would receive any support. Five days before the wedding, A.J. sent the agreement to Sara, telling her to consult a lawyer and offering
to pay her lawyer’s fee. Sara was upset, but did consult a lawyer, who advised her that under the agreement she would get nothing if the couple divorced. The day before the wedding, A.J. and Sara met together with their lawyers. After a heated discussion, Sara asked A.J. if he wanted her to sign. He said yes, and she signed. During the parties’ six-year marriage, A.J.’s net worth increased from $2.4 million to $6.5 million. When Sara sued for divorce, she requested support and a share in A.J.’s increased property. What should be the result? (See In re the Marriage of Spiegel, 553 N.W.2d 309 (Iowa 1996).)

Problem 1-4

James, age forty-five, and Peggy, age twenty-two, began living together when Peggy worked as a bookkeeper in one of James’ companies. James was worth about $1.2 million. Peggy’s net worth was $8,200. They lived together for three years, during which time James was physically violent with Peggy on three occasions. After each episode, he apologized profusely. Peggy continued to work in James’ businesses before and during their later marriage. After three years they decided to marry. James had the lawyer for his businesses draft a prenuptial agreement precluding the accumulation of marital property and containing Peggy’s waiver of any claim to alimony. Peggy knew this lawyer and respected him, but he told her plainly in writing that he was acting for James and that she should employ her own lawyer. The agreement was presented to Peggy two days before the wedding and she signed it a day later, although she had known for two weeks that it was being prepared. Nine years later Peggy sued for divorce and contended that the agreement should be disregarded. Under Simeone, should the agreement be enforced? What about the UPAA? (See Matter of Marriage of Foran, 834 P.2d 1081 (Wash. Ct. App. 1992); see also Sogg v. Nevada State Bank, 832 P.2d 781 (Nev. 1992).)

Problem 1-5

Warren and Carol signed a valid prenuptial agreement several days before their marriage which included a waiver of claims for support. Eight years later, Carol was very seriously injured in a traffic accident. Two years after the accident, her medical bills totaled more than a million dollars and she was still mentally and physically devastated by her injuries. Warren, who has substantial separate property, has filed for divorce, and asked the court to enforce Carol’s support waiver. Should the court enforce the agreement? If the court denies enforcement, how should it determine an appropriate amount of support? (See Marriage of Rosendale, 15 Cal.Rptr.3d 137 (Cal.Ct.App. 2004).)
Problem 1-6

Robert and Laurie signed a premarital agreement three days before their wedding that included this language: “This Agreement shall become null and void and of no further force and effect upon the seventh (7th) anniversary of the parties’ marriage.” Robert filed an action for divorce three months before their seventh wedding anniversary. At the divorce hearing, several months after their anniversary, Laurie asked the court not to enforce the agreement, arguing that it had expired and also that an agreement with a “sunset” provision violated public policy by encouraging Robert to file for divorce. How should the court rule? (See Peterson v. Sykes-Peterson, 37 A.3d 173 (Conn. Ct. App. 2012); see also Sides v. Sides, 717 S.E.2d 472 (Ga. 2011).)

Problem 1-7

Two years after Cynthia and Michael were married, Cynthia demanded that Michael sign an agreement promising that if he were ever guilty of statutory grounds for divorce, Cynthia could divorce him and he would be required to pay her half of his assets and half of all his future income. When they signed the agreement, Michael was in medical school. When Cynthia filed for divorce on grounds of adultery fifteen years later, he was an orthopedic surgeon earning $500,000 a year. Cynthia had a part time career in real estate. Should this agreement be enforceable? Should the answer to this question depend on whether the claim is brought in a fault-based or no-fault divorce jurisdiction? (See Bratton v. Bratton, 136 S.W.3d 595 (Tenn. 2004); see also Mehren v. Dargan, 13 Cal. Rptr.3d 522 (Cal. Ct. App. 2004).)

Further Reading: Marital Agreements

- Homer H. Clark, Jr., Domestic Relations § 1.1 (Student 2d ed. 1988).
- Brett R. Turner and Laura W. Morgan, Attacking and Defending Marital Agreements (2d ed. 2012)
Chapter 1  Marriage and Its Alternatives

C. Getting Married

Marriage patterns have changed dramatically around the world over the past fifty years. Although the majority of all adults over age 30 in the United States have married, the percentages of men and women who marry have been declining and the median age at first marriage has been increasing. As marriage rates have decreased, other trends have also emerged: divorce rates have leveled off, cohabitation has become more common, and marriage is now more common among those who are better off socioeconomically and have more education. Between twenty and twenty-five percent of all currently married couples have at least one partner who had been married previously.

Rates of marriage across different racial, ethnic and religious groups are also increasing. Government data indicate that one in every ten women under age 45 who are currently in their first marriage is married to an individual of a different racial or ethnic group. (In these surveys, the groups identified are non-Hispanic White, non-Hispanic Black, non-Hispanic Asian, non-Hispanic other, and Hispanic.)

1. Licensing and Solemnization

In all of the American states, there are statutes regulating entry into marriage. Much of this legislation governs procedures for licensing and solemnization of ceremonial marriages. In all states, individuals who wish to be married must obtain a license, usually from some public official such as the county clerk or a clerk of court. Where common law marriage or some other form of informal marriage is recognized, these statutory requirements may be by-passed. Statutes in some states impose a waiting period, to run between the application for the license and its issuance or between the issuance of the license and the marriage.

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There were 2,077,000 marriages in the United States in 2009, and a rate of 6.8 marriages per 1000 population. In 1990, the marriage rate was 9.8 per 1000. Statistical Abstract of the United States 2012, Table 133 (2011). The U.S. National Center for Health Statistics, based in the Centers for Disease Control and Prevention (CDC), collects marriage and divorce statistics from state authorities and makes them available through the National Vital Statistics System. See Casey E. Cope, et al, First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth, National Health Statistics Reports No. 49 (March 22, 2012). Survey data on marriage and divorce are available from the U.S. Census Bureau. See Rose M. Kreider and Renee Ellis, Number, Timing, and Duration of Marriages and Divorces, 2009 (Current Population Reports, May 2011), and Diana B. Elliott and Tavia Simmons, Marital Events of Americans: 2009 (American Community Survey Reports, 2011).
Most statutes authorize marriages to be solemnized by such religious leaders as priests, rabbis and ministers and by various civil officers, including judges, justices of the peace, county clerks and others. Some statutes explicitly allow solemnization in accordance with the rules of any denomination, e.g., Ill. Ann. Stat. 750 ILCS 5/209 (2012); Mass. Ann. L. ch. 207, § 38 (2012), or in accordance with the customs of an Indian Nation, Tribe or Native Group, see Uniform Mar-riage and Divorce Act § 206, 9A U.L.A. (Part 1) 182 (1998). A Colorado statute provides that a marriage may be solemnized by the parties to the marriage. Colo. Rev. Stat. Ann. § 14-2-109 (2012). Statutes typically require two witnesses, whose names or signatures appear on the marriage certificate. The certificate usually must be filled out by the person solemnizing the marriage and sent to the place of recording. Marriage certificates are then kept as public records.

In addition to formal, ceremonial marriage under these statutes, many jurisdictions in the United States recognized the validity of informal, or “common law” marriages, discussed further below. This institution traces its roots to the English ecclesiastical courts, which recognized until 1753 a form of marriage called sponsalia per verba de praesenti entered into without a ceremony. Such a marriage was held valid to the extent of prevailing over a subsequent ceremonial marriage meeting all the formal requirements, although the common law courts would not recognize it for purposes of awarding dower to a woman who was married in this fashion. Once relatively widespread, common law marriage has been on the decline in the United States, with only ten states and the District of Columbia allowing common law marriages.

** Accounts Management, Inc. v. Litchfield **

576 N.W.2d 233 (S.D. 1998)

Konenkamp, Justice.

Today we must decide whether failure to record a marriage license invalidates a marriage. A widow denies responsibility for her deceased husband’s medical bills contending her marriage was void for lack of recording with the register of deeds. Because we construe our licensing statutes to favor validation of marriages even when a statutory formality was overlooked, we declare the marriage valid and conclude our statutes make her financially responsible for his medical care. Her debt is affirmed.
Chapter 1  Marriage and Its Alternatives

Facts

Fredrick Klusman and Claudia Caswell submitted an application for a marriage license to the Pennington County Register of Deeds on December 20, 1984. They were married four days later by an ordained Presbyterian minister in the company of a few friends and relatives. On October 14, 1986, Fredrick was in Mitchell, South Dakota on a business trip when he suffered a severe heart attack. Emergency personnel transported him to St. Joseph Hospital. Claudia signed, as his wife, an “Admission Consent Form” and an “Authorization for Medical and/or Surgical Treatment.” Fredrick was in the intensive care unit for seven days. As a result of his heart attack, Fredrick’s brain was deprived of oxygen for eight to ten minutes resulting in severe and irreversible brain damage. Claudia obtained guardianship of his person and assumed responsibility for all his affairs until his death from cancer in 1989.

The medical bill at St. Joseph totaled $14,170. Claudia made consistent, monthly payments for nearly eight years. Distressed the balance was not decreasing as quickly as she anticipated, she stopped paying in August 1994. Accounts Management, Inc. (AMI), the successor in interest to the balance owed St. Joseph, brought suit for the remaining amount. Following a hearing, the circuit court granted AMI’s motion for summary judgment. Claudia appeals believing genuine issues of fact persist on whether she has any obligation to pay Fredrick’s medical bills because an unrecorded marriage is invalid, there is no official proof she was ever legally married to him, and his medical expenses were not “necessaries.”

* * *

Analysis and Decision

1. Failure to Record Marriage License

After their marriage ceremony, Claudia evidently believed she was married to Fredrick. Now she feels the marriage should be deemed void as the license was never recorded. Our law makes recording mandatory. “After performing the ceremony, the person solemnizing the marriage shall deliver the marriage certificate to the persons married and return, within ten days, the license and record of marriage to the county register of deeds.” SDCL 25-1-35. Then, the “register of deeds shall maintain ... records of marriages solemnized in that register’s county.” SDCL 25-1-37. With the use of the word “shall” in SDCL 25-1-35 and-37, was it the Legislature’s intent to require recording before a marriage is legitimized?

We aspire to preserve the sanctity of marriage and family, so when the validity of a marital union is challenged, we examine the pertinent legislative enactments with respectful care * * * These statutes should be construed to favor validation.
even when full compliance with statutory formalities may be deficient. * * * Only two states, Alaska and Oklahoma, have statutes which appear to provide that noncompliance with licensing requirements will render a marriage invalid. See Lynn D. Wardle et al., Contemporary Family Law, § 3.09, at 47 (1988).

Our law defines marriage as “consent” followed by “solemnization.” SDCL 25-1-1. Although SDCL 25-1-29 provides that a “marriage must be solemnized, authenticated, and recorded as provided in this chapter,” no statute makes recollection essential to legalize a marriage. Rather than the newlyweds, SDCL 25-1-35 commands “the person solemnizing the marriage” to deliver the license to the register of deeds and SDCL 25-1-37 specifically directs the register of deeds to “maintain ... records of marriages solemnized in that register’s county.” Neither of these statutes require action or compliance by the parties to the marriage. With this in mind, we cannot imagine our legislators intended that the mere act of recording would be necessary to “perfect” the marital relationship as if akin to a UCC filing. If so, what would be the status of the parties during the interim between the ceremony and the recording?

The real question here is whether there was any genuine issue of fact about the parties’ relationship. Competent evidence of a marriage may be proven by direct or circumstantial evidence. AMI submitted an affidavit from the secretary of the Big Bend Presbyterian Church, confirming Claudia and Fredrick were married by an ordained minister in the church. No record of the marriage can be found with the register of deeds in accord with SDCL 25-1-37, but Claudia and Fredrick did take out a valid license, exchanged vows in a marriage ceremony, and lived together as a married couple. Claudia signed the hospital admission and consent papers as “Claudia Klusman, wife,” and later signed a petition swearing under oath she was married to Fredrick. No genuine issue of fact exists. Fredrick and Claudia were husband and wife.

2. Deceased Spouse’s Medical Bills

Claudia believes the Legislature intended spouses to be liable for nothing more than food, clothing, and fuel. SDCL 25-2-11 provides:

Every husband and wife shall be jointly and severally liable for the purchase price, if such price be stated or agreed upon at the time of purchase, and if not so stated or agreed upon, for the reasonable value of all the necessaries of life, consisting of food, clothing, and fuel purchased by either husband or wife for their family while they are living together as husband and wife.

(emphasis added). Her argument has facial merit if we apply the maxim of expressio unius est exclusio alterius, the enumeration of particular things excludes those things not mentioned. Yet, statutory rules of construction, applied senselessly,
yield absurd results. Will a wife be responsible for her husband's fuel, but not his life saving medical treatment? If we accept this interpretation, then we cannot reconcile SDCL 25-7-4, which makes it a felony for able persons to neglect to provide medical care to their spouses.

Every person with sufficient ability to provide for his or her spouse's support, or who is able to earn the means of the spouse's support, who intentionally abandons and leaves his or her spouse in a destitute condition, or who refuses or neglects to provide such spouse with necessary food, clothing, shelter or medical attendance, unless, by the spouse's misconduct, he or she is justified in abandoning the spouse or failing to so provide is guilty of a Class 6 felony.

In determining legislative intent, we must give words “a reasonable, natural, and practical meaning.” Husbands and wives must stand accountable for each other’s bills when third-party creditors provide necessaries to their respective spouses. That was the obvious intent behind these statutes—marriage as a partnership, with a duty to care for each other, hence the broad modifier “all” to the words “necessaries of life.” * * * Other statutes also enforce a spouse’s obligation to pay medical bills as Chief Justice Dunn recognized when he wrote for a unanimous Court in *Faulk County Mem’l Hosp. v. Neilan*, 269 N.W.2d 121, 123 (S.D.1978): “[W]e hold that under SDCL 25-7-1, 25-7-2 and 25-7-4 the general duty of a husband to support his wife is applicable and, therefore, Bernard is responsible for Blanche’s hospital bills.” Considering this overall statutory scheme, which applies to husbands and wives equally, a spouse’s duty to pay for necessaries inescapably includes medical care and treatment.

* * *

Affirmed.

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**Points for Discussion**

**a. Marriage Validation.**

where couple made deliberate choice not to obtain marriage license). The fact that a marriage is solemnized by a person not authorized to do so does not invalidate the marriage if either or both parties are not aware of the disqualification. *Helfond v. Helfond*, 280 N.Y.S.2d 990 (Sup. Ct. 1967).

d. Estoppel

The parties in this case acted in all respects as if married for five years. Should an estoppel doctrine be applied to bar Claudia from attacking the validity of her marriage? Would your answer be different if she had been challenging the validity of their marriage in a divorce or inheritance case? Estoppel and validation principles are discussed following the next case.

c. Spousal Necessaries

In *Accounts Management*, the validity of the marriage was asserted by a creditor seeking to collect a debt. Under the common law, a husband was required to pay debts incurred by his wife or children for “necessaries.” Since the late 1960s, in many states, these obligations have been extended by statute to both husband and wife, in order to avoid discrimination based on sex. In what other legal contexts might someone other than a husband or wife seek to challenge or uphold the validity of a marriage?

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**Farah v. Farah**

*429 S.E.2d 626 (Va. Ct. App. 1993)*

COLEMAN, Judge.

In this appeal from a declaratory judgment and divorce decree, we hold that a proxy marriage celebrated in England will not be recognized as a valid marriage in Virginia. Accordingly, we hold that the trial judge erred by declaring the Farahs’ marriage to be valid in Virginia based on the trial judge’s finding that the marriage was valid under Islamic or Pakistani law. Thus, because no valid marriage existed under Virginia law, the trial judge erred by granting the parties a divorce and by equitably distributing their property pursuant to Code § 20–107.3. We remand the case to the trial court to vacate the declaratory judgment and divorce decree and for such further proceedings as may be necessary.

Ahmed Farah is a citizen of Algeria. Naima Mansur is a citizen of Pakistan. They have resided in Virginia for several years. They belong to different Muslim sects. They signed a proxy marriage form (the “Nikah”) that is used to solemnize marriages by members of the Ahmadiyya Muslim community. The “Nikah” or
marriage contract also provided that Ahmed Farah would receive a deferred payment of $20,000 as the wife’s dower. On July 31, 1988, Ahmed Farah and Naima Mansur purported to enter into a Muslim marriage through their proxies in London, England. Neither Ahmed Farah nor Naima Mansur was present in England during the ceremony. No marriage certificate was issued by any court or governmental authority in England. According to testimony at trial, under Islamic law and Pakistani law, which generally recognizes Islamic religious law, the parties to the “Nikah” are legally married once the proxy ceremony is complete. During the ceremony, a member of the Muslim community solemnizes the marriage in the presence of the parties’ proxy representatives and their witnesses.

Approximately one month after the “Nikah” was solemnized in London, the parties went to Pakistan for three days, where Naima Mansur’s father held a reception (the “Rukhsati”) in their honor. Under the tradition of the wife’s Islamic sect, the “Rukhsati” symbolizes the sending away of the bride with her husband. The parties returned to Virginia in September of 1988 and purchased a house that was jointly titled in both names. They had intended to have a civil marriage ceremony when they returned to the United States, but they never did so. They lived together in Virginia as husband and wife for about one year when, on June 29, 1989, they separated, and Ahmed Farah filed a bill to have the marriage declared void and Naima Mansur filed for divorce and equitable distribution.

At trial, Ahmed Farah introduced testimony from a solicitor of the Supreme Court of England and Wales that a marriage performed in England is void ab initio unless all statutory formalities of the Marriage Act are satisfied. The Marriage Act of England requires issuance of a marriage license, fifteen-day residence in England by one of the parties before the marriage, and the issuance of a certificate of marriage by a duly authorized registrar of marriages. Ahmed Farah and Naima Mansur, in their proxy marriage, did not obtain a special license nor did they comply with any of the formalities required by the Marriage Act of England.

Naima Mansur contends that, even though they did not comply with the requirements of the Marriage Act of England, her marriage to Ahmed Farah is valid and must be recognized in Virginia. She asserts that the English law governing her marriage is not applicable because the marriage ceremony was completed in Pakistan by conducting the “Rukhsati,” and, furthermore, that the proxy mar-
riage conducted in London was valid under Pakistani law, which recognizes a valid Islamic marriage.

A marriage that is valid under the law of the state or country where it is celebrated is valid in Virginia, unless it is repugnant to public policy. *Kleinfield v. Veruki*, 7 Va.App. 183, 186, 372 S.E.2d 407, 409 (1988). A marriage that is void where it was celebrated is void everywhere. *Spradlin v. State Compensation Commissioner*, 113 S.E.2d 832, 834 (W.Va.1960). Although the trial judge found that the marriage was celebrated in England, he ruled, however, that

... the marriage of the parties took place in London under Moslem law which was applicable to the parties, that the marriage by proxy is sanctioned under Moslem law and that the law of the state of Pakistan sanctions marriages performed under the personal law of the parties which in this case was Moslem law * * *. The Commonwealth of Virginia recognizes the marriage as consistent with Islamic law and therefore as valid by a state, viz., Pakistan, to which the comity of recognition is due.

The trial court granted the parties a divorce based upon a separation of more than one year and ordered equitable distribution of their jointly owned marital residence by evenly dividing the equity of approximately $62,000. The fact that Pakistan may recognize the parties’ marriage as valid because it was valid according to Islamic religious law does not control the issue of the validity of the marriage under Virginia law. In Virginia, whether a marriage is valid is controlled by the law of the place where the marriage was celebrated. *Kleinfield*, 7 Va.App. at 186, 372 S.E.2d at 409. Thus, the question is whether aspects of the marriage were performed in Pakistan, as the wife contends, so that it was a marriage celebrated in Pakistan, or whether it was a valid marriage celebrated in England.

The only aspect of the Muslim ceremony that occurred in Pakistan was the “Rukhsati,” or reception, which the evidence showed is merely a custom that has no legal significance and is not a formality required for a legal marriage in Pakistan. Furthermore, at trial, evidence was presented that even Pakistan would not recognize the proxy marriage in England as valid because, contrary to Islamic law, the parties had not signed the “Nikah” at the same time and also because the wife was a member of a controversial Muslim sect that the Pakistani government did not recognize. No evidence established that a marriage ceremony, or any part of it, occurred in Pakistan or that it was celebrated in any jurisdiction other than England.
Because the marriage was contracted and celebrated in England, the validity of the marriage is determined according to English law. Id. at 186, 372 S.E.2d at 409. The Marriage Act of England requires that a marriage be contracted in strict compliance with its statutory formalities. None of those formalities were complied with in the proxy marriage. Therefore, the marriage was void ab initio in England and is void in Virginia.

Furthermore, Ahmed Farah and Naima Mansur did not enter into a common-law marriage that Virginia recognizes. Virginia does not recognize common-law marriages where the relationship is created in Virginia. Offield v. Davis, 100 Va. 250, 253, 40 S.E. 910, 914 (1902). Virginia does recognize a common-law marriage that is valid under the laws of the jurisdiction where the common-law relationship was created. Kleinfield, 7 Va.App. at 186, 372 S.E.2d at 409; Metropolitan Life Ins. Co. v. Holding, 293 F. Supp. 854, 857 (E.D.Va. 1968). There is no evidence, however, that Ahmed Farah and Naima Mansur created a common-law marriage by entering into a relationship as husband and wife in any jurisdiction that recognizes common-law marriages.

For these reasons, we hold that Ahmed Farah and Naima Mansur never entered into a marriage that is recognized as valid in Virginia. Accordingly, no marriage existed from which the trial judge could grant a divorce according to Virginia law. Therefore, we reverse the trial judge’s declaratory judgment finding that the parties entered into a valid marriage, and we remand the matter for the circuit court to vacate the divorce decree and order of equitable distribution. We leave the parties to seek such other remedies as are appropriate to determine and resolve their property rights.

Reversed and remanded.

Points for Discussion

a. Choice of Law Principles

Farah recites the traditional choice of law rule of lex loci celebrationis, sometimes referred to as lex loci contractus: the validity of a marriage is determined based on the law of the place where it is celebrated or contracted. Statutes in a number of states incorporate this principle. See also Uniform Marriage and Divorce Act § 210, 9A U.L.A. (Part 1) 194 (1998).

A different rule is included in Restatement (Second) of Conflict of Laws § 283 (1971), which states that the “validity of a marriage is to be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage.” Restatement §6 lists these
factors as bearing on the question of significant relationship: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; (g) ease in the determination and application of the law to be applied. See, e.g., Donlann v. Macgurn, 55 P.3d 74 (Ariz. Ct.App.2002) (applying § 283 to uphold validity in Arizona of marriage that was invalid under the law of Mexico, where it was celebrated). The results in *Farah* could be found either to support or reject the Restatement approach, since the Restatement does not indicate which factors should be given the greatest weight. Which of the listed factors are most important in this case? When the Restatement speaks of protecting expectations, to whose expectations is it referring?

b. Marriage Validation

A number of English cases have held that in some circumstances, English common law marriage principles could serve to validate foreign marriages contracted without the proper formalities. In Taczanowska (Orse. Roth) v. Taczanowski, [1957] P. 301, 2 All E.R. 563, the court refused to annul a marriage performed in Italy at the end of World War II by a Roman Catholic priest serving as a Polish army chaplain. The bride and groom were both Polish nationals, the bride a civilian refugee and the groom an officer in the Polish army serving in Italy. The couple did not observe the marriage formalities of either Poland or Italy. They became domiciled in England a year later, and had one child in that year. The Court of Appeal upheld the marriage as a common law marriage, notwithstanding the foreign nationality and domicile of the parties at the date of the ceremony. Other English cases reaching similar results are Preston (Orse Putynski) v. Preston (Orse Basinska), [1963] 2 All E.R. 405, [1963] P. 411; and Kochanski v. Kochanska, [1958] P. 147, 1957 All E.R. 142. Cf. Lazarewicz v. Lazarewicz, [1962] P. 171, 2 All E.R. 5 (marriage invalid where parties clearly chose to submit to Italian law). A number of U.S. cases reach the same conclusion, upholding the validity of marriages solemnized in a traditional or religious ceremony in another country, despite a failure to comply with the formalities required in the place of celebration. See, e.g., *Xiong ex rel. Edmondson v. Xiong*, 648 N.W.2d 900 (Wis. Ct.App.2002); *Amsellem v. Amsellem*, 730 N.Y.S.2d 212 (Sup.Ct.2001).

Professor Alfred Ehrenzweig defended the result in *Taczanowski* on a principle of validation: if some reasonable argument can be made in favor of recognizing a marriage, that should be done, rather than frustrating the parties’ expectations by applying technical rules which are not based on important policies. Alfred Ehrenzweig, Conflict of Laws, 378–379 (1962). Could the Virginia Court of Appeals have upheld the marriage in *Farah* on this basis?
c. Estoppel

There are strong public policy reasons for upholding marriages despite defects in solemnization, particularly when one of the parties raises the challenge. In *Yun v. Yun*, 908 S.W.2d 787 (Mo.Ct.App.1995) the court rejected husband’s argument that there was no valid marriage where a license was not properly obtained prior to the ceremony. Among other grounds for its decision, the court concluded that he should be equitably estopped from denying the validity of the marriage. “Mr. Yun engaged in a marriage ceremony, cohabitation, and other conduct consistent with the existence of a marriage relationship. He obtained the benefits of marriage to Mrs. Yun, and lived the life of a married man. He participated in bringing children into the marriage and did not disavow the existence of a marriage.... Mr. Yun never, until after Mrs. Yun decided to seek dissolution, informed Mrs. Yun that he would take the position there was no marriage. He now seeks to avoid the marriage only to deprive Mrs. Yun of the relief which the law would provide her.” Should this estoppel principle have been invoked in *Farah*?

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**Engagement**

Under the English common law, a broken engagement might be followed by a lawsuit for *breach of promise to marry*. During the sixteenth century, when marriages among the wealthy were often extensively negotiated property transactions, the remedies in such an action were similar to those for breach of a commercial contract. In later years, the action came to look more like a tort action, in which damages might be given for injury to the plaintiff’s feelings, health, and reputation and for expenses such as costs incurred in preparing for a wedding.

Widespread criticism of the suit for breach of promise to marry (as well as related tort actions including *seduction* and *alienation of affections*) led to the passage of *heartbalm statutes* abolishing these claims in many jurisdictions in the United States beginning in the 1930s. See *Gilbert v. Barkes*, 987 S.W.2d 772 (Ky.1999) (listing 28 other jurisdictions in which the action has been abolished.) The action is still recognized in some jurisdictions; see, e.g., *Finch v. Dasgupta*, 555 S.E.2d 22 (Ga. Ct. App. 2001). See also 1 Homer H. Clark, Jr., Domestic Relations, 1–31 (2d ed. 1987), and Rebecca Tushnet, Note, *Rules of Engagement*, 107 Yale L.J. 2583 (1998).
2. Common Law and Putative Marriage

The doctrines of common law marriage and putative marriage are expressions of the marriage validation principle, which seeks to uphold marriages whenever possible. These doctrines serve an important remedial purpose, allowing courts to extend the legal rights and obligations of marriage to couples who behaved as if they were married. In this respect, the doctrines are similar to other rules and presumptions in favor of marriage considered in this chapter. In addition, common law marriage served to legitimate the children of couples who had not complied with marriage licensing requirements. The Supreme Court considered these arguments in *Meister v. Moore*, 96 U.S. 76 (1877).

Cohabitation alone, even for an extended period of time, does not give rise to a common law marriage in any state. The couple must have an agreement to be married, expressed in words of the present tense. This is often proved indirectly by circumstantial evidence of cohabitation and repute: that the couple lived together and that they held themselves out in the community as husband and wife.
Although once widely recognized, fewer than a dozen jurisdictions in the United States still permit common-law marriage. In states that have abolished common law marriage relatively recently, these issues still arise with respect to marriages entered into before the date when common law marriage was abolished. In addition, states that never permitted common law marriage or abolished it many years ago often recognize common-law marriages from other states under the *lex loci contractus* rule.

**Lewis v. Anderson**

173 S.W.3d 556 (Tex. App. 2005)

Opinion by Justice MOSELEY.

In this case, we must determine whether the evidence supports the jury’s finding that a common law or informal marriage existed between Mindy Jane Anderson and Harold Ray Lewis. In three issues, Lewis claims the evidence is legally and factually insufficient to support that finding and that the trial court improperly commented on the weight of the evidence in its instructions to the jury. We affirm the trial court’s judgment.

**BACKGROUND**

In 1998, Anderson left Lewis and filed for divorce. After Lewis denied the existence of a marriage, the trial court conducted a separate trial on the existence of an informal marriage. A jury found that Anderson and Lewis were informally married and the trial court entered a judgment declaring the existence of an informal marriage. This judgment was later severed from the divorce action. After the trial court denied his motion for judgment notwithstanding the verdict and for new trial, Lewis perfected this appeal.

The record indicates that Anderson, a nurse, and Lewis, a medical doctor, were married in a formal ceremony in December 1974. They bought a house in 1976. Lewis testified that in 1976 or 1977, it became clear to him that a divorce was necessary. One of his reasons was that Anderson was reluctant to sign documents about financial matters. Anderson resisted the divorce, saying she was committed to the marriage. Lewis determined that divorce was absolutely necessary because he would not allow his “financial situation to be jeopardized by her emotional state.” Lewis prepared the divorce papers himself without a lawyer and Anderson signed the waiver of service and divorce decree. Lewis presented the documents to the court and the divorce decree was signed on May 26, 1977.
Following the signing of the divorce decree, Anderson conveyed her interest in the residence to Lewis in August 1977. However, except for a few weeks in 1978 when Lewis (according to Anderson) locked her out of the house, Anderson and Lewis lived together for the next twenty years, until 1998. During this time, they joined a church as “Hal and Mindy Lewis” and adopted two children. Documents in both adoption proceedings referred to Anderson and Lewis as husband and wife, “Dr. and Mrs. Lewis,” or “Harold and Mindy Lewis.”

The couple attended Lewis family functions together and celebrated wedding anniversaries. Lewis wore a wedding ring until the couple separated in 1998. The record contains one tax return filed by the couple in 1997 as married filing jointly. Lewis could not remember whether earlier tax returns were filed jointly or singly, but said the 1997 return was a mistake and he had notified the IRS of the mistake.

Anderson testified she did not remember the 1977 divorce decree until sometime after this suit was filed in 1998. However, she wrote to Lewis sometime in 1978 about the termination of their marriage the previous year. She did not dispute the divorce or her signature on the waiver and divorce decree. The jury found the parties were informally married as of September 21, 1982, the date they filed the petition to adopt their first child.

DISCUSSION

Lewis's first and second issues challenge the legal and factual sufficiency of the evidence to support the finding of an informal marriage. Specifically, he challenges the sufficiency of the evidence of an agreement to be married.

1. Legal Sufficiency of the Evidence

* * *

A common law, or informal, marriage may be proved by evidence that: (1) the parties agreed to be married and after the agreement; (2) they lived together in Texas as husband and wife; and (3) there represented to others that they were married. TEX. FAM. CODE ANN. § 2.401(a)(2) (Vernon 1998). The proponent of a common law marriage may prove an agreement to be married by circumstantial as well as direct evidence. Russell v. Russell, 865 S.W.2d 929, 933 (Tex.1993). The legislature has not excluded the finding of a tacit agreement to be married, but circumstantial evidence must be “more convincing” than before the 1989 amendments to the statute. Direct evidence of an agreement to be married is not required. Evidence of cohabitation and representations that the couple is married may constitute circumstantial evidence of an agreement to be married, but “the circumstances of each case must be determined based upon its own facts.”
Lewis makes three arguments in support of his first issue: (a) the evidence conclusively negates an agreement to be married; (b) there is no evidence of the holding out of a new marriage; and (c) there is no evidence of the date of the marriage found by the jury.

(a) Evidence of Agreement to be Married

The record contains evidence that after the 1977 divorce, Lewis and Anderson lived together as husband and wife in Texas and represented to others that they were presently married. In 1978, Anderson wrote Lewis a note expressing regret over their situation and acknowledging “the termination of our marriage and the resulting property settlement.” She also stated, “I continue to be committed to a marriage with you and our future.” After a few weeks of separation in 1978, the couple resumed living together and continued to live together for the next twenty years. They joined a church together in 1979 as “Hal and Mindy Lewis” and Anderson heard Lewis tell the pastor that they were married. The pastor testified the couple represented themselves as “Hal and Mindy Lewis” and he knew both of them by the name Lewis.

In 1982, the couple hired an attorney to adopt their first child in a private adoption. Correspondence from the adoption attorney referred to them as “Dr. and Mrs. Lewis.” Anderson testified that Lewis told the attorney they were married. Lewis admitted he reviewed the lawyer’s correspondence and never told the lawyer they were not married or were divorced. The petitions for termination of the parental rights of the birth mother and for adoption of the child signed by their attorney identified Anderson and Lewis as husband and wife. Correspondence arranging the social study for the adoption was addressed to “Dr. & Mrs. Harold Ray Lewis.” Anderson heard Lewis tell the social worker they were married. She also heard Lewis testify in court at the adoption hearing that they were married. The decree of adoption signed by the judge on February 11, 1983 recites that “On this day Petitioners, Harold Ray Lewis and wife, Malinda Jane Lewis, appeared in person and by attorney and announced ready for trial.” Lewis testified that he did not tell his attorney, the social worker, or the adoption court that he and Anderson were not married and were divorced because he did not feel it was important or relevant.

In 1985, the couple adopted another child through Hope Cottage. They signed a custody agreement with Hope Cottage as “Harold Ray Lewis and Malinda J. Anderson Lewis, husband and wife respectively.” The document obligated them to reimburse Hope Cottage for expenses of the child and mother in the amount of $5000. Anderson heard Lewis tell Hope Cottage and testify in court that they were married. The adoption decree identified the parties as “Harold and Mindy Lewis.” Anderson also heard Lewis tell their children that they were married, but
never heard him tell the children they were divorced. Anderson testified that she and Lewis represented themselves as married to the children's schools.

Lewis argues there is no evidence of an agreement to be married after the divorce and that the evidence conclusively shows the opposite—that the couple did not agree to be married. Lewis points to some of Anderson's testimony that after the divorce, she and Lewis did not have discussions that they were “common law married” and that the only date she asserted they were married was the date of their 1974 ceremonial marriage. He also relies on Anderson's testimony that she felt her agreement to be married to Lewis began in 1974 and never ended. Lewis testified that there was no agreement to be married after the divorce.

Anderson also testified, however, that during the period after the divorce, she felt they were husband and wife. She said, “we had an agreement that we were married every year. We celebrated our anniversary every year.” During cross-examination, she testified:

Q I'm sorry. You had discussions between 1977 and 1998 that you were informally married?
A We agreed that we were.
Q Is that what you just testified to?
A We had—we agreed that we were married. We didn’t have a discussion as to whether it was formal or informal.
Q I apologize, I'm a little lost. Just a moment ago you testified, we had discussions that we were informally and formally married. Is that accurate?
A That's not accurate.
Q Okay. Thank you.
A We had discussions—
Q Did you—
A —that we were married.

While Anderson agreed that she and Lewis had not discussed being “common law married,” she testified that they did agree they were married and had an agreement they were married every year. After the 1977 divorce, she did not believe there was any reason to talk about a common law marriage with or remarrying Lewis, “[b]ecause he told me we were married.”

The issue here of course is not whether Anderson agreed to be married—she testified that she agreed to be married to Lewis from 1974 until she filed this action. The issue is whether there is some evidence that after the divorce, Lewis also agreed to be married to Anderson. Anderson’s testimony that in the years after the divorce, she and Lewis agreed they were married and that Lewis told her they were married is at least some evidence that Lewis did agree to be married to Anderson after the divorce. That Anderson did not remember the divorce later,
does not negate an agreement to be married after the divorce. See Dalworth Trucking Co. v. Bulen, 924 S.W.2d 728, 737 (Tex.App.-Texarkana 1996, no writ) (“She may have been mistaken about the effectiveness of the divorce decree, but so long as she and Ricky met the requirements of a common law marriage sometime after the divorce and before he died, they were capable of entering into a new marriage after the acknowledged divorce.”). It is undisputed that Lewis knew about the divorce; yet there is evidence that afterwards he told Anderson and others they were married. Anderson wanted to be married to Lewis and there is evidence that Lewis agreed with her after the divorce.

In addition to Anderson’s direct testimony of an agreement to be married, the evidence of cohabitation and representations to others is circumstantial evidence of an agreement to be married. See Russell, 865 S.W.2d at 933 (stating agreement to be married may be shown by direct or circumstantial evidence or both). The jury could reasonably infer that Lewis and Anderson agreed to be married after their divorce.

* * *

Lewis relies primarily on Gary v. Gary, 490 S.W.2d 929 (Tex.Civ.App.-Tyler 1973, writ ref’d n.r.e.), a case decided some twenty years before Russell. However, each case must be decided on its own facts, Russell, 865 S.W.2d at 933, and we conclude Gary is distinguishable. * * *

The evidence of an express agreement, the lack of doubt about the validity of the divorce, the long cohabitation and adoption of children, the representations of a present marriage for an extended time, and Lewis’s willingness to sign or accept without question legal documents referring to an existing marriage with Anderson distinguish this case from Gary. We also distinguish Gary because the evidence of holding out in this case is more convincing than in Gary. See Russell, 865 S.W.2d at 932 (“evidence of holding-out must be more convincing than before the 1989 [amendment!”] (quoting Joseph W. McKnight, Family Law: Husband and Wife, 44 SW. L.J. 1, 2–3 (1990)).

(b) Holding out of a New Marriage

Lewis argues that the fact that he and Anderson did not tell anyone they were divorced, negates a holding out of a subsequent informal marriage. He argues the evidence they represented they were married following the divorce, was a holding out of the earlier ceremonial marriage (that was dissolved by the 1977 divorce). We disagree. While the parties did not discuss the divorce, the divorce decree

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2 There is evidence in the record that Lewis told his brother at some point that he and Anderson were divorced, and Lewis testified that Anderson told the staff of Hope Cottage during the second adoption that she and Lewis were divorced.
was a matter of public record and its validity was never disputed. As a matter of law, the 1974 ceremonial marriage was terminated. Thus, when the parties later represented that they were presently married, the representation was of a new, current marriage rather than the old, previously terminated ceremonial marriage.

* * * Lewis argues it would be reasonable to infer from the evidence that the parties represented they remained married under the 1974 ceremonial marriage after the divorce. We disagree. There is evidence that after the divorce, both Lewis and Anderson represented to others that they were presently married. Some of this evidence was disputed; however, a reasonable jury could disbelieve the disputed evidence and resolve the disputes in favor of the finding of an agreement and holding out. Although there was evidence that the parties submitted the 1974 marriage certificate to the social worker in one or both of the adoptions, the undisputed facts remain that the ceremonial marriage was terminated by the 1977 divorce and that they represented they were presently married at the time of the adoptions.

Because the earlier ceremonial marriage had been terminated by the divorce, it is not reasonable to infer that the later representations of a present marriage were representations of the terminated marriage instead of a new agreement to be married. Certainly Lewis was aware of the divorce and the termination of the ceremonial marriage. The evidence that he later represented to others that he was presently married to Anderson leads to only one logical inference—the representation was of a new post-divorce marriage. Any inference that the parties could unilaterally nullify the divorce decree by holding out that they remained married under the 1974 ceremonial marriage would not reasonable.

(c) Date of the Marriage

Lewis argues there is no evidence to support the jury's finding that they were informally married on September 21, 1982, the date the first adoption petition was filed. This date is significant because the petition was a representation by the couple through their attorney that they were husband and wife. The couple had been living together since 1978. Anderson testified that she and Lewis had an agreement they were married every year. There is evidence that Lewis told the attorney who prepared the petition that he and Anderson were married. Evidence that the parties continued to represent that they were married when they later adopted a second child tends to corroborate that they were married by the time of the first adoption. Thus, there is evidence that by the time the first adoption petition was filed, all of the elements of an informal marriage existed. See Winfield v. Renfro, 821 S.W.2d 640, 646 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (elements may occur at different times, but until all three exist there is no common law marriage).
(d) Conclusion

Viewing the evidence in the light most favorable to the jury's finding, we conclude the evidence is such that reasonable minds could differ in their conclusions about whether Lewis and Anderson had an informal marriage. Crediting all favorable evidence that reasonable jurors could believe and disregarding all contrary evidence except that which they could not ignore, we conclude the evidence is legally sufficient to support the jury's verdict. We resolve Lewis's first issue against him.

2. Factual Sufficiency of the Evidence

Lewis also argues the evidence is factually insufficient. * * *

Lewis argues there is no direct evidence of an agreement to be married nor of a holding out of a post-divorce informal marriage. We have already concluded there is legally sufficient evidence of an agreement to be married after the divorce and that the representations that the couple was married in the years following the divorce was a representation of a current marriage post-dating the termination of the ceremonial marriage. We do not repeat that discussion.

In support of the factual insufficiency issue, Lewis points to his testimony that he and Anderson never agreed to be married following their divorce and never discussed whether they were married or were going to be married. He also testified that in 1994, he made arrangements to remarry Anderson, but she refused, saying she would not consent to being married to him. He denied ever representing to anyone (their pastor, lawyer, the social workers, or the adoption courts) that he was married to Anderson after the divorce. He testified that Anderson told the representatives of Hope Cottage that she and Lewis were divorced. He said the 1997 joint tax return was a mistake and he had contacted the IRS about the mistake.

There is also evidence that Lewis and Anderson kept separate banking arrangements and that Anderson continued to use her maiden name. For example, in 1980, Anderson purchased a house individually as “Mindy Anderson, a single woman.” However, when Anderson sold the house in 1985, the deed referred to her as “Mindy Anderson Lewis,” but was signed on her behalf by her agent.

The record indicates much of the testimony was conflicting. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. While not always clear and consistent, Anderson did testify to an agreement and holding out. It was up to the jury "to resolve conflicts and inconsistencies in the testimony of any one witness as well as in the testimony of different
witnesses.” *Ford v. Panhandle & Santa Fe Ry. Co.,* 151 Tex. 538, 252 S.W.2d 561, 563 (1952). After reviewing all the evidence, we cannot say the evidence is so weak that the jury finding of an informal marriage on September 21, 1982 is clearly wrong and unjust. Thus the evidence is factually sufficient to support the verdict. We resolve Lewis’s second issue against him.

* * *

We affirm the trial court’s judgment.

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**Points for Discussion**

**a. Lewis**

What evidence served to support the finding of common law marriage in this case? What evidence tended to negate it? What evidence do you think was most persuasive to the jury? In your view, does the fact that the couple divorced in 1977 make this case easier or more difficult to decide? Would an estoppel theory have been preferable here?

**b. Proof of Common Law Marriage**

Under the leading English authority on common law marriage, *Dalrymple v. Dalrymple, 2 Hagg.Cons. 53, 161 Eng.Rep. 665 (1811)* the only requirement is proof of “* * * the consent of two parties expressed in words of present mutual acceptance * * *. ” Courts in the United States sometimes find a common law marriage based on evidence that the parties were thought by their friends and relatives to be married, and that they referred to each other as husband and wife in official documents or otherwise, even though there was little or no evidence of an explicit agreement to be married. See, e.g., *In re Marriage of Winegard, 257 N.W.2d 609 (Iowa 1977)*; *In re Estate of Benjamin, 311 N.E.2d 495 (N.Y. 1974)*. This has been true even under the Texas statute applied in Lewis and reprinted below. How did the court in Lewis explain the elements required under the Texas statute?

In cases in which there is clear evidence of a present agreement to be husband and wife, but the parties either never told people they were married, or they told some people they were married and told others they were not married, results are mixed, with some cases finding that a common law marriage existed. See, e.g., *Ridley v. Grandison, 389 S.E.2d 746 (Ga. 1990)*. The Utah statute adopted in 1987 sets forth requirements to establish an “unsolemnized marriage” including cohabitation, the mutual assumption of marital rights, duties and obligations, and a general reputation as husband and wife. The statute, which was enacted for
the purpose of preventing welfare fraud, does not require evidence of a present agreement to be married. See Clark v. Clark, 27 P.3d 538 (Utah), cert. den., 534 U.S. 1066 (2001).

An Islamic religious ceremony followed by representation in the community that the parties were married was held to constitute a valid common law marriage by State v. Phelps, 652 N.E.2d 1032 (Ohio Ct. App. 1995), so that the wife was incompetent to testify against the husband in a criminal case. If Virginia had recognized common law marriage, would the parties in the Farah case have had a valid common law marriage?

**Texas Family Code § 2.401 (2012):**

Proof of Informal Marriage

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(1) be a party to an informal marriage; or

(2) execute a declaration of informal marriage under Section 2.402.

(c) A person under 18 years of age may not:

(d) A person may not be a party to an informal marriage or execute a declaration of an informal marriage if the person is presently married to a person who is not the other party to the informal marriage or declaration of an informal marriage, as applicable.
c. Common Law Marriage Jurisdictions

Common law marriages can still be contracted in the jurisdictions shown in the chart below. Although New York no longer recognizes common law marriage, it does recognize a marriage contracted by a written, signed, witnessed and acknowledged document. N.Y.Dom.Rel.L. § 11(4) (2012). In New Hampshire, a statute provides that: “Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.” N.H. Rev. Stat. § 457:39 (2012).

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In recent years, common law marriage has been abolished by statute in Georgia (as of Jan. 1, 1997), Idaho (as of Jan. 1, 1996), and Pennsylvania (as of Jan. 1, 2005). These states continue to recognize common law marriages that commenced before the date when the law took effect. What are the policy arguments against recognizing common law marriages? Does common law marriage encourage fraud and perjury, or debase conventional marriage? What policy arguments support continuing or restoring recognition for common law marriage? See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75
Chapter 1  Marriage and Its Alternatives


Problem 1-8

Two young graduate students, Hank and Winnie, begin living together in a state that recognizes common law marriage. Although they believe that marriage is an immoral restraint on individual freedom, they begin to represent themselves as married in order to make it possible to live together in the university’s family housing and to make Winnie eligible for the lower resident tuition rate. Hank and Winnie also tell their parents that they have gotten married. After living in this way for three years, Hank is killed in an automobile accident. May Winnie recover as a surviving spouse under the wrongful death statute in the state? May Winnie take Hank’s property against his will? If Winnie or Hank had consulted you after they began living together in this way, what would you have advised them about their legal rights? (Cf. Schrader v. Schrader, 207 Kan. 349, 484 P.2d 1007 (1971).)

Problem 1-9

Assume that Hank and Winnie move in together in the circumstances described above, but that before they do so they execute a notarized “Affidavit of Common Law Marriage” prepared by the university housing office. If they live together for three years and then separate, are they required to get a divorce before marrying again? If Winnie has significant assets, can Hank seek a division of property? (See Bell v. Ferraro, 849 A.2d 1233 (Pa. Super. Ct. 2004).)

Renshaw v. Heckler

787 F.2d 50 (7th Cir. 1986)

GEORGE C. PRATT, Circuit Judge:

This appeal presents a single question: did the Secretary of Health and Human Services and the district court err in determining that, under Pennsylvania law, plaintiff Edith L. Renshaw was not the common-law wife of the decedent Albert Renshaw, and therefore not entitled to widow’s insurance benefits under Title II of the Social Security Act. Finding that Edith and Albert Renshaw had entered into a valid common-law marriage under the laws of the Commonwealth of Pennsylvania, we reverse the decision of the district court and remand to the Secretary for action consistent with this opinion.
BACKGROUND

After a brief courtship following their respective divorces from other individuals, Albert and Edith Renshaw began living together on July 5, 1958 in Baltimore, Maryland. Although the couple did not have a formal ceremonial marriage, Mrs. Renshaw testified that when she and Mr. Renshaw began living together they agreed to live “just as though [they] were married” and that they considered themselves “husband and wife”. The evidence supports her assertion.

Edith immediately adopted the last name Renshaw and a short time later, changed the name on her social security card—the only identification she had at that time—to reflect her new status. The couple told friends and relatives that they had been married, and introduced each other to relatives, friends, and acquaintances as husband and wife.

Mr. Renshaw gave Mrs. Renshaw a wedding band shortly after they began to live together, and throughout the 21 years they lived together they celebrated July 5 as their marriage anniversary. The couple never separated or broke up, and Mrs. Renshaw testified that neither ever had relationships with others during this time. Moreover, the couple filed joint tax returns as husband and wife, and Mr. Renshaw listed Mrs. Renshaw as his wife and beneficiary on his life insurance policy.

Immediately after their marriage the Renshaws lived in Maryland for several months. After that, they moved to Buffalo, New York, where they lived for the next twenty years. During this time, the couple had one child, Lorna Gail Renshaw.

On approximately eight occasions between 1968 and 1975, the Renshaws drove to Virginia and North Carolina to visit relatives. Since the visits required a lengthy drive each way, the Renshaws always spent the night at the Port Motel in Port Treverton, Pennsylvania, a state that recognizes common-law marriage. Their daughter always accompanied them on these trips; on occasions when Mr. Renshaw’s mother was in Buffalo, she also traveled with them.

It is unknown whether the couple signed the register as husband and wife since the motel records were unavailable and since Mrs. Renshaw never accompanied her husband to the motel office when he signed the guest register. However, she did recall hearing him make reservations by phone and specifying the date and the fact that he would be there with himself, his wife, and his daughter.

While at the motel in Pennsylvania, the Renshaws would check into their room, eat dinner at the restaurant, walk around the motel grounds, retire for the evening, and continue their journey the next morning. With the exception of a
coincidental meeting with her brother, who believed that she and Mr. Renshaw were legally married, the couple never met anyone they knew while in Pennsylvania.

**DISCUSSION**

Section 202(e) of the Social Security Act, 42 U.S.C. § 402(e), provides that a widow of an individual who died while fully insured is entitled to widow’s insurance benefits, if she meets certain other conditions not in issue on this appeal. Section 216(h)(1)(A) of the Social Security Act, 42 U.S.C. § 416(h)(1)(A), provides that an applicant is the widow of an insured individual if the courts of the state in which the insured individual was domiciled at the time of his death would find that the applicant and insured individual were validly married at the time of his death. Since Mr. and Mrs. Renshaw were domiciled in New York at the time of his death, New York law governs her status as a widow.

Although New York does not itself recognize common-law marriages, a common-law marriage contracted in another state will be recognized as valid in New York if it is valid where contracted. *Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292, 434 N.Y.S.2d 155, 157, 414 N.E.2d 657, 659 (1980).

The law to be applied in determining the validity of such a marriage is the law of the state in which the marriage occurred. Since plaintiff claims that she contracted a common-law marriage with her husband in Pennsylvania during their travels through the state, the appropriate law to apply is the law of Pennsylvania.

The Commonwealth of Pennsylvania recognizes the institution of common-law marriage. *In re Estate of Stauffer*, 504 Pa. 626, 476 A.2d 354, 356 (1984). Believing that common-law marriage is a fruitful source of perjury and fraud, however, the Pennsylvania courts have imposed a heavy burden on one who grounds his or her claim on an allegation of common-law marriage.

Generally, a common-law marriage may be created by uttering words in the present tense with the intent to establish a marital relationship. *Commonwealth v. Sullivan*, 484 Pa. 130, 398 A.2d 978, 980 (1979); but where no such utterance is
proved, Pennsylvania law also permits a finding of marriage based on reputation and cohabitation when established by satisfactory proof. In re Estate of Wagner, 398 Pa. 531, 159 A.2d 495, 498 (1960).

In reaching his determination that the Renshaws had not entered into a valid common-law marriage under Pennsylvania law, the magistrate—to whom the case was referred on consent of the parties—noted that “if the facts had shown that the Renshaws lived their lives primarily in Pennsylvania, and conducted themselves there as the evidence indicates they conducted their lives in New York, their marriage would be declared a valid common-law marriage by a Pennsylvania court.” “Under this hypothetical, he continued, “the facts would show the plaintiff clearly was entitled to the presumption of marriage by her showing of the continuous relationship and the holding of themselves out as husband and wife.” Magistrate’s Decision and Order, at 9. The magistrate declined to make such a finding, however, since “at best only 16 days out of Mr. Renshaw’s lifetime were spent in Pennsylvania [and] the overwhelming bulk of the supporting evidence rests on actions taken outside of Pennsylvania in non-common law states.” Relying on Peart v. T.D. Bross Line Construction Co., 45 A.D.2d 801, 357 N.Y.S.2d 53 (3d Dep’t 1974), the magistrate concluded that absent proof of some present intent to marry while in Pennsylvania, the parties had not contracted a valid common-law marriage under Pennsylvania law.

The facts admittedly present a unique situation. Although we have found no Pennsylvania cases directly on point, New York courts have recognized valid common-law marriages under similar factual situations. McCullon v. McCullon, 96 Misc.2d 962, 410 N.Y.S.2d 226 (Erie County 1978) (valid common-law marriage where New York residents vacationed in Pennsylvania for two to four weeks at a time over a 30–year period); Skinner v. Skinner, 4 Misc.2d 1013, 150 N.Y.S.2d 739 (New York County 1956) (valid common-law marriage found on the basis of a three week visit to Pennsylvania). But see Peart v. T.D. Bross Line Construction Co., 45 A.D.2d 801, 357 N.Y.S.2d 53 (3d Dep’t 1974) (three or four days’ stay as a cohabitating couple in Pennsylvania did not establish the existence of a common-law marriage). We think that a New York court would find that the Renshaws had contracted a valid common-law marriage in Pennsylvania.

Although Mrs. Renshaw furnished no proof of words in the present tense establishing a marriage contract while in Pennsylvania, she did present proof of cohabitation and reputation. The Renshaws’ stays in Pennsylvania were admittedly
short; but they cohabitated during the entire time that they were there. While the evidence of reputation is not extensive, they held themselves out as husband and wife to every individual they knew that they saw in Pennsylvania—his mother, her brother, and their daughter. Moreover, Mrs. Renshaw testified that when Mr. Renshaw made reservations over the phone, he indicated on at least one occasion that the reservations were for himself, his wife, and their daughter.

In different circumstances, such facts alone might not prove sufficient. But the uncontroverted evidence as to their 21 year relationship, their intent to live as husband and wife during that time, and the fact that until these proceedings began all of their relatives, friends, and acquaintances assumed that they were married, negates the possibility that Mrs. Renshaw is attempting to engage in perjury or fraud and provides the additional assurance that Pennsylvania courts seem to have required before giving judicial approval to such a relationship. Cf. Chlieb v. Heckler, 777 F.2d 842 (2d Cir.1985) (absent other evidence of marriage relationship and in light of contrary intent, couple's two nights in Pennsylvania and one night in Ohio failed to establish common-law marriage).

In reaching our conclusion, we recognize that there is no evidence of some present tense intent to create the marriage while in Pennsylvania. The magistrate found this absence fatal to Mrs. Renshaw's claim, reasoning that "some conscious recognition by the parties that they intended to establish or at least consciously reaffirm their marriage" while in Pennsylvania was required. We disagree.

In Sullivan v. American Bridge Company, 115 Pa.Super. 536, 176 A. 24 (1935), a couple had exchanged marriage vows in a state that did not recognize common-law marriages while under the impression that in using the words they did use they were entering into a valid marriage. Subsequently, the couple moved to Pennsylvania. When the husband died, the widow sought benefits under the workman's compensation act. In objecting to her claim that she was the legal widow of her husband, her husband's employer relied on the general rule that a marriage, if valid in the state where it is contracted, is valid everywhere; and its corollary, which is not so well established, that, if the marriage is invalid in the state where it is contracted, it is invalid everywhere, and * * * that, as the attempted marriage in Maryland was invalid under the laws of that state, and there was no proof of any subsequent contract of marriage, in verba de praesenti, entered into between the parties, * * * in * * * Pennsylvania * * * there never was a valid marriage between them, and claimant never became his lawful wife.

The Pennsylvania court reasoned that the corollary to the general rule—that if the marriage is invalid in the state where it is contracted it is invalid everywhere—had been held subject to exceptions by the Supreme Courts of both Pennsylvania
and the United States. See *Phillips v. Gregg*, 10 Watts 158, 168 (1840); *Travers v. Reinhardt*, 205 U.S. 423, 27 S.Ct. 563, 51 L.Ed. 865 (1907). The court held that, even in the absence of a “new contract in verba de praesenti” in Pennsylvania, “the subsequent conduct of the parties was equivalent to a declaration by each that they did, and during their joint lives were to, occupy the relation of husband and wife.” *Sullivan*, 176 A. at 25. We think that the Renshaws’ conduct while in Pennsylvania and elsewhere is similarly sufficient to support finding such a declaration here, and conclude that the Renshaws entered into a valid common-law marriage under Pennsylvania law.

If the Secretary’s findings as to any fact are supported by substantial evidence in the record, they should not be disturbed by a court on review. 42 U.S.C. § 405(g). Under Pennsylvania law, however, the question as to whether a person has been legally married to another is a mixed question of law and fact for the purpose of review, *In re Cummings Estate*, 330 Pa.Super. 255, 479 A.2d 537, 541 (1984), and since the underlying facts are undisputed, we are not bound by the substantial evidence standard of review on this issue. Accordingly, we hold that the Secretary erred in finding that the Renshaws had not entered into a valid common-law marriage.

CONCLUSION

The judgment of the district court is reversed and the case is remanded to the Secretary for the purpose of determining: (1) whether Edith Renshaw, as the legal widow of Albert Renshaw, is eligible for widow’s insurance benefits, and (2) the amount of benefits due.

Points for Discussion

a. Proof of a New Agreement

The Magistrate who initially decided the case ruled against Mrs. Renshaw because she had not proved that they had made a new agreement to be married while they were in Pennsylvania. How does the appellate court resolve this question? Compare *Marriage of Swanner-Renner*, 209 P.3d 238 (Mont. 2009) with *Callen v. Callen*, 620 S.E.2d 59 (S.C. 2005).

In *Travers v. Reinhardt*, 205 U.S. 423 (1907), the parties lived together in various states that did not recognize common law marriage before moving to New Jersey, which did recognize common law marriage. The Supreme Court held that they contracted a common law marriage in New Jersey, although there was no
evidence of any new agreement to be husband and wife made after moving to that state, and although they only lived there for a short time before the husband died. In his dissent, Justice Holmes remarked: “To live in New Jersey and think you are married does not constitute a marriage by the law of that state.”

b. Choice of Law and Common Law Marriage

Should the choice of law principle applicable to recognition and validity of ceremonial marriages also be applied to test the validity of common law marriages? This is the New York conflicts principle, applied by the court in *Renshaw*, but other states take different approaches.

In states with strong public policies against common law marriage, courts do not recognize common law marriages contracted in other states if the parties maintained their domicile in a non-common law marriage state at the time they were alleged to have contracted a common law marriage. See for example, *Lynch v. Bowen*, 681 F.Supp. 506 (N.D. Ill. 1988) which held, on the basis of Illinois law, that four visits to states which recognized common law marriage, during which about twenty four days were spent in those states, did not produce a common law marriage. As a result, despite the fact that the parties lived together thirty-eight years and had three children, the woman was denied social security widow’s benefits on the man’s death.

Courts in another group of states recognize out-of-state common law marriages by their domiciliaries so long as the parties have an established place of abode in the common law marriage state. For example, *In re Estate of Bivians*, 652 P.2d 744 (N.M. 1982) held that a man and woman domiciled in New Mexico did not succeed in contracting a common law marriage during several business and pleasure trips to Texas and Colorado, concluding: “Where the couple was not domiciled in a common law marriage state, evidence of substantial contacts with the common law state must be presented.”

In states that take the New York approach, and recognize common law marriages contracted in a state where the parties have no domicile or substantial connections, how much of a stay in the common law marriage state should be necessary to produce a valid marriage? An overnight visit? A drive through the state without stopping overnight? A two-week summer or winter vacation? Should the result be different if the parties were domiciled in a state which did not recognize common law marriage, but visited a common law marriage state for the purpose of contracting a marriage there?
The answers to these doctrinal questions are influenced by different views of the wisdom of common law marriage as an institution, and often seem to be affected by the factual context of the particular case. To what extent should the law individualize results in this context? Are there better solutions to the problems that common law marriage seeks to solve?

Global View: Cohabitation vs. Common Law Marriage

Individuals sometimes argue that cohabitation relationships that are accorded legal effects in other countries, such as concubinage in Mexico, should be recognized as common law marriages in the United States. Courts have consistently refused to do this unless the legal status under foreign law confers all of the rights and benefits of marriage. E.g. In re Estate of Duval, 777 N.W.2d 380 (S.D. 2010); Rosales v. Battle, 7 Cal.Rptr.3d 13 (Ct. App. 2004).

c. Federal and State Law

As the court notes, the Social Security Act provisions under which Edith Renshaw sought widow’s insurance benefits rely on state law to define marital status and other family relationships. This is also true in many other contexts, such as federal income tax and immigration laws. Would it be preferable for these programs to have uniform nationwide application? The broader issue is debated in Kahn v. Immigration and Naturalization Service 36 F.3d 1412 (9th Cir.1994) (considering common law type relationship as factor in granting waiver of deportation).
Chapter 1  Marriage and Its Alternatives

Problem 1-10

Dave, a professional baseball player, learned that his girlfriend, Sandra, was pregnant. During a three-day stay together at the honeymoon suite of a hotel in Texas, they agreed to be “informally married.” The hotel suite was booked for them as “Mr. and Mrs. David Winfield.” Dave refused to have a ceremonial marriage, because he was concerned that his career and his image in the media would suffer if it were known that he had fathered a child before marriage. He bought a condominium in Texas for Sandra to live in, and spent about 100 days there with her during the off-seasons over the next two years. Sandra told her mother that they were married, but neither Dave nor Sandra wore a wedding ring, and Dave continued to see other women. Sandra’s tax returns, bank and pay records, and insurance forms all identified her as single. Can Sandra sue Dave for divorce and property division under the Texas statute? (See Winfield v. Renfro, 821 S.W.2d 640 (Tex. App. 1991).)

Putative Marriage

Putative marriage was adopted from the Napoleonic Code in states with a civil law tradition, such as California, Louisiana and Texas. The purpose of the doctrine is to protect parties to invalid marriages. Putative marriage occurs when a marriage is contracted at a time when an existing impediment makes the purported marriage either void or voidable and when one or both of the parties are ignorant of the impediment. Under these circumstances a party who entered the marriage in the good faith belief that it was valid is entitled to assert financial or property claims based upon the marriage, such as the claim to share in community property, the right to inherit from the putative spouse, the right to sue for wrongful death, or the right to social security benefits. If the impediment is later removed, the putative marriage becomes fully valid.

The putative spouse doctrine is now widely recognized in many states, either by statute or judicial decision. The Uniform Marriage and Divorce Act § 209, 9A U.L.A. (Part 1) 192 (1998), defines a putative spouse as “any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person.”
Problem 1-11

After Robert filed for divorce from his first wife, he began living with Feather. When they learned that the judge would sign Robert's stipulated divorce judgment on April 5, he and Feather made plans to be married that weekend in Acapulco, Mexico. On April 4, Robert and Feather went to a government office in Acapulco, filled out some forms, signed a document before witnesses, and at the end of the proceedings were told by an official that they were married. The next day, April 5, they found an English-speaking minister who performed a religious marriage ceremony for them, telling them that by Mexican law it was not a valid marriage unless there had been an earlier valid civil ceremony. Robert and Feather returned home to Nebraska, and lived together as husband and wife. Feather sued Robert for divorce more than twenty years later, and he defended on the ground that they were not validly married. Should the Court find that Feather was never married to Robert, and therefore that she has no financial or other claims upon him? (See Randall v. Randall, 345 N.W.2d 319 (Neb. 1984).)

Problem 1-12

Yang and Xiong, both refugees from Laos, met in Minnesota and two weeks later had a Hmong cultural marriage ceremony. At the time, Yang was 16, and too young to marry under state law. Five years later, the couple went to the courthouse, signed some papers, and obtained a marriage license, and continued living together as a married couple. Years later, Yang objected when Xiong brought home a second wife. When Yang went to speak to a lawyer about getting a divorce, she learned that a marriage license was not the same thing as a marriage certificate. Minnesota does not recognize common-law marriage. Can Yang seek property division and support from Xiong? (See In re Marriage of Xiong, 800 N.W.2d 187 (Minn. Ct. App. 2011).)
3. Marital Capacity and Consent

A marriage in which one party was below a minimum age, or where a party lacked capacity to consent to or consummate the marriage, or where consent was induced by fraud or duress or as a jest or dare, is traditionally treated as voidable. These marriages are fully valid, however, unless one of the parties (or a parent or guardian) brings an action for annulment or declaration of invalidity of the marriage. Standing to seek annulment of a marriage, and the time periods within which such an action may be brought, depend upon the specific grounds for annulment. See, e.g., Uniform Marriage and Divorce Act § 208, 9A U.L.A. (Part 1) 186–87 (1998).

Most states today set the age of consent for marriage at eighteen, although many states allow children below the statutory age to marry with the consent of their parents or approval of a court. Failure to obtain a parent’s consent does not invalidate the marriage, so long as the parties are above the minimum marriageable age. Most states set a minimum age for marriage at sixteen, but in a few states the minimum age follows the common law rule, which allowed marriage at age fourteen for boys and at age twelve for girls.

The authorities agree that “Marriage being a contract is of course consensual * * * for it is of the essence of all contracts to be constituted by the consent of parties.” Dalrymple v. Dalrymple, 2 Hagg.Cons. 54, 161 Eng.Rep. 665, 668 (1811). This implies that the consent must be freely and voluntarily given. Religious teachings have also emphasized that the marriage contract requires a free consent. When consent has been induced by fraud, duress, or undue influence, the marriage can be annulled. See, e.g., Clark v. Foust-Graham, 615 S.E.2d 398 (N.C. Ct. App. 2005).

Global View: Forced Marriage

International human rights laws take a strong position against child marriage and forced marriage, reflected in Article 16(2) of the Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights. Women and men, children and adults may be subject to marriage coercion, both domestically and in international settings. The U.S. State Department provides information and assistance with forced marriage prevention for U.S. citizens who may be facing marriage coercion in another country.
Janda v. Janda
984 So.2d 434 (Ala. Civ. App. 2007)

MOORE, Judge.

Jiri Janda appeals from a judgment of the Baldwin Circuit Court annulling his marriage to Antoinette Walters Janda. We affirm.

Background

On February 14, 2007, Antoinette filed a petition for an annulment of her marriage to Jiri. In support of her petition, Antoinette asserted that Jiri, a native of the Czech Republic, had fraudulently induced her to marry him; that, at the time of the marriage, Jiri had no intention of honoring his marital obligations; and that Jiri had married her only so that he could obtain a “green card,” which would permit him to remain in the United States. Jiri answered the complaint, denying those allegations; he counterclaimed for a divorce.

The Baldwin Circuit Court conducted a hearing on May 8, 2007, at which both parties appeared pro se and presented ore tenus evidence. At that hearing, Antoinette testified that she and Jiri were married on June 5, 2005, after a courtship of only a few months. She also testified that she and Jiri had “honeymooned” by camping in the Smokey Mountains; that, throughout their honeymoon, they had had no sexual relations; and that they had slept in separate tents the entire time. She further testified that, when they returned to live in her home in Baldwin County, Jiri would not share a bedroom with her.

Antoinette testified that throughout their marriage she and Jiri had never had a sexual relationship of any kind. Antoinette initially believed that their differing expectations regarding a sexual relationship resulted from cultural differences. Antoinette testified that she eventually asked Jiri about the lack of a sexual relationship between them, and, according to Antoinette, Jiri had reported that he was unhappy with Antoinette’s weight. Antoinette then lost 65 pounds, but, she testified, Jiri still showed no romantic interest in her. Antoinette testified that, after 20 months of marriage, she realized that Jiri had married her never intending to engage in marital intercourse with her.

According to Jiri’s testimony, he is a native of the Czech Republic. He came to the United States in October 2001.\(^1\) Jiri claimed that he became a permanent

\(^1\) It appears that Jiri was in the United States on a temporary green card, valid for two years, before or at the time of his marriage to Antoinette. Jiri testified that he had visited the United States on two other occasions, once in 1996 and again in 1997. On those occasions, he had obtained “B2” tourist visas. Jiri also testified that, at one point, he had applied for a temporary work permit.
resident of the United States as a result of his marriage to Antoinette. Jiri acknowledged that if his marriage to Antoinette was annulled, he would be deported back to the Czech Republic. Jiri testified that if his marriage was terminated by divorce, rather than by annulment, whether he could remain in the United States was “between him and the immigration service.”

Jiri denied that he had proposed to Antoinette; he claimed that Antoinette had proposed to him in March 2005. He agreed that they had married in June 2005 and that he and Antoinette had purchased a grill and a television together after they were married. Jiri acknowledged that he had voluntarily quit working at some of his jobs. Jiri also admitted that he was unhappy with Antoinette’s weight, with the difficulties Antoinette experienced with her 19-year-old son, and with changes that had occurred in Antoinette’s personality and behavior following a hysterectomy. Jiri testified that he had maintained his own bedroom because Antoinette was “messy” while he was tidy. Jiri also complained that Antoinette at times would mistakenly call him by her son’s name.

The trial court entered an order annulling the marriage on May 8, 2007, specifically finding that the parties had not consummated the marriage and had not acted as a married couple, but had acted more as roommates, during their marriage. Jiri appeals, asserting that the trial court should have entered a judgment of divorce rather than an annulment.

Analysis

In this appeal, we must determine whether the trial court properly annulled the marriage of Jiri and Antoinette. Under long-standing Alabama caselaw, a court may annul a marriage because of fraudulent inducement going to “the essence of the marriage relation.” Williams v. Williams, 268 Ala. 223, 226, 105 So.2d 676, 678 (1958); Hyslop v. Hyslop, 241 Ala. 223, 226, 2 So.2d 443, 445 (1941); and Raia v. Raia, 214 Ala. 391, 392, 108 So. 11, 12 (1926). The existence of fraud is a question for the trier of fact -- in this case, the trial court -- to determine. This court may not predicate error on a finding of fact based on oral testimony unless that finding is plainly and palpably wrong, without supporting evidence, or manifestly unjust.

In Hyslop v. Hyslop, supra, the Alabama Supreme Court addressed extensively the issue of annulment on the basis of fraudulent inducement:

“The public policy of this state, evidenced by the statutes, the decisions, or the general consensus of opinion, does not regard a fraudulent marriage ceremony as sacred and irrevocable by judicial action; it does
not encourage the practice of fraud in such cases by investing a formal
marriage, entered into in consequence of deceit, with all the force and
validity of an honest marriage. While marriage is a contract attended
with many important and peculiar features in which the state is inter-
ested, and while it is one of the fundamental elements of social welfare,
its transcendent importance would seem to demand that wily and de-
signing people should find it difficult to successfully perpetrate fraud
and deceit as inducements to the marriage relation, rather than that such
base attempts should be regarded as of trivial importance and be wholly
disregarded by the courts. Unhappy and unfortunate marriages ought
not to be encouraged. Sch. Dom. Rel. § 24. The successful perpetration
of fraud is not deemed to be a subject for judicial encouragement.”

* * *

Hyslop, 241 Ala. at 225-26, 2 So.2d at 444-45 (quoting Gatto v. Gatto, 79
N.H. 177, 184, 106 A. 493, 497 (1919)). See also Williams, 268 Ala. at 225-26,
105 So.2d at 678 (quoting Hyslop).

We note that in both Williams, supra, and Hyslop, supra, the Alabama Supreme
Court cited with approval the case of Millar v. Millar, 175 Cal. 797, 167 P. 394
(1917). We find Millar to be directly on point. In that case, the California court
annulled the parties’ marriage, after eight months of cohabitation, because the
wife had refused to engage in a sexual relationship with her husband since the
date of their marriage ceremony. The California court concluded that, despite the
parties’ cohabitation, the wife’s secret intent to refuse to matrimonial intercourse
provided a proper basis for an annulment. * * *

Despite the age of these cited cases, we find no reason, and none has been
urged in this case, to depart from their long-standing recognition of the nature of
the marital relationship, the public policy attendant to that relationship, and the
impact of a fraudulent intent, held at the time of the marriage, upon that relation-
ship. We agree with Millar that a fraud perpetrated at the time of the marriage and
going to the essence of the marital relationship renders the marriage voidable by
the injured party. See Williams, supra, and Hyslop, supra (both citing Millar
with approval). Also, as recognized in Millar, supra, we agree that traditionally a sexual
relationship is implicit in marriage vows and that an unstated intent, held at the
time of the marriage ceremony, to utterly refuse to engage in a sexual relation-
ship with the other party is a fraud that alters the very essence of the marriage.
Finally, the continued viability of the principles stated above is evidenced by their application in more recent cases from other jurisdictions.\(^4\)

In this case, the trial court heard testimony indicating that, immediately after the marriage ceremony, Jiri refused to share a bed with Antoinette and refused to engage in sexual relations with her. Antoinette testified that she had remained in the marriage because she originally believed Jiri’s reluctance to engage in marital intercourse with her resulted from cultural differences between them. Jiri subsequently told Antoinette that he would not engage in marital intercourse with her because of her weight. However, after Antoinette lost 65 pounds, Jiri persisted in his refusal to engage in marital intercourse with her. Antoinette testified that, after some 20 months of marriage, she realized that Jiri had married her never intending to engage in marital intercourse with her. Upon that realization, she petitioned the court for an annulment. As recognized in *Millar supra*, these circumstances gave rise to a marriage that was voidable by Antoinette. By filing her petition, Antoinette sought to void her marriage to Jiri.

We acknowledge that, because of the length of time the parties cohabitated together, this is a close case and could have been resolved either way. However, the trial court resolved the evidence in favor of an annulment. Because the ore tenus rule applies and because the record contains substantial evidence to support the trial court’s judgment, we will not disturb that judgment. We, therefore, affirm the trial court’s judgment.

\(^4\) See, e.g., *In re the Marriage of Meagher*, 131 Cal. App. 4th 1, 7, 31 Cal. Rptr. 3d 663, 667 (2005) (recognizing that annulments on the basis of fraud are generally granted only in cases in which the fraud related in some way to the sexual or procreative aspects of marriage); *In re Marriage of Liu*, 197 Cal. App. 3d 143, 155-56, 242 Cal. Rptr. 649, 656-57 (1987) (annulling marriage because wife had fraudulently induced husband into marriage so that the wife could obtain a “green card”); *Stojcevska v. Anic* (No. 210144, Jan. 11, 2000) (Mich.Ct.App 2000) (not reported in Mich.App. or N.W.2d) (annulling marriage, upon wife’s request, because evidence indicated that wife’s parents had arranged her marriage to her cousin so that he could obtain a visa to United States); *V. J. S. v. M. J. B.*, 249 N.J. 318, 320, 592 A.2d 328, 329 (Ch. Div. 1991) (“Where the marriage has been consummated, the fraud of defendant will entitle plaintiff to an annulment only when the fraud is of an extreme nature, going to one of the essentials of marriage.”); *Bishop v. Bishop*, 62 Misc. 2d 436, 308 N.Y.S. 2d 998 (N.Y. Sup. Ct. 1970) (denying husband’s petition for annulment based on fraudulent inducement; court found no fraud in wife’s attempt to obtain a divorce and in her refusal to consummate the marital relationship because husband himself testified that he and wife had agreed they would marry and then immediately divorce; such an agreement did not contemplate marital intercourse).
Points for Discussion

a. Essentials of the Marriage

At a time when divorces were difficult to obtain, courts defined "the essentials of marriage" very narrowly, including only misrepresentations concerning the ability and willingness to have sexual relations and to bear children. The leading early authority for that view is *Reynolds v. Reynolds*, 85 Mass. 605, 3 Allen (85 Mass.) 605 (1862). In that case the wife concealed from her husband her pregnancy by another man. The parties had not had pre-marital sexual relations. In granting a decree annulling the marriage the court explained its reasoning in these terms:

"The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring. It would tend to defeat this object, if error or disappointment in personal qualities or character was allowed to be the basis of proceedings on which to found a dissolution of the marriage tie. The law therefore wisely requires that persons who act on representations or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of a 'blind credulity, however it may have been produced'."

* * *

"But a very different question arises where, as in the case at bar, a marriage is contracted and consummated on the faith of a representation that the woman is chaste and virtuous, and it is afterwards ascertained not only that this statement was false, but that she was at the time of making it and when she entered into the marriage relation pregnant with child by a man other than her husband. * * * In such a case, the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the gravest character on him with whom she enters into that relation. * * * "

85 Mass. 605, 3 Allen (85 Mass.) 605, 607, 609

b. Fraud

Over time, there has been an expansion of the kinds of fraud that courts recognize as an appropriate basis for granting an annulment. *Janda* repeats the rule that the fraud must relate to the essentials of the marriage in order to justify an annulment. Does the court define essentials? If Jiri had been willing to "honor his marital obligations" to Antoinette, could she have had the marriage annulled by proving that he married her only to obtain immigration benefits?
c. Sham Marriage

Courts hearing annulment actions have disagreed as to whether a marriage contracted for some ulterior reason should be treated as valid. For example, a Connecticut court refused to annul a marriage contracted for the sole purpose of “giving a child a name,” without any intention that the parties would live together as husband and wife. Schibi v. Schibi, 69 A.2d 831 (Conn. 1949). The court in Faustin v. Lewis, 427 A.2d 1105 (N.J. 1981) granted an annulment of a marriage the plaintiff had entered into for the purpose of becoming eligible for permanent residence in the United States.

Global View: Marriage and Immigration Law

Marriages that are valid in the place of celebration are generally recognized for purposes of federal immigration law, with specific restrictions applicable to proxy marriages and polygamous marriages. See generally Ann Laquer Estin, International Family Law Desk Book 39-40 (2012).

Under the 1986 Immigration Marriage Fraud Amendments, codified at 8 U.S.C.A. § 1186a (2012) an immigrant spouse in a marriage that has lasted less than two years is limited to a two-year conditional permanent residence status, and the spouses must usually petition jointly to have the condition removed at the end of two years. The procedures are included at 8 CFR § 216 (2012) and described on the U.S. Citizenship and Immigration Services web site.

Haacke v. Glenn

814 P.2d 1157 (Utah Ct. App. 1991)

Garff, Judge:

Appellant LeslieAnn Haacke appeals a final order denying her a decree of annulment and granting her a decree of divorce. Appellant asserts that the court erred because the findings supported a decree of annulment. We reverse and remand.
Facts

Appellant, LeslieAnn Haacke and appellee, Mark Mitchell Glenn participated in a marriage ceremony on December 16, 1989 in Bountiful, Utah. At the time of the ceremony, Haacke was employed as an attorney for the Inspector General’s Division of the Utah Department of Corrections. As part of her job she had unlimited access to criminal files and records. Thus, a marriage with a convicted felon would create a severe conflict of interest and would place Haacke in violation of state policy and procedure, and state statute.

Prior to and during the parties’ marriage, Glenn deliberately and intentionally concealed from Haacke the fact that he had been convicted of a second degree felony, theft of property, in Alabama. In fact, Glenn told Haacke that the purpose for his frequent travels to Alabama was to take care of prior child support obligations, when in fact he was using the parties’ joint funds for payment of fines and restitution attendant to his felony conviction. Haacke did not become aware of Glenn’s criminal record until she was informed by her employer. Subsequently, Gary W. DeLand, Executive Director of the Utah Department of Corrections, in a letter dated September 4, 1990, told Haacke that because of her marriage to a convicted felon, the Attorney General had determined there was a conflict of interest and, therefore, her employment with the department would terminate effective September 14, 1990. DeLand told her that she would be considered for reemployment in the event “the current circumstances were to change, eliminating the conflict of interest.” In a later letter, Haacke was informed that, even if she were to dissolve her marriage through divorce, the department would investigate whether or not she had been aware of Glenn’s criminal record prior to the marriage.

In response to discovering Glenn’s deception, Haacke filed a complaint for divorce. She later amended her complaint to request an annulment. The parties entered into a stipulation in which they consented to the entry of a decree of annulment. However, when the court heard the matter on September 14, 1990, it refused to grant the annulment, and instead granted a divorce. The court based the grounds for divorce on the following finding:

Plaintiff should be awarded a Decree of Divorce in this matter in that prior to the marriage, Defendant did make fraudulent misrepresentations concerning his honesty, trustworthiness and lack of criminal involvement. Defendant failed to inform Plaintiff that he had been convicted of a felony in the state of his previous residence, Alabama; he informed Plaintiff that he was traveling to Alabama to take care of prior child support obligations and problems when in reality he was utilizing the funds of these parties for payment of fines and restitution, and he failed to inform Plaintiff of his prior criminal activity, much to Plaintiff’s detriment in the form of loss of her employment with the State of Utah, Department of Corrections.
Haacke does not challenge the court’s findings, but appeals the court’s conclusion that she is not entitled to an annulment.

Annulment

Utah Code Ann. § 30-1-17.1(1) specifies two general categories of grounds for annulment. The first is for marriages that do not conform to Utah Code Ann. § 30-1-1. The second category allows for annulment “upon grounds existing at common law.” Utah Code Ann. § 30-1-17.1(2). Haacke claims that the lower court erred in failing to grant her an annulment on the common law ground of fraud.

Under common law, a marriage could be annulled for a fraud going to the essence of the marriage. The fraud must be such that directly affects the marriage relationship rather than “merely such fraud as would be sufficient to rescind an ordinary civil contract.” The misrepresentation must go to present and not future facts. Further, the fraud must be material to such a degree that, had the deceived party known of the fraud, he or she would not have consented to the marriage. “The test in all cases is whether the false representations or concealment were such as to defeat the essential purpose of the injured spouse inherent in the contracting of a marriage.”

As to the form the fraud takes, it may “consist of an affirmative false representation or the withholding of the truth when it should be disclosed.”

In determining fraud, courts have adopted a subjective standard and have considered the facts of the particular marriage. Wölfe, 19 Ill.Dec. at 311, 378 N.E.2d at 1186 (where husband concealed his prior marital history from Roman Catholic wife); Costello, 282 A.2d 432 (where husband omitted to tell wife of his heroin addiction); Lamberti v. Lamberti, 77 Cal.Rptr. 430, 432, 272 Cal.App.2d 482 (1969) (where husband’s secret intent in marrying was to acquire an advantageous alien status and where he falsely promised to go through a subsequent religious ceremony); Parks v. Parks, 418 S.W.2d 726 (Ky.1967) (where wife falsely represented at time of marriage that she was pregnant); Kober v. Kober, 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965) (where husband failed to disclose his extreme anti-Semitism to wife); Handley v. Handley, 179 Cal.App.2d 742, 3 Cal.Rptr. 910 (1960) (where wife secretly intended not to live with husband and not to adopt his name); Osborne v. Osborne, 134 A.2d 438 (D.C.1957) (where husband secretly intended not to live with his wife); Rathburn v. Rathburn, 138 Cal.App.2d 568, 292 P.2d 274, 277 (1956) (where wife secretly intended not to consummate the marriage); Vileta v. Vileta, 53 Cal.App.2d 794, 128 P.2d 376, 377 (1942) (where wife did not disclose her infertility); Rubman v. Rubman, 140 Misc. 658, 251 N.Y.S. 474 (1931) (where husband falsely told wife he loved her and did not disclose that real reason for marriage was to avoid deportation). See also
Leventhal v. Liberman, 262 N.Y. 209, 186 N.E. 675 (1933) (where husband did not disclose he had tuberculosis and was a narcotics addict).

Courts have recognized that justice may demand that an annulment be granted even though there is no case with the same set of specific facts. This includes cases where the grounds pleaded for annulment could also constitute grounds for divorce, such as here.

As to the factual pattern of this case, courts have granted annulments where one spouse has concealed from the other a criminal background. Lockwood v. Lockwood, 29 Misc. 2d 114, 220 N.Y.S. 2d 718 (1961) (where husband did not disclose his former drug addiction and prior criminal record); Douglass, 307 P.2d at 676 (“the fraud of the defendant in concealing his criminal record and true character was deceit so gross and cruel as to prove him to plaintiff to be a man unworthy of trust, either with respect to his truthfulness, his moral character or a disposition to be a law-abiding citizen.”).

The court’s findings in the instant case present a strong case for annulment on the common law ground of fraud. Glenn’s fraud went to the fact, present at the time of the marriage, that he had a felony criminal record. He affirmatively represented to Haacke that he traveled to Alabama to take care of child support arrearages. He falsely represented that joint funds were being used for child support when, in reality, the real purpose was to pay fines and restitution. Not only did Glenn’s fraudulent misrepresentation affect Haacke’s career, but, more importantly, it defeated “the essential purpose of the injured spouse inherent in the contracting of a marriage.” Douglass, 307 P.2d at 675. We think the same considerations given by the Douglass court have validity here. “There was no reason whatever to doubt that in consenting to marry defendant her purposes were . . . namely, to have a home, a husband of honorable character whom she could respect and trust, one whom she would be proud to have as a companion and to introduce to her friends, and who would be a suitable [father] for her children.” Douglass, 307 P.2d at 676.

Considering the relevant case law, and applying a subjective analysis to the particular marriage, we conclude that the original false representations and concealments by Glenn so violated the essential purpose of the marriage, that Haacke is entitled to an annulment. We therefore reverse the decree of divorce and remand for the court to enter a decree of annulment.

Reversed and remanded.

Bench and Billings, JJ., concur.
Points for Discussion

a. Materiality.

The Haacke case adopts a materiality principle to determine when fraud will justify an annulment. Is this the same as or different from the principle applied in Reynolds and Janda? How does the materiality test compare to rules governing the disaffirmance of commercial contracts for fraud? See, e.g., Restatement (Second) Contracts § 162 (1981); 12 Williston, Contracts, § 1490 (3d ed. Jaeger 1970). Can you devise a reasonably clear statutory provisions which would assist the courts in determining what types of misrepresentation or non-disclosure justify an annulment for fraud?

b. Annulment vs. Divorce

Why did Ms. Haacke seek an annulment rather than a divorce? With divorce now readily available in every state on no-fault grounds, actions for annulment are very rare. What purposes does the law of annulment serve today? When might you advise a client to pursue an annulment rather than a divorce?

Annulment and Declaration of Invalidity

An annulment, also known as a declaration of invalidity, is available for a marriage that is voidable based on a lack of capacity or consent. An action for annulment may also be brought by either party to a void marriage, such as one that is bigamous or that falls within the prohibited degrees of family relationship. In some circumstances, a parent or guardian may have standing to bring an action for annulment. See generally Uniform Marriage and Divorce Act (UMDA) § 208, 9A U.L.A. (Part 1) 186–87 (1998).

Actions for annulment lay within the jurisdiction of the ecclesiastical courts in England, and served an important function in the time before absolute divorce was permitted. An action for annulment usually resulted in a declaration that no marriage ever existed between the parties, either because the marriage was void ab initio or because the court's decree nullified the marriage retroactively. Under the common law, this had the result of bastardizing any children born of the marriage, and denying the spouse any possibility of alimony. With the emergence of statutes governing annulment and divorce in the United States, the distinction between the two was that a divorce terminated a valid existing marriage for the future, while an annulment declared that no valid marriage had ever occurred.
Today there may be important legal consequences from void or voidable marriages. Contemporary statutes protect the legitimacy of children born in void or voidable marriages, and grant courts authority to order financial remedies including spousal support or equitable division of property in an action for annulment or declaration of invalidity. See, e.g., UMDA § 208(d) and (e). See also Fontana v. Callahan, 999 F.Supp. 304 (E.D.N.Y. 1998) (allowing social security benefits to wife whose 27-year marriage ended in annulment rather than divorce).

Because of the rule that an annulment terminates a marriage retroactively, it has some consequences that are different from the consequences of divorce. For example, couples who filed joint income tax returns prior to having their marriage annulled are obligated to re-file separate returns. A spouse who had been receiving alimony from a prior marriage, subject to termination on his or her remarriage, may request that the initial alimony obligation be revived if the later marriage is annulled. See, e.g., Joye v. Yon, 586 S.E.2d 131 (S.C. 2003); Amundson v. Amundson, 645 N.W.2d 837 (S.D. 2002).

D. Restrictions on Marriage

In addition to regulations governing licensing and solemnization of marriages, and laws defining the requirements of marital capacity and consent, state laws include substantive restrictions on the entry into marriage. Marriage is not permitted in any state if either party was previously married, and that marriage has not been terminated by death or divorce. Marriage is also not permitted if the parties are related by blood or marriage within certain degrees. Bigamous or incestuous marriages are treated as prohibited and void. See, e.g., Uniform Marriage and Divorce Act § 207. Bigamy and incest may also be punishable under state criminal laws.

Before the Supreme Court’s ruling in Loving v. Virginia, reprinted above, many states also prohibited interracial marriages and subjected the parties to the threat of criminal prosecution. These boundaries were enforced for many years with laws that also criminalized nonmarital cohabitation or sexual relationships across the color line. One such law was upheld by the Court in Pace v. Alabama, 106 U.S. 583 (1883), and Pace remained good law until it was overruled in McLaughlin v. Florida, 379 U.S. 184 (1964). Because states took different approaches to interracial marriages, many courts considered whether an interracial marriage that was valid in the state of celebration must be recognized in other states.
Same-sex couples began to seek the right to marry in the early 1970s, challenging the explicit or implicit requirement in state laws that marriage must be between a man and a woman. In the past twenty years, many states have enacted new statutes or added language to their state constitutions to prohibit same sex marriages. At the same time, other states have begun to extend recognition to same sex marriages, prompting new and difficult conflict of laws questions.

1. Successive Marriages: Bigamy?

Monogamy is the controlling principle of Anglo-American marriage law: a person may have only one spouse at a time. This rule is expressed in civil statutes that treat a subsequent marriage as void if one partner has a living spouse from whom he or she has not been divorced, and also in criminal statutes that impose penalties for bigamy, for attempting to contract a marriage when a prior marriage remains undissolved, or for bigamous cohabitation, the crime of living with a person of the opposite sex as a spouse when there is an earlier marriage still in existence. See, e.g., Cal.Penal Code §§ 281, 282, 283, 284 (2012); Colo.Rev.Stat. Ann. § 18–6–201 (2012); Tenn.Code Ann. § 39-15-301 (2012); Model Penal Code § 230.1 (Official Draft 1985). See also Marjorie A. Shields, Annotation, Validity of Bigamy and Polygamy Statutes and Constitutional Provisions, 22 A.L.R.6th 1 (2007).

Despite this strong principle, rules against bigamy are not enforced very often. Criminal prosecutions are rare, although one famous case, Williams v. North Carolina, 317 U.S. 287 (1942) and 325 U.S. 226 (1945), did involve a bigamy prosecution, and there are several more recent examples involving fundamentalist Mormon communities. See, e.g., State v. Green, 99 P.3d 820 (Utah 2004). On the civil side, various doctrines dilute the force of the monogamy principle. One such doctrine is the presumption of the validity of the later marriage, addressed in the cases that follow. In many of the cases applying this presumption, there was no divorce ending the earlier marriage, yet the courts presumed that a divorce had occurred without great concern that one or both of the parties might be bigamists.
Chandler v. Central Oil Corporation, Inc.

853 P.2d 649 (Kan. 1993)

Lockett, Justice:

Claimant, Mary Glin Chandler, appeals a judgment of the district court which affirmed the decisions of an Administrative Law Judge (ALJ) and the Director of Workers Compensation which awarded benefits to another claimant, Eliza Davis Chandler, as the surviving widow of Fred R. Chandler, Sr., deceased. Mary Chandler appealed, claiming that the district court erred in failing to require the claimed common-law wife to overcome the presumption of validity of the subsequent ceremonial marriage between claimant Mary and the deceased. In an unpublished opinion filed August 28, 1992, the Court of Appeals reversed and remanded for further proceedings. 839 P.2d 82. Eliza Chandler’s petition for review was granted by this court.

Fred R. Chandler, Sr., was shot during a robbery in the course of his employment as a gas station attendant for Central Oil Corporation, Inc., respondent. Fred died on July 18, 1988, as a result of his injury.

Fred fathered three children with three different women. Fred had a son named Ruben Holmes who was born on March 6, 1955, to Dorothy R. Johnson. Fred and Dorothy were never married. Ruben was 33 years old when Fred was killed. Ruben never appeared in this action.

After his relationship with Dorothy, Fred married three women and fathered two other children. He first married Noletta J. Carter on June 20, 1964. Fred and Noletta were divorced on June 1, 1973. There were no children born of this marriage.

The second wife, Eliza, began living with Fred in 1969. Rosalin Chandler, the daughter of Fred and Eliza, was born August 27, 1971. She turned 18 on August 27, 1989, after Fred’s death, while this case was pending. Eliza and Fred were married in Arkansas on July 7, 1972. Eliza did not know that Fred was still married to Noletta at the time. Eliza and Fred continued to live together after Fred’s divorce from Noletta became final.

Mary, the third wife, and Fred began living together in April 1982. They were married on July 10, 1985, in Kansas City, Kansas. Fred R. Chandler, Jr., the son of Fred and Mary, was born July 14, 1983. Mary also had six children who were not Fred’s natural children. Fred and Mary lived together until his death on July 18, 1988.
After Fred’s death, both Eliza and Mary claimed to be the surviving spouse. In determining whether Eliza or Mary was entitled to Fred’s workers compensation death benefits, the ALJ concluded that, because Eliza and Fred continued to live together and hold themselves out as husband and wife after Fred’s divorce from Noletta became final, a common-law marriage existed between Eliza and Fred. Under these facts, Fred lacked capacity to enter into the subsequent marriage with Mary because his prior common-law marriage to Eliza had not been dissolved. The ALJ found that because Eliza was the common-law wife of Fred at the time of his death, Eliza and her children were entitled to receive benefits in various amounts and at various periods of time. The ALJ denied benefits to Mary and her children, except for Fred, Jr.’s, own benefits. Mary appealed to the Director of Workers Compensation. The Director upheld the ALJ. Mary appealed to the district court.

The district court observed the only issue on review was who was the surviving spouse of Fred R. Chandler, Sr. After reviewing the testimony, the exhibits, the submission letters of the parties, and oral arguments, the district court affirmed the ALJ and the Director’s determination that Eliza Chandler was the surviving spouse and, as a result, entitled to the benefits.

The district court noted that well-settled law in Kansas recognizes a common-law marriage if three elements are present: (1) the requisite capacities of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public. * * * The district court pointed out that both the award of the ALJ and the order of the Director recognized the prerequisites for a common-law marriage and set forth in detail the factual basis for concluding that such a relationship existed between Fred and Eliza at the time Fred died. The district court concluded the three elements required for a common-law marriage existed between Fred and Eliza. Because the subsequent marriage of Fred to Mary Chandler was void and of no legal effect, Eliza, as the surviving spouse of Fred Chandler, Sr., was entitled to all benefits allowed under the Workers Compensation Act to the surviving widow. The district court affirmed the award of the ALJ and the Director. Mary appealed to the Court of Appeals.

In an unpublished opinion, the Court of Appeals noted that in proceedings under the Workers Compensation Act, the burden of proof is on the claimant to establish the claimant’s right to an award of compensation and to prove the
various conditions on which the claimant’s right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact considers the whole record. K.S.A.1991 Supp. 44-501(a). It observed that K.S.A.1991 Supp. 44-508(g) defines burden of proof under workers compensation as “the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.” It observed that under these statutes, both Mary and Eliza had the burden to prove by a preponderance of the evidence they were entitled to benefits as Fred’s surviving spouse. The Court of Appeals noted that Mary claims she is entitled to a presumption that her subsequent marriage to Fred was valid under Harper v. Dupree, 185 Kan. 483, Syl. ¶ 2, 345 P.2d 644 (1959).

In Harper, a husband sought to have his marriage annulled because his alleged wife had a surviving spouse from a previous marriage. * * *

The Harper court noted that the majority view is that a second or subsequent marriage of a person is presumed to be valid; that such presumption is stronger than and overcomes or rebuts the presumption of the continuance of the previous marriage, and that the burden of proving the continuance of the previous marriage, and the invalidity of the second marriage, is upon the party attacking the validity of the subsequent marriage. To overcome the presumption of validity, and to sustain the burden of proving the invalidity of a marriage, every reasonable possibility of validity must be negatived, and the evidence to overcome the presumption of validity of the subsequent marriage must be clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt. In other words, the burden of proving that a divorce has not been granted to either party to a former marriage is substantial and is not met by proof of facts from which mere inferences may be drawn. 185 Kan. at 487, 345 P.2d 644.

* * *

Eliza argues that this presumption applies only when a party to the marriage seeks to annul the marriage; because she is not a party to the marriage, the presumption does not apply. The Court of Appeals pointed out that Eliza’s argument is inconsistent with Hawkins v. Weinberger, 368 F.Supp. 896 (D.Kan.1973), in which the United States District Court for the District of Kansas applied the presumption of validity of the second marriage against the alleged spouse of a prior common-law marriage who was attempting to obtain
social security benefits as the decedent's surviving widow. * * * The Court of Appeals found that this case is controlled by Harper and that the Hawkins rationale applies because here, as in Hawkins, the prior common-law spouse sought to invalidate the decedent's subsequent ceremonial marriage in order to receive dependent benefits.

* * *

The Court of Appeals reversed and remanded the cause with directions to the district court to (1) apply the presumption of validity to the marriage of Fred and Mary and then permit Eliza the opportunity to rebut such presumption; and (2) after deciding which of the claimants was the wife of the worker at the time of his death, determine how the benefits for dependent children/stepchildren should be divided. The Court of Appeals held that if the district court after remand concludes that Mary was the surviving spouse of Fred, the court must also consider whether Mary's children from a previous marriage were entitled to dependent benefits as stepchildren pursuant to K.S.A.1991 Supp. 44-508(c)(3)(B) and (C).

* * *

We agree with the Court of Appeals' statement that, because of the peculiar nature of the relationship of marriage and the grave consequences attendant upon its subversion, the law raises a presumption of validity of a subsequent marriage, and such presumption is " 'one of the strongest known to the law.' " Harper v. Dupree, 185 Kan. at 488 (quoting Shepard v. Carter, 86 Kan. 125, 130, 119 P. 533 [1911]). Where an attempt is made to annul a marriage on the ground of a prior subsisting marriage of the other party, the presumption of validity of the subsequent marriage is stronger than and overcomes the presumption of the continuance of the previous marriage, and one who seeks to impeach the subsequent marriage assumes the burden of proving by evidence " 'so cogent as to compel conviction' " that the previous marriage has not been dissolved. Harper v. Dupree, 185 Kan. at 488, 345 P.2d 644.

On remand, to overcome the presumption of validity and to sustain the burden of proving the invalidity of the marriage of Mary and Fred, every reasonable possibility of validity of that marriage must be negatived, and Eliza's evidence of a continuing common-law marriage to overcome the presumption of validity of the subsequent marriage must be clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt. Clear and convincing evidence is evidence that is certain, unambiguous, and plain to the understanding and so reasonable and persuasive as to cause the trier of fact to believe it. Clear and convincing evidence is not a quantum of proof, but rather a quality of proof; thus, a party establishes a claim by a preponderance of the evidence, but this evidence must be clear and convincing in nature.
Judgment of the district court is reversed and the case is remanded. Judgment of the Court of Appeals is affirmed as modified.

Points for Discussion

a. Presumption of Validity

What is the basis for the presumption of the validity of the later marriage? Is it that the probabilities of the situation favor the validity of that marriage? Or is it some consideration of social policy?

To rebut the presumption in this case, Eliza must prove that her marriage to Fred was not terminated in some fashion prior to his death. How could their marriage have been terminated without Eliza being aware of that fact? The possibility of ex parte divorce is addressed in Chapter 6. As a practical matter, what evidence would Eliza have to present to “negative every reasonable possibility” that Fred’s marriage to Mary is valid?

b. Removal of Impediments

As described in Chandler, Fred Chandler married his second wife, Eliza, in 1972, while he was still married to his first wife. The trial court concluded that Fred and Eliza’s continued cohabitation after the termination of Fred’s first marriage gave rise to a common law marriage under Kansas law. Most cases take the position that if a married couple begin living together when there is an impediment to their marriage, usually a prior existing marriage, and they continue to live together after the impediment is removed, as by divorce or death, a common law marriage results if either or both parties had begun living together in bona fide ignorance of the impediment. In states that do not recognize common law marriage, the same result may be reached through statutes or judicial decisions. See, e.g., Mass.Ann.L. ch. 207, § 6 (2012); Wis.Stat.Ann. § 765.24 (2012).

c. Presumptions in Favor of Marriage

Once a marriage has been proved, various presumptions flow from this fact. These include the presumption that the marriage was contracted in good faith, that it was performed by a person having authority, and that the parties had the capacity to marry. In other words, the marriage is presumed valid, and the party attacking it has the burden of proving it invalid. As in Chandler, a conflict may arise between the presumption that a marriage once contracted is valid and continues, and the presumption that the later of two marriages is valid. The latter presumption is often said to be the stronger. Stewart v. Hampton, 506 So.2d 70 (Fla.Ct.App.1987). The presumption of validity of the later marriage, without proof, was held not sufficient to support a bigamy conviction in State v. Rivera.
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977 P.2d 1247 (Wash. Ct. App. 1999). For further discussion of these presumptions and the presumption of the validity of the later marriage, see Homer H. Clark, Jr., Domestic Relations § 2.7 (Student 2d ed. 1988).

Gomez v. Windows on the World


CARDONA, P.J.

Appeal from a decision of the Workers’ Compensation Board, filed July 6, 2004, which ruled that claimant is the legal widow of decedent and awarded her workers’ compensation death benefits.


After decedent’s work-related death was established, a Workers’ Compensation Law Judge (hereinafter WCLJ) concluded that claimant was decedent’s surviving spouse and awarded benefits. Upon Escalante’s application for further review, the Workers’ Compensation Board affirmed, prompting this appeal.

Initially, we agree with Escalante that the Board should have formally considered certain evidence which had not been presented to the WCLJ but which was submitted as part of her application for Board review. Escalante indicated to the WCLJ that she had been married to one Guillermo Rojas in 1981 but divorced him before her marriage to decedent. In support of this claim, Escalante submitted her Colombian “civil registry record of birth” which noted, among other facts, that she had obtained a “separación de cuerpos” from Rojas and thereafter “contracted civil matrimony” with decedent. Based upon the Spanish-to-English translation provided and representations made by Escalante’s counsel, the WCLJ apparently concluded that Escalante and Rojas had merely been legally separated (see generally Domestic Relations Law art. 11) and that, as a result, her subsequent marriage to decedent was “questionable.” Therefore, according to the WCLJ, that proof failed to overcome the presumptive validity of decedent’s marriage to claimant (see Matter of Seidel v. Crown Indus., 132 A.D.2d 729, 730, 517 N.Y.S.2d 310 [1987]).
In her application for Board review, however, Escalante submitted a copy of the actual order of separación de cuerpos and an affidavit of an experienced Colombian attorney, Sulamita Kaim Torres. Kaim Torres attested that the “birth registry” submitted by Escalante is a statutorily-derived, “unique and definitive” catalogue of facts relating to a person’s legal capacity and status. Moreover, Kaim Torres indicated that, under then-existing Colombian law, a separacion de cuerpos was used to civilly dissolve a canonic or religious marriage--such as purportedly existed between Escalante and Rojas--and that the device served as the functional equivalent to a divorce in that context.

Assuming the Board’s unfamiliarity with the laws of Colombia, which are pertinent to the resolution of the instant dispute, and inasmuch as Escalante prof ered a credible excuse for failing to present the evidence in question to the WCLJ, we conclude that the Board should have formally considered this additional proof. However, in light of the fact that the Board stated that the new evidence, even if considered, would not change its determination, we decline to remit the matter for additional factfinding) and will instead review the record before us to ascertain whether the Board’s determination in favor of claimant is supported by substantial evidence (see generally 111 NY Jur.2d, Workers Compensation §§ 772, 773).

It has long been the rule that, where a marriage has been proven by the facts adduced, there exists a presumption that such marriage is valid. However, where, as here, two competing putative spouses have come forth with adequate proof establishing the existence of their respective matrimony, the law further presumes that it is the second marriage which is valid and that the first marriage was dissolved by death, divorce or annulment. Thus, it was Escalante’s burden to prove that the more recent marriage of decedent to claimant was invalid due to the continued existence of her own marriage to decedent. Regardless of whether Escalante’s burden of persuasion is set at a clear and convincing standard or something less stringent, it is our view that Escalante has sufficiently established the vitality of her marriage to decedent and thus rebutted the presumptive validity of claimant’s marriage to decedent.

As discussed above, Escalante produced documentary proof that a Colombian court issued a judgment of separación de cuerpos dissolving her marriage to Rojas, a fact further evidenced by a consistent notation on her Colombian civil registry form. This evidence, in conjunction with Colombian documentation of her subsequent marriage to decedent, sufficiently resolves any question concerning Escalante’s capacity to marry decedent. Moreover, Escalante affirmatively testified that she and decedent never divorced and that decedent continued to provide for her and their three children following his emigration. Escalante’s assertion is further buttressed by the fact that decedent disavowed any prior marriages on the marriage certificate associated with his marriage to claimant. Significantly,
the notarized Colombian marriage registration documenting the union between Escalante and decedent, as well as Escalante’s civil registry, both of which were generated by Colombian authorities after decedent’s death, make no mention of any dissolution of the marriage. Again, Kaim Torres explained the significance of the absence of such notation on Escalante’s registry form and, further, there is record evidence indicating that no divorce action involving decedent or Escalante has been commenced anywhere within New York City. Accordingly, inasmuch as we find the presumptive validity of decedent’s marriage to claimant to be sufficiently rebutted by Escalante’s proof, and insofar as claimant has failed to adduce affirmative proof of the invalidity of Escalante’s marriage to decedent, we find the decision unsupported by substantial evidence.

ORDERED that the decision is reversed, without costs, and matter remitted to the Workers’ Compensation Board for further proceedings not inconsistent with this Court’s decision.

Points for Discussion

a. Gomez

Is the standard the New York court applied in Gomez different from the one articulated by the Kansas court in Chandler? If not, what explains the different outcome?

b. Proof of Personal Status

There is no U.S. equivalent to the Colombian birth registry described in Gomez, which is also found in other civil law countries. In the United States, birth, death, and marriage certificates are public records maintained by local or state authorities in the place where the birth, death or marriage occurred. For a single individual, these records may be scattered in different jurisdictions. In most states, the only official record of a divorce is the court decree issued in a divorce proceeding, available from the clerk of the local court. Because there is no central registry of divorce proceedings or decrees, it can be difficult to know where to search. What evidence other than her “birth registry” was Escalante’s lawyer able to present in this case? Would that have been sufficient to establish her right to the workers’ compensation benefits?
Problem 1-13

John and Barbara were married in 1996 in Texas. They lived together for about three years in Texas and in Maryland, except for a time while John was in prison and later when he was in the army. They had two children. John left the family in September 1999 while they were living in Texas. He telephoned Barbara three months later to tell her he would not return. In 2003, Barbara telephoned John to ask for his cooperation in obtaining a divorce. John said she should have a lawyer draw the papers, send them to him, and he would sign and return them with half the money for the lawyer’s fee. Barbara did so, but John never returned either the papers or the fee.

In 2007, after John was killed in an auto accident, Barbara applied for social security benefits. The Social Security Administration investigated, found no divorce decree, and awarded survivor benefits to Barbara as John’s widow and to their children. Barbara later learned that John had married a woman named Nancy in North Carolina in December 1999. John and Nancy lived together for eight years in Maryland and Virginia, and had three children. After John’s death, Nancy brought a wrongful death action. She obtained a settlement of $400,000, and Barbara was notified of the settlement. Can Barbara claim the $400,000? What does she need to prove to be entitled to the money? (See *Hewitt v. Firestone Tire & Rubber Co.*, 490 F.Supp. 1358 (E.D.Va.1980).)

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Polygamous Marriages

Polygamy, or more specifically polygyny, is a form of marriage in which a man marries and lives at one time with several wives and their children. Polygamous marriages are legally permitted in many countries around the world, particularly in Africa and in Muslim countries. India abandoned polygamy in 1955, and polygamy rates have declined in Africa. Polygamy is practiced in a few places in the United States, but the practice was harshly suppressed in the nineteenth century in federal legislation that was eventually sustained in *Reynolds v. United States*, 98 U.S. 145 (1878).

George Reynolds lived in the Utah Territory, and had attempted to assert his religious beliefs as a defense in his prosecution for bigamy. Rejecting this argument, the Supreme Court approved the federal statute, writing:
Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. *** [W]e think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. *** An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Polygamous groups in the western United States have drawn considerable attention in recent years. A Utah man with multiple wives and more than 25 children was convicted for failure to provide child support, multiple counts of bigamy, and other crimes related to marrying and fathering a child with a 13-year-old girl. State v. Green, 99 P.3d 820 (Utah 2004). Individuals may attempt to avoid violation of the criminal law by entering into a legal marriage with only one of their several “wives;” see, e.g., Barlow v. Blackburn, 798 P.2d 1360 (Ariz. Ct.App. 1990); State v. Holm, 137 P.3d 726 (Utah 2006). In the Green and Holm cases, however, the court sustained Utah’s statute criminalizing bigamous cohabitation.

Despite the universal rule in the United States that polygamous marriages are not valid, courts have been willing to grant non-matrimonial relief based on a polygamous foreign marriage that was valid in the place where it was contracted. See In re Dalip Singh Bir’s Estate, 188 P.2d 499 (Cal. Ct.App. 1948) (recognizing valid polygamous marriage for purposes of intestate succession). Immigration laws expressly exclude polygamists from entry into the United States, and polygamous marriages are not recognized in this context. See 8 U.S.C. § 1182(a)(10)(A) (2012); Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 Minn. L. Rev. 1625 (2007).

For a thoughtful contemporary discussion of the polygamy question see Martha Bailey and Amy J. Kaufman, Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy (2010).

Problem 1-14

When G applies for a license to marry J, the local official refuses to issue a license because G is already married to D. G and J challenge the state statutory and constitutional provisions that prohibit their marriage as a violation of their rights under the First Amendment and Lawrence v. Texas, 539 U.S. 558 (2003). All three individuals subscribe to the religious doctrine of plural marriage. How should the court evaluate this claim? (See Bronson v. Swensen, 394 F.Supp.2d 1329 (D. Utah 2005); see also Bronson v. Swensen, 500 F.3d 1099 (10th Cir. 2007).)
2. Marriages Within Families: Incest?

All states have statutes prohibiting marriages within various degrees of kinship, and most of these provide that such marriages are void. All states prohibit marriages between ancestors and descendants, and between brothers and sisters of the half-blood as well as the whole blood, illegitimate as well as legitimate. Nearly all states prohibit the marriages of uncle and niece and aunt and nephew, and a large number prohibit the marriages of first cousins. Many states forbid marriages between stepparents and stepchildren, and a few prohibit marriages in which there is some other family relationship by marriage.

Incest prohibitions are also enforced through criminal laws that punish sexual relations or marriage between certain family members. See, e.g., Model Penal Code § 230.2, 10A U.L.A. 601 (2001); Colo. Rev. Stat. § 18-6-301 (2012). In addition, the issue sometimes arises in child protection proceedings. See In re Zachary B., 662 N.W.2d 360 (Wis.Ct.App.2003) (considering statute permitting involuntary termination of parental rights on basis of incestuous parenthood).

_in Re May’s Estate_

305 N.Y. 486, 114 N.E.2d 4 (1953)

LEWIS, CHIEF JUDGE.

In this proceeding, involving the administration of the estate of Fannie May, deceased, we are to determine whether the marriage in 1913 between the respondent Sam May and the decedent, who was his niece by the half blood—which marriage was celebrated in Rhode Island, where concededly such marriage is valid—is to be given legal effect in New York where statute law declares incestuous and void a marriage between uncle and niece. Domestic Relations Law, § 5. * * *

The question thus presented arises from proof of the following facts: The petitioner Alice May Greenberg, one of six children born of the Rhode Island marriage of Sam and Fannie May, petitioned in 1951 for letters of administration of the estate of her mother Fannie May, who had died in 1945. Thereupon, the respondent Sam May, who asserts the validity of his marriage to the decedent, filed an objection to the issuance to petitioner of such letters of administration upon the ground that he is the surviving husband of the decedent and accordingly, under section 118 of the Surrogate’s Court Act, he has the paramount right to administer her estate. Contemporaneously with, and in support of the objection filed by Sam May, his daughter Sirel Lenrow and his sons Harry May and Morris B. May—who are children of the challenged marriage—filed objections to the issuance of letters of administration to their sister, the petitioner, and by such objections consented that letters of administration be issued to their father Sam May.
The petitioner, supported by her sisters Ruth Weisbrout and Evelyn May, contended throughout this proceeding that her father is not the surviving spouse of her mother because, although their marriage was valid in Rhode Island, the marriage never had validity in New York where they were then resident and where they retained their residence until the decedent’s death.

The record shows that for a period of more than five years prior to his marriage to decedent the respondent Sam May had resided in Portage, Wisconsin; that he came to New York in December, 1912, and within a month thereafter he and the decedent—both of whom were adherents of the Jewish faith—went to Providence, Rhode Island, where, on January 21, 1913, they entered into a ceremonial marriage performed by and at the home of a Jewish rabbi. The certificate issued upon that marriage gave the age of each party as twenty-six years and the residence of each as “New York, N.Y.” Two weeks after their marriage in Rhode Island the respondent May and the decedent returned to Ulster County, New York, where they lived as man and wife for thirty-two years until the decedent’s death in 1945. Meantime the six children were born who are parties to this proceeding.

A further significant item of proof—to which more particular reference will be made—was the fact that in Rhode Island on January 21, 1913, the date of the marriage here involved, there were effective statutes which prohibited, the marriage of an uncle and a niece, excluding, however, those instances—of which the present case is one—where the marriage solemnized is between persons of the Jewish faith within the degrees of affinity and consanguinity allowed by their religion.

In Surrogate’s Court, where letters of administration were granted to the petitioner, the Surrogate ruled that although the marriage of Sam May and the decedent in Rhode Island in 1913 was valid in that State, such marriage was not only void in New York as opposed to natural law but is contrary to the provisions of subdivision 3 of section 5 of the Domestic Relations Law. Accordingly the Surrogate concluded that Sam May did not qualify in this jurisdiction for letters of administration as the surviving spouse of the decedent.

At the Appellate Division the order of the Surrogate was reversed on the law and the proceeding was remitted to Surrogate’s Court with direction that letters of administration upon decedent’s estate be granted to Sam May who was held to be the surviving spouse of the decedent. * * *

We regard the law as settled that, subject to two exceptions presently to be considered, and in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of a marriage between persons sui juris is to be determined by the law of the place where it is celebrated. * * *
In Van Voorhis v. Brintnall, the decision turned upon the civil status in this State of a divorced husband and his second wife whom he had married in Connecticut to evade the prohibition of a judgment of divorce which, pursuant to New York law then prevailing, forbade his remarriage until the death of his former wife. In reaching its decision, which held valid the Connecticut marriage there involved, this court noted the fact that in the much earlier case of Decouche v. Savetier, 3 Johns.Ch. 190, 211 (1817), Chancellor Kent had recognized the general principle “... that the rights dependent upon nuptial contracts, are to be determined by the lex loci.” Incidental to the decision in Van Voorhis v. Brintnall, supra, which followed the general rule that “... recognizes as valid a marriage considered valid in the place where celebrated”, Id., 86 N.Y. at page 25, this court gave careful consideration to, and held against the application of two exceptions to that rule—viz., cases within the prohibition of positive law; and cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law.

We think the Appellate Division in the case at bar rightly held that the principle of law which ruled Van Voorhis v. Brintnall and kindred cases cited, supra, was decisive of the present case and that neither of the two exceptions to that general rule is here applicable.

The statute of New York upon which the appellants rely is subdivision 3 of section 5 of the Domestic Relations Law which, insofar as relevant to our problem, provides:

§5. Incestuous and void marriages
“A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:
“1. *
“2. *
“3. An uncle and niece or an aunt and nephew. * * * ”

Although the New York statute quoted above declares to be incestuous and void a marriage between an uncle and a niece and imposes penal measures upon the parties thereto, it is important to note that the statute does not by express terms regulate a marriage solemnized in another State where, as in our present case, the marriage was concededly legal. In the case at hand, as we have seen, the parties to the challenged marriage were adherents of the Jewish faith which, according to Biblical law and Jewish tradition—made the subject of proof in this case—permits a marriage between an uncle and a niece; they were married by a Jewish rabbi in the State of Rhode Island where, on the date of such marriage in 1913 and ever since, a statute forbidding the marriage of an uncle and a niece was expressly qualified by the following statutory exceptions appearing in 1913 in Rhode Island General Laws, tit. XXIV, ch. 243, §§ 4, 9; now tit. XXXVI, ch. 415, §§ 4, 9:
“§ 4. The provisions of the preceding sections shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion.”

* * *

As section 5 of the New York Domestic Relations Law (quoted supra) does not expressly declare void a marriage of its domiciliaries solemnized in a foreign State where such marriage is valid, the statute's scope should not be extended by judicial construction. * * * Indeed, had the Legislature been so disposed it could have declared by appropriate enactment that marriages contracted in another State—which if entered into here would be void—shall have no force in this State. * * * Although examples of such legislation are not wanting, we find none in New York which serve to give subdivision 3 of section 5 of the Domestic Relations Law extraterritorial effectiveness. * * * Accordingly, as to the first exception to the general rule that a marriage valid where performed is valid everywhere, we conclude that, absent any New York statute expressing clearly the Legislature’s intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no “positive law” in this jurisdiction which serves to interdict the 1913 marriage in Rhode Island of the respondent Sam May and the decedent.

As to the second exception to the marriage here involved—between persons of the Jewish faith whose kinship was not in the direct ascending or descending line of consanguinity and who were not brother and sister—we conclude that such marriage, solemnized, as it was, in accord with the ritual of the Jewish faith in a State whose legislative body has declared such a marriage to be “good and valid in law”, was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law.

* * *

The decree of the Surrogate’s Court should be affirmed, with one bill of costs to respondents, payable out of the estate.
Points for Discussion

a. Marriage Restrictions

Statutes prohibiting the marriage of close family members trace to the ecclesiastical law and to marriage prohibitions in the Bible (Leviticus 18: 6-18). There is a large literature in the social sciences on the origins of the incest taboos, which are believed to exist in every human society. Geneticists have explored the harmful consequences resulting from inbreeding, which is often cited as a basis for these statutes. See A.H. Bittles and M.L. Black, *Consanguineous Marriage and Human Evolution*, 39 Ann. Rev. of Anthropology 193 (2010); Bernadette Modell and Aamra Darr, *Genetic Counselling and Customary Consanguineous Marriage*, 3 Nature Reviews 225 (2003).

Is this the purpose of the statutes prohibiting the marriage of uncle and niece? If this prohibition reflects an important social policy, why should it be avoidable by a trip to another state? A case reaching the opposite result is *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961). Should the result in *May* have been different if Fannie had brought a suit against Sam to annul their marriage?


b. Scope of Incest Prohibitions

Beyond the central prohibitions on marriage between siblings and marriage between parents or grandparents and their descendants, incest prohibitions in state marriage statutes are different in many respects. For example, many but not all states prohibit marriage between cousins. See *Mason v. Mason*, 775 N.E.2d 706 (Ind. Ct. App. 2002) (recognizing validity of Tennessee marriage between first cousins as a matter of comity). This variation is even more pronounced when the question is considered in a broader cross-cultural perspective. Other societies accept and even encourage marriages between cousins. See generally Martin Ottenheimer, *Forbidden Relatives: The American Myth of Cousin Marriage* (1996), which argues that prohibitions on cousin marriage serve a cultural rather than biological purpose.

Note also that statutes in some states forbid marriages between certain persons related by marriage, who have no genetic relationship at all. See, e.g., *Mass. Gen. L. Ann. c. 207, §§ 1, 2* (2012); *Miss. Code Ann. § 93-1-1* (2012). Although
Domestic Relationships § 207 prohibits marriages of adoptive siblings, Israel v. Allen, 577 P.2d 762 (Colo. 1978), found that a state statute based this provision was unconstitutional, as a violation of equal protection. The court concluded that because there was no blood relationship between the parties the statute failed to satisfy a “minimum rationality” test. On this reasoning, would a prohibition on the marriage of a father and adopted daughter also be unconstitutional?

These questions are not purely hypothetical. See, e.g., In re Adoption of M, 722 A.2d 615 (N.J. Super. Ch. Div. 1998) (vacating adoption so pregnant adoptive daughter could marry her recently-divorced adoptive father). According to the Commissioners’ Note to UMDA § 207, “Marriages of brothers and sisters by adoption are prohibited because of the social interest in discouraging romantic attachments between such persons even if there is no genetic risk.”

Similar issues arise in interpretation and application of criminal incest statutes. See State v. Rogers, 133 S.E.2d 1 (N.C. 1963) (holding no criminal violation occurred when a father had sexual relations with his adopted daughter), but see State v. George B., 785 A.2d 573 (Conn. 2001) (concluding that lack of a biological relationship was not a defense in grandfather’s prosecution for sexual assault). How should this policy be implemented in the criminal law? Should statutes distinguish between consensual and nonconsensual incest? How do cases such as Lawrence v. Texas affect this question? See Brett H. McDonnell, Is Incest Next? 10 Cardozo Women’s L.J. 337 (2004); Note, Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family,” 119 Harv. L. Rev. 2464 (2006).

c. Conflict of Laws and Marriage Evasion

May begins with the traditional conflict of laws rule, under which courts recognize a marriage if it is valid under the law of the place of celebration, and then wrestles with the problem of how widely to define the public policy exception to that rule. As the court notes, statutes in some states address this question. For example, statutes based on the Uniform Marriage Evasion Act would prevent the result of the May case. The Illinois version of the Act, 750 Ill. Comp. Stat. Ann. § 5/216 (2012), reads as follows:

“§ 216 Prohibited marriages void if contracted in another state. That if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the law of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.”
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See also Iowa Code § 595.20 (2012), which treats a marriage solemnized in another jurisdiction as valid in Iowa if it was valid in that jurisdiction and if the parties meet the requirements for a valid marriage under Iowa law. Both Illinois and Iowa prohibit uncle-niece marriages. Which of these exceptions is likely to sweep more broadly? Note that Uniform Marriage and Divorce Act §210 includes a broad marriage recognition principle, validating all marriages “that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicil of the parties.”

Under Restatement (Second) Conflict of Laws § 283(1) (1971), marriage validity is determined by “the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage.” Comments to this section suggest that the state where a marriage was celebrated will primarily be concerned with marriage formalities, such as the requirement of a license or ceremony. In cases of conflict as to more substantive aspects of marriage regulation, other states, such as the state where one or both spouses are domiciled at the time of the marriage or immediately afterward, may have a stronger interest. Section 283(2) states that a marriage that meets the requirements of the place of celebration “will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”

What would be the result in May under these approaches? What if the marriage had been invalid in Rhode Island, but valid in New York? What if, at the time of the marriage, Fannie had been domiciled in Rhode Island and Sam in New York? See also Leszinske v. Poole, 798 P.2d 1049 (N.M. App. 1990), cert. denied 797 P.2d 983 (N.M.1990).

Problem 1-15

Tahereh married her first first cousin, Hamid, in Iran in 1976 and gave birth to their son a year later. She remained behind when Hamid went to the United States on a student visa. Hamid eventually became a U.S. citizen and sponsored the admission of his son to the United States in 1995. In 2005, the son sponsored his mother’s immigration. After arriving in the United States, Tahereh filed an action for divorce against Hamid. First cousins are not permitted to marry in the state where Tahereh and Hamid both live now. What issues will the court need to consider to determine whether Tahereh and Hamid have a valid marriage? (See Ghassemi v. Ghassemi, 998 So.2d 731 (La. Ct. App. 2008).)
3. Same Sex Marriage

At the time of this writing, Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia allow same-sex couples to marry. Another group of states provide for civil union or registered partnership status that confers substantially the same rights and obligations as marriage under state law. These states include California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island. Several other states have recognized more limited registered partnership rights for same-sex couples.

Same-sex couples began to challenge marriage license laws in the early 1970s. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), and Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App.), rev. denied, 84 Wash. 2d 1008 (1974). Twenty years later, they obtained the first significant legal victory, when the Hawaii Supreme Court held in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), that state laws limiting marriage to opposite-sex couples classified on the basis of sex and were therefore presumptively invalid under the Hawaii Constitution. Baehr provoked dramatic reactions across the country, but did not result in legalization of same-sex marriage in Hawaii. The court remanded the case, to give the state an opportunity to establish that its marriage statutes furthered compelling state interests and were narrowly drawn to prevent unnecessary infringements of constitutional rights. While legal proceedings continued, the state's voters approved an amendment to Hawaii's Constitution in 1998 giving the state legislature the authority to reserve marriage to opposite sex couples, and the litigation was dismissed as moot in 1999.

After the decision in Baehr, in light of the prospect that same-sex marriage would become legal in Hawaii, the question arose whether same-sex couples living in other states would be able to come to Hawaii to marry and return home with the expectation that their marriages would be recognized. Many states responded by enacting legislation or constitutional amendments to prohibit both contracting of same-sex marriage within the state and recognition of same-sex marriages celebrated elsewhere. In 1996, the U.S. Congress enacted the Defense of Marriage Act (DOMA) providing that states would not be required to recognize same-sex marriages from other states and defining marriage for purposes of federal law to include only opposite-sex marriages. See 28 U.S.C. § 1738C and 1 U.S.C. § 7 (2011). DOMA is discussed further below.

The next significant victory for advocates of same-sex marriage was the decision in Baker v. State, 744 A.2d 864 (Vt. 1999), which held that the state could not exclude same-sex couples from the legal benefits and protections that it provides to married opposite-sex couples. Baker left the question of a remedy to the state's legislature, which implemented the ruling in Baker by enacting a civil union statute. Same-sex couples had the opportunity to enter into civil unions
in Vermont from 2000 until 2009, when new legislation extended full marriage rights to same-sex couples.

In contrast to Vermont, the Massachusetts Supreme Judicial Court decided in Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2001), that the state could not deny the “protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.” The court reaffirmed in a subsequent opinion that providing for civil union would not remedy the constitutional violation addressed in Goodridge, because it would create “a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage.” Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004). On May 17, 2004, Massachusetts became the first U.S. state to allow same-sex marriage. See Edward Stein, The Story of Goodridge v. Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples, in Family Law Stories 27 (Carol Sanger, ed. 2008).

Global View: Same Sex Marriage

Same-sex couples have been allowed to marry in the Netherlands since 2000, and in Belgium and Canada since 2003. By 2012, the list of countries that authorize same-sex marriage at the national level had expanded to include Argentina, Iceland, Norway, Portugal, Spain and Sweden. Same-sex couples can also marry in Mexico City, and these marriages must be recognized in other Mexican states.

Varnum v. Brien

763 N.W.2d 862 (Iowa 2009)

CADY, Justice.

In this case, we must decide if our state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution, as the district court ruled. On our review, we hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution. Therefore, we affirm the decision of the district court.

I. Background Facts and Proceedings.

This lawsuit is a civil rights action by twelve individuals who reside in six communities across Iowa. Like most Iowans, they are responsible, caring, and
productive individuals. They maintain important jobs, or are retired, and are contributing, benevolent members of their communities. They include a nurse, business manager, insurance analyst, bank agent, stay-at-home parent, church organist and piano teacher, museum director, federal employee, social worker, teacher, and two retired teachers. Like many Iowans, some have children and others hope to have children. Some are foster parents. Like all Iowans, they prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected—a belief embraced by our state motto.

Despite the commonality shared with other Iowans, the twelve plaintiffs are different from most in one way. They are sexually and romantically attracted to members of their own sex. The twelve plaintiffs comprise six same-sex couples who live in committed relationships. Each maintains a hope of getting married one day, an aspiration shared by many throughout Iowa.

Unlike opposite-sex couples in Iowa, same-sex couples are not permitted to marry in Iowa. The Iowa legislature amended the marriage statute in 1998 to define marriage as a union between only a man and a woman. Despite this law, the six same-sex couples in this litigation asked the Polk County Recorder to issue marriage licenses to them. The recorder, following the law, refused to issue the licenses, and the six couples have been unable to be married in this state. Except for the statutory restriction that defines marriage as a union between a man and a woman, the twelve plaintiffs met the legal requirements to marry in Iowa.

As other Iowans have done in the past when faced with the enforcement of a law that prohibits them from engaging in an activity or achieving a status enjoyed by other Iowans, the twelve plaintiffs turned to the courts to challenge the statute. They seek to declare the marriage statute unconstitutional so they can obtain the array of benefits of marriage enjoyed by heterosexual couples, protect themselves and their children, and demonstrate to one another and to society their mutual commitment.

* * *

The district court concluded the statute was unconstitutional under the due process and equal protection clauses of the Iowa Constitution and granted summary judgment to the plaintiffs. It initially ordered the county recorder to begin processing marriage licenses for same-sex couples, but stayed the order during the pendency of an appeal.

* * *
IV. Equal Protection.

A. Background Principles.

The primary constitutional principle at the heart of this case is the doctrine of equal protection. The concept of equal protection is deeply rooted in our national and state history, but that history reveals this concept is often expressed far more easily than it is practiced. For sure, our nation has struggled to achieve a broad national consensus on equal protection of the laws when it has been forced to apply that principle to some of the institutions, traditions, and norms woven into the fabric of our society. This observation is important today because it reveals equal protection can only be defined by the standards of each generation. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) (“[T]he Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.”).

The process of defining equal protection, as shown by our history as captured and told in court decisions, begins by classifying people into groups. A classification persists until a new understanding of equal protection is achieved. The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality and the ability of the judicial system to perform its constitutional role free from the influences that tend to make society's understanding of equal protection resistant to change. As Justice Oliver Wendell Holmes poignantly said, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendell Holmes, Justice, Supreme Judicial Court of Massachusetts, *The Path of the Law*, address dedicating new hall at Boston University School of Law (January 8, 1897), in 10 Harv. L. Rev. 457, 469 (1897). This concept is evident in our past cases.

In the first reported case of the Supreme Court of the Territory of Iowa, *In re Ralph*, 1 Morris 1 (Iowa 1839), we refused to treat a human being as property to enforce a contract for slavery and held our laws must extend equal protection to persons of all races and conditions. 1 Morris at 9. This decision was seventeen years before the United States Supreme Court infamously decided *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1856), which upheld the rights of a slave owner to treat a person as property. Similarly, in *Clark v. Board of Directors*, 24 Iowa 266 (1868), and *Coger v. North West. Union Packet Co.*, 37 Iowa 145 (1873), we struck blows to the concept of segregation long before the United States Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Iowa was also the first state in the nation to admit
a woman to the practice of law, doing so in 1869. Admission of Women to the Bar, 1 Chicago Law Times 76, 76 (1887). Her admission occurred three years before the United States Supreme Court affirmed the State of Illinois’ decision to deny women admission to the practice of law, see Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139, 21 L.Ed. 442, 445 (1873), and twenty-five years before the United States Supreme Court affirmed the refusal of the Commonwealth of Virginia to admit women into the practice of law, see Ex parte Lockwood, 154 U.S. 116, 118, 14 S.Ct. 1082, 1083, 38 L.Ed. 929, 930 (1894). In each of those instances, our state approached a fork in the road toward fulfillment of our constitution's ideals and reaffirmed the “absolute equality of all” persons before the law as “the very foundation principle of our government.”

4 See Coger, 37 Iowa at 153.

...
all persons similarly situated should be treated alike.”6 Racing Ass’n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 7 (Iowa 2004) [hereinafter RACI II] (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985)).

Even in the zealous protection of the constitution’s mandate of equal protection, courts must give respect to the legislative process and presume its enactments are constitutional. We understand that Iowa’s tripartite system of government requires the legislature to make difficult policy choices, including distributing benefits and burdens amongst the citizens of Iowa. In this process, some classifications and barriers are inevitable. As a result, courts pay deference to legislative decisions when called upon to determine whether the Iowa Constitution’s mandate of equality has been violated by legislative action. More specifically, when evaluating challenges based on the equal protection clause, our deference to legislative policy-making is primarily manifested in the level of scrutiny we apply to review legislative action.

In most cases, we apply a very differential standard known as the “rational basis test.” Id. Under the rational basis test, “[t]he plaintiff has the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained.” Bierkamp v. Rogers, 293 N.W.2d 577, 579-80 (Iowa 1980). In deference to the legislature, a statute will satisfy the requirements of the equal protection clause

“so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmak-

6 Plaintiffs’ challenge to Iowa Code section 595.2 is based on the equal protection guarantee in the Iowa Constitution and does not implicate federal constitutional protections. Generally, we view the federal and state equal protection clauses as “identical in scope, import, and purpose.” Callender, 591 N.W.2d at 187. At the same time, we have jealously guarded our right to “employ a different analytical framework” under the state equal protection clause as well as to independently apply the federally formulated principles. Racing Ass’n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 4-7 (Iowa 2004). Here again, we find federal precedent instructive in interpreting the Iowa Constitution, but we refuse to follow it blindly.

The United States Supreme Court has not resolved the broad question of whether an absolute ban of marriages between persons of the same sex violates the Federal Equal Protection Clause. See Lawrence, 539 U.S. at 578, 123 S.Ct. at 2484, 156 L.Ed.2d at 525 (noting that case does not decide “whether the government must give formal recognition to any relationship that homosexual persons seek to enter”). Nor has the Court resolved many of the narrower legal questions presented by this lawsuit. Nonetheless, the federal framework traditionally employed for resolution of equal protection cases provides a useful starting point for evaluation of Iowa’s constitutional equal protection provision.
er, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”

RACI II, 675 N.W.2d at 7 (quoting Fitzgerald v. Racing Ass’n of Cent. Iowa, 539 U.S. 103, 107, 123 S.Ct. 2156, 2159, 156 L.Ed.2d 97, 103 (2003)). Although the rational basis test is “deferential to legislative judgment, ‘it is not a toothless one’ in Iowa.” Id. at 9 (quoting Mathews v de Castro, 429 U.S. 181, 185, 97 S.Ct. 431, 434, 50 L.Ed.2d 389, 394 (1976)). The rational basis test defers to the legislature’s prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision and, again, a merely rational relationship between the classification and the policy justification. Nonetheless, the deference built into the rational basis test is not dispositive because this court engages in a meaningful review of all legislation challenged on equal protection grounds by applying the rational basis test to the facts of each case. Id. (citing Bierkamp, 293 N.W.2d at 581).

The constitutional guarantee of equal protection, however, demands certain types of statutory classifications must be subjected to closer scrutiny by courts. See, e.g., Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786, 799 (1982) (“[W]e would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification.”). Thus, courts apply a heightened level of scrutiny under equal protection analysis when reasons exist to suspect “prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234, 1242 n. 4 (1938).

Under this approach, classifications based on race, alienage, or national origin and those affecting fundamental rights are evaluated according to a standard known as “strict scrutiny.” Sherman v. Pella Corp., 576 N.W.2d 312, 317 (Iowa 1998). Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest. In re S.A.J.B., 679 N.W.2d 645, 649 (Iowa 2004).

A middle tier of analysis exists between rational basis and strict scrutiny. This intermediate tier has been applied to statutes classifying on the basis of gender or illegitimacy and requires the party seeking to uphold the statute to demonstrate the challenged classification is substantially related to the achievement of an important governmental objective. Sherman, 576 N.W.2d at 317. It is known as “intermediate scrutiny” or “heightened scrutiny,” and groups entitled to this tier of review are often called “quasi-suspect” groups. See Cleburne Living Ctr., 473 U.S. at 445, 105 S.Ct. at 3258, 87 L.Ed.2d at 324. To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification

* * *

D. Similarly Situated People.

The County seeks to undercut the plaintiffs’ equal protection claim by asserting the plaintiffs are not similarly situated to heterosexuals. We consider this threshold argument before proceeding to the application of our equal protection test.

We begin by recognizing the constitutional pledge of equal protection does not prohibit laws that impose classifications. Many statutes impose classifications by granting special benefits or declaring special burdens, and the equal protection clause does not require all laws to apply uniformly to all people. Instead, equal protection demands that laws treat alike all people who are “similarly situated with respect to the legitimate purposes of the law.” RACI II, 675 N.W.2d at 7 (quoting Coll. Area Renters & Landlord Ass’n v. City of San Diego, 43 Cal.App.4th 677, 50 Cal.Rptr.2d 515, 520 (1996)) (emphasis omitted).

This requirement of equal protection—that the law must treat all similarly situated people the same—has generated a narrow threshold test. Under this threshold test, if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause. Not only have we utilized this test in the past, but courts from other jurisdictions have confronted it in cases involving equal protection challenges to statutes that restrict marriage to opposite-sex couples. See In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 435 n. 54 (2008) (analyzing and rejecting the government’s threshold argument that same-sex couples are not similarly situated to opposite-sex couples); Kerrigan v. Commissioner of Pub. Health, 289 Conn. 135, 957 A.2d 407, 423-24 & n. 19 (2008) (same).

The County references this threshold test in this case and asserts the plaintiffs are not similarly situated to opposite-sex couples so as to necessitate further equal protection analysis because the plaintiffs cannot “procreate naturally.” In other words, the County argues the statute does not treat similarly situated persons differently, but merely treats dissimilar persons differently.

In considering whether two classes are similarly situated, a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without that trait is not similarly situated to persons with the trait. See Racing Ass’n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 559
The equal protection clause does not merely ensure the challenged statute applies equally to all people in the legislative classification. “'[S]imilarly situated’ cannot mean simply ‘similar in the possession of the classifying trait.’ All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test.” Tussman & tenBroek, 37 Cal. L.Rev. at 345. In the same way, the similarly situated requirement cannot possibly be interpreted to require plaintiffs to be identical in every way to people treated more favorably by the law. No two people or groups of people are the same in every way, and nearly every equal protection claim could be run aground onto the shoals of a threshold analysis if the two groups needed to be a mirror image of one another. Such a threshold analysis would hollow out the constitution's promise of equal protection.

Thus, equal protection before the law demands more than the equal application of the classifications made by the law. The law itself must be equal. In other words, to truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike. RACI II, 675 N.W.2d at 7. This requirement makes it “impossible to pass judgment on the reasonableness of a [legislative] classification without taking into consideration, or identifying, the purpose of the law.” Tussman & tenBroek, 37 Cal. L.Rev. at 347. The purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes. For these reasons, the trait asserted by the County is insufficient to support its threshold argument.

Nevertheless, we have said our marriage laws “are rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.” Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983); see also Bach v. Lewin, 74 Haw. 530, 852 P.2d 44, 58 (1993) (stating civil marriage is “a partnership to which both partners bring their financial resources as well as their individual energies and efforts’ ” (quoting Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484, 491 (1992))). These laws also serve to recognize the status of the parties' committed relationship. See Madison v. Colby, 348 N.W.2d 202, 206 (Iowa 1984) (stating “the marriage state is not one entered into for the purpose of labor and support alone,’ ” but also includes “the comfort and happiness of the parties to the marriage contract’ ” (quoting Price v. Price, 91 Iowa 693, 697-98, 60 N.W. 202, 203 (Iowa 1894)) (emphasis added)); Hamilton v. McNeill, 150 Iowa 470, 478, 129 N.W. 480, 482 (1911) (“The marriage to be dissolved is not a mere contract, but is a status.”); Turner v. Hitchcock, 20 Iowa 310, 325 (1866) (Lowe, C.J., concurring) (observing that marriage changes the parties' “legal and social status”).
Therefore, with respect to the subject and purposes of Iowa's marriage laws, we find that the plaintiffs are similarly situated compared to heterosexual persons. Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples. Moreover, official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples.

In short, for purposes of Iowa's marriage laws, which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation. As indicated above, this distinction cannot defeat the application of equal protection analysis through the application of the similarly situated concept because, under this circular approach, all distinctions would evade equal protection review. Therefore, with respect to the government's purpose of “providing an institutional basis for defining the fundamental relational rights and responsibilities of persons,” same-sex couples are similarly situated to opposite-sex couples.

E. Classification Undertaken in Iowa Code Section 595.2.

Plaintiffs believe Iowa Code section 595.2 classifies on the bases of gender and sexual orientation. The County argues the same-sex marriage ban does not discriminate on either basis. The district court held section 595.2 classifies according to gender. As we will explain, we believe the ban on civil marriages between two people of the same sex classifies on the basis of sexual orientation.

* * *

It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class—their sexual orientation. In re Marriage Cases, 183 P.3d
The benefit denied by the marriage statute—the status of civil marriage for same-sex couples—is so “closely correlated with being homosexual” as to make it apparent the law is targeted at gay and lesbian people as a class. See Lawrence, 539 U.S. at 583, 123 S.Ct. at 2486, 156 L.Ed.2d at 529 (O’Connor, J., concurring) (reviewing criminalization of homosexual sodomy and concluding that “[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.”). The Court’s decision in Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), supports this conclusion. Romer can be read to imply that sexual orientation is a trait that defines an individual and is not merely a means to associate a group with a type of behavior. See Romer, 517 U.S. at 632, 116 S.Ct. at 1627, 134 L.Ed.2d at 865-66 (holding an amendment to a state constitution pertaining to “homosexual ... orientation” expresses “animus toward the class that it affects”).

By purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation. See Kerrigan, 957 A.2d at 431 n. 24; Conaway v. Deane, 401 Md. 219, 932 A.2d 571, 605 (2007). Thus, we proceed to analyze the constitutionality of the statute based on sexual orientation discrimination.


Our determination that the marriage statute employs a sexual-orientation-based classification does not, of course, control the outcome of our equal protection inquiry. Most statutes, one way or the other, create classifications. To determine if this particular classification violates constitutional principles of equal protection, we must next ask what level of scrutiny applies to classifications of this type. The County argues the more deferential rational basis test should apply, while plaintiffs argue closer scrutiny is appropriate.

* * *

Instead of adopting a rigid formula to determine whether certain legislative classifications warrant more demanding constitutional analysis, the Supreme Court has looked to four factors. Conaway, 932 A.2d at 606 (discussing factors examined by Supreme Court in considering use of heightened scrutiny). The Supreme Court has considered: (1) the history of invidious
discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member’s ability to contribute to society; (3) whether the distinguishing characteristic is “immutable” or beyond the class members’ control; and (4) the political power of the subject class. In considering whether sexual orientation is a suspect class, a number of our sister jurisdictions have referenced similar factors. See *In re Marriage Cases*, 183 P.3d at 442-43; *Kerrigan*, 957 A.2d at 426; *Conaway*, 932 A.2d at 606-07; *Andersen v. King County*, 158 Wash.2d 1, 138 P.3d 963, 974 (2006).

* * *

H. Application of Heightened Scrutiny.

Plaintiffs argue sexual-orientation-based statutes should be subject to the most searching scrutiny. The County asserts Iowa’s marriage statute, section 595.2, may be reviewed, at most, according to an intermediate level of scrutiny. Because we conclude Iowa’s same-sex marriage statute cannot withstand intermediate scrutiny, we need not decide whether classifications based on sexual orientation are subject to a higher level of scrutiny. Thus, we turn to a discussion of the intermediate scrutiny standard.

1. Intermediate scrutiny standard. “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465, 472 (1988). In applying an intermediate standard to review gender-based classifications, the Supreme Court has stated: “Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’ ” *Virginia*, 518 U.S. at 532-33, 116 S.Ct. at 2275, 135 L.Ed.2d at 751. To this end, courts evaluate whether the proffered governmental objectives are important and whether the statutory classification is “substantially related to the achievement of those objectives.” *Id.* at 533, 116 S.Ct. at 2275, 135 L.Ed.2d at 751 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090, 1098 (1982)).

2. Statutory classification: exclusion of gay and lesbian people from civil marriage. To identify the statutory classification, we focus on the “differential treatment or denial of opportunity for which relief is sought.” *Id.* at 532-33, 116 S.Ct. at 2275.
135 L.Ed.2d at 751 (considering “categorical exclusion” of women from institution of higher education). Plaintiffs bring this lawsuit complaining of their exclusion from the institution of civil marriage. In response, the County offers support for the legislature’s decision to statutorily establish heterosexual civil marriage. Because the relevant focal point is the opportunity sought by the plaintiffs, the issue presented by this lawsuit is whether the state has “exceedingly persuasive” reasons for denying civil marriage to same-sex couples, not whether state-sanctioned, heterosexual marriage is constitutional. See id. at 531, 116 S.Ct. at 2274, 135 L.Ed.2d at 751. Thus, the question we must answer is whether excluding gay and lesbian people from civil marriage is substantially related to any important governmental objective.

3. Governmental objectives. The County has proffered a number of objectives supporting the marriage statute. These objectives include support for the “traditional” institution of marriage, the optimal procreation and rearing of children, and financial considerations.24

The first step in scrutinizing a statutory classification can be to determine whether the objectives purportedly advanced by the classification are important. “The burden of justification is demanding and it rests entirely on the State.” Id. at 533, 116 S.Ct. at 2275, 135 L.Ed.2d at 751.

* * *

a. Maintaining traditional marriage. First, the County argues the same-sex marriage ban promotes the “integrity of traditional marriage” by “maintaining the historical and traditional marriage norm ([as] one between a man and a woman).” This argument is straightforward and has superficial appeal. A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged. When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification. In other words, the

24 Other jurisdictions considering the validity of legislative exclusion of gay and lesbian people from civil marriage have considered alternative justifications. See, e.g., Kerrigan, 957 A.2d at 476 (uniformity with laws of other jurisdictions); id. at 518 (Zarella, J., dissenting) (regulation of heterosexual procreation); Hernandez v. Robles, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1, 32-34 (2006) (Kaye, C.J., dissenting) (moral disapproval, uniformity with other jurisdictions); Andersen, 138 P.3d at 982 (avoid “the need to resolve the sometimes conflicting rights and obligations of the same-sex couple and the necessary third party in relation to a child”). We need not independently analyze these alternative justifications as they are not offered to support the Iowa statute. See Virginia, 518 U.S. at 533, 116 S.Ct. at 2275, 135 L.Ed.2d at 751 (“The justification must be genuine, not hypothesized or invented post hoc in response to litigation.”).
Chapter 1  Marriage and Its Alternatives

equal protection clause is converted into a “‘barren form of words’” when “‘discrimination ... is made an end in itself.’” Tussman & tenBroek, 37 Cal. L.Rev. at 357 (quoting Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131, 135 (1915)).

This precise situation is presented by the County’s claim that the statute in this case exists to preserve the traditional understanding of marriage. The governmental objective identified by the County—to maintain the traditional understanding of marriage—is simply another way of saying the governmental objective is to limit civil marriage to opposite-sex couples. Opposite-sex marriage, however, is the classification made under the statute, and this classification must comply with our principles of equal protection. Thus, the use of traditional marriage as both the governmental objective and the classification of the statute transforms the equal protection analysis into the question of whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage.

This approach is, of course, an empty analysis. It permits a classification to be maintained “‘for its own sake.’” Kerrigan, 957 A.2d at 478 (quoting Romer, 517 U.S. at 635, 116 S.Ct. at 1629, 134 L.Ed.2d at 868). Moreover, it can allow discrimination to become acceptable as tradition and helps to explain how discrimination can exist for such a long time. If a simple showing that discrimination is traditional satisfies equal protection, previous successful equal protection challenges of invidious racial and gender classifications would have failed. Consequently, equal protection demands that “‘the classification (that is), the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself.’” Id. (quoting Hernandez v. Robles, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1, 33 (2006) (Kaye, C.J., dissenting)); see also Romer, 517 U.S. at 635, 116 S.Ct. at 1629, 134 L.Ed.2d at 868 (rejecting “classification of persons undertaken for its own sake”).

“[W]hen tradition is offered to justify preserving a statutory scheme that has been challenged on equal protection grounds, we must determine whether the reasons underlying that tradition are sufficient to satisfy constitutional requirements.” Kerrigan, 957 A.2d at 478-79 (emphasis added). Thus, we must analyze the legislature’s objective in maintaining the traditional classification being challenged.

The reasons underlying traditional marriage may include the other objectives asserted by the County, objectives we will separately address in this decision. However, some underlying reason other than the preservation of tradition must
be identified. 25 Because the County offers no particular governmental reason underlying the tradition of limiting civil marriage to heterosexual couples, we press forward to consider other plausible reasons for the legislative classification.

b. Promotion of optimal environment to raise children. Another governmental objective proffered by the County is the promotion of “child rearing by a father and a mother in a marital relationship which social scientists say with confidence is the optimal milieu for child rearing.” This objective implicates the broader governmental interest to promote the best interests of children. The “best interests of children” is, undeniably, an important governmental objective. Yet, we first examine the underlying premise proffered by the County that the optimal environment for children is to be raised within a marriage of both a mother and a father.

Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents. On the other hand, we acknowledge the existence of reasoned opinions that dual-gender parenting is the optimal environment for children. These opinions, while thoughtful and sincere, were largely unsupported by reliable scientific studies.

Even assuming there may be a rational basis at this time to believe the legislative classification advances a legitimate government interest, this assumed fact would not be sufficient to survive the equal protection analysis applicable in this case. In order to ensure this classification based on sexual orientation is not borne of prejudice and stereotype, intermediate scrutiny demands a closer relationship between the legislative classification and the purpose of the classification than mere rationality. Under intermediate scrutiny, the relationship between the government’s goal and the classification employed to further that goal must be “substantial.” Clark, 486 U.S. at 461, 108 S.Ct. at 1914, 100 L.Ed.2d at 472. In order to evaluate that relationship, it is helpful to consider whether the legislation is over-inclusive or under-inclusive. See RACI II, 675 N.W.2d at 10 (considering under-inclusion and over-inclusion even in the rational basis context).

* * *

We begin with the County’s argument that the goal of the same-sex marriage ban is to ensure children will be raised only in the optimal milieu. In pursuit of this objective, the statutory exclusion of gay and lesbian people is both under-

25 The preservation of traditional marriage could only be a legitimate reason for the classification if expanding marriage to include others in its definition would undermine the traditional institution. The County has simply failed to explain how the traditional institution of civil marriage would suffer if same-sex civil marriage were allowed. There is no legitimate notion that a more inclusive definition of marriage will transform civil marriage into something less than it presently is for heterosexuals. Benjamin G. Ledsham, Note, Means to Legitimate Ends: Same-Sex Marriage through the Lens of Illegitimacy-Based Discrimination, 28 Cardozo L.Rev. 2373, 2388 (2007).
inclusive and over-inclusive. The civil marriage statute is under-inclusive because it does not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents. Such under-inclusion tends to demonstrate that the sexual-orientation-based classification is grounded in prejudice or “overbroad generalizations about the different talents, capacities, or preferences” of gay and lesbian people, rather than having a substantial relationship to some important objective. See Virginia, 518 U.S. at 533, 116 S.Ct. at 2275, 135 L.Ed.2d at 751 (rejecting use of overbroad generalizations to classify). If the marriage statute was truly focused on optimal parenting, many classifications of people would be excluded, not merely gay and lesbian people.

Of course, “[r]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” Knepper v. Monticello State Bank, 450 N.W.2d 833, 837 (Iowa 1990) (citing Williamson v. Lee Optical of Okla., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955)). Thus, “[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others.” Williamson, 348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573. While a statute does not automatically violate equal protection merely by being under-inclusive, the degree of under-inclusion nonetheless indicates the substantiality of the relationship between the legislative means and end.

As applied to this case, it could be argued the same-sex marriage ban is just one legislative step toward ensuring the optimal environment for raising children. Under this argument, the governmental objective is slightly more modest. It seeks to reduce the number of same-sex parent households, nudging our state a step closer to providing the asserted optimal milieu for children. Even evaluated in light of this narrower objective, however, the ban on same-sex marriage is flawed.

The ban on same-sex marriage is substantially over-inclusive because not all same-sex couples choose to raise children. Yet, the marriage statute denies civil marriage to all gay and lesbian people in order to discourage the limited number of same-sex couples who desire to raise children. In doing so, the legislature includes a consequential number of “individuals within the statute's purview who are not afflicted with the evil the statute seeks to remedy.” Conaway, 932 A.2d at 649 (Raker, J., concurring in part and dissenting).

At the same time, the exclusion of gay and lesbian people from marriage is under-inclusive, even in relation to the narrower goal of improving child rearing by limiting same-sex parenting. Quite obviously, the statute does not prohibit same-sex couples from raising children. Same-sex couples currently raise chil-
Children in Iowa, even while being excluded from civil marriage, and such couples will undoubtedly continue to do so. Recognition of this under-inclusion puts in perspective just how minimally the same-sex marriage ban actually advances the purported legislative goal. A law so simultaneously over-inclusive and under-inclusive is not substantially related to the government’s objective. In the end, a careful analysis of the over- and under-inclusiveness of the statute reveals it is less about using marriage to achieve an optimal environment for children and more about merely precluding gay and lesbian people from civil marriage.

If the statute was truly about the best interest of children, some benefit to children derived from the ban on same-sex civil marriages would be observable. Yet, the germane analysis does not show how the best interests of children of gay and lesbian parents, who are denied an environment supported by the benefits of marriage under the statute, are served by the ban. Likewise, the exclusion of gays and lesbians from marriage does not benefit the interests of those children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples.

The ban on same-sex civil marriage can only logically be justified as a means to ensure the asserted optimal environment for raising children if fewer children will be raised within same-sex relationships or more children will be raised in dual-gender marriages. Yet, the same-sex-marriage ban will accomplish these outcomes only when people in same-sex relationships choose not to raise children without the benefit of marriage or when children are adopted by dual-gender couples who would have been adopted by same-sex couples but for the same-sex civil marriage ban. We discern no substantial support for this proposition. These outcomes, at best, are minimally advanced by the classification. Consequently, a classification that limits civil marriage to opposite-sex couples is simply not substantially related to the objective of promoting the optimal environment to raise children. This conclusion suggests stereotype and prejudice, or some other unarticulated reason, could be present to explain the real objectives of the statute.

c. Promotion of procreation. The County also proposes that government endorsement of traditional civil marriage will result in more procreation. It points out that procreation is important to the continuation of the human race, and opposite-sex couples accomplish this objective because procreation occurs naturally within this group. In contrast, the County points out, same-sex couples can procreate only through assisted reproductive techniques, and some same-sex couples may choose not to procreate. While heterosexual marriage does lead to procreation, the argument by the County fails to address the real issue in our required analysis
of the objective: whether exclusion of gay and lesbian individuals from the institution of civil marriage will result in more procreation? If procreation is the true objective, then the proffered classification must work to achieve that objective.

Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation. Thus, the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to “become” heterosexual in order to procreate within the present traditional institution of civil marriage. The briefs, the record, our research, and common sense do not suggest such an outcome. Even if possibly true, the link between exclusion of gay and lesbian people from marriage and increased procreation is far too tenuous to withstand heightened scrutiny. Specifically, the statute is significantly under-inclusive with respect to the objective of increasing procreation because it does not include a variety of groups that do not procreate for reasons such as age, physical disability, or choice. In other words, the classification is not substantially related to the asserted legislative purpose.

d. Promoting stability in opposite-sex relationships. A fourth suggested rationale supporting the marriage statute is “promoting stability in opposite sex relationships.” While the institution of civil marriage likely encourages stability in opposite-sex relationships, we must evaluate whether excluding gay and lesbian people from civil marriage encourages stability in opposite-sex relationships. The County offers no reasons that it does, and we can find none. The stability of opposite-sex relationships is an important governmental interest, but the exclusion of same-sex couples from marriage is not substantially related to that objective.

e. Conservation of resources. The conservation of state resources is another objective arguably furthered by excluding gay and lesbian persons from civil marriage. The argument is based on a simple premise: couples who are married enjoy numerous governmental benefits, so the state’s fiscal burden associated with civil marriage is reduced if less people are allowed to marry. In the common sense of the word, then, it is “rational” for the legislature to seek to conserve state resources by limiting the number of couples allowed to form civil marriages. By way of example, the County hypothesizes that, due to our laws granting tax benefits to married couples, the State of Iowa would reap less tax revenue if individual tax-paying gay and lesbian people were allowed to obtain a civil marriage. Certainly, Iowa’s marriage statute causes numerous government benefits, including tax ben-
Thus, the ban on same-sex marriages may conserve some state resources. Excluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally “rational” way. Yet, such classifications so obviously offend our society’s collective sense of equality that courts have not hesitated to provide added protections against such inequalities.

* * *

The trait of sexual orientation is a poor proxy for regulating aspiring spouses’ usage of state resources. This tenuous relationship between the classification and its purpose demonstrates many people who are similarly situated with respect to the purpose of the law are treated differently. As a result, the sexual-orientation-based classification does not substantially further the suggested governmental interest, as required by intermediate scrutiny.

4. Conclusion. Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude the sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives. While the objectives asserted may be important (and many undoubtedly are important), none are furthered in a substantial way by the exclusion of same-sex couples from civil marriage. Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute.

I. Religious Opposition to Same-Sex Marriage.

Now that we have addressed and rejected each specific interest advanced by the County to justify the classification drawn under the statute, we consider

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28 Plaintiffs identify over two hundred Iowa statutes affected by civil-marriage status. See, e.g., [Iowa Code § 83.4] (dependent surviving spouse receives benefits when spouse death caused by work injury); id. § 1391.1(4) (hospice patient’s family includes spouse); id. § 142C.4 (spouse has power to make decision concerning anatomical gifts); id. § 144A.7 (patient’s spouse determines application of life-sustaining procedures in absence of declaration); id. § 144C.5 (surviving spouse controls disposition of decedent’s remains in absence of declaration); id. § 252A.3(1) (spouse liable for support of other spouse); id. § 252A.3(4) (children of married parents legitimate); id. § 422.7 (spouses may file joint tax return); id. § 422.9(1) (optional standard deduction for married taxpayers); id. § 422.12(1)(b) (spouses eligible for personal exemption credit); id. § 450.3 (inheritance rights of surviving spouses); id. § 450.9 (surviving spouse exempt from inheritance tax on property passed from decedent spouse); id. § 450.10(6) (spousal allowance for surviving spouse); id. § 523.309 (surviving spouse must consent to decedent spouse’s interment); id. § 613.15 (spouse may recover value of services and support of decedent spouse for wrongful death or negligent injury); id. § 622.9 (restriction of testimony of communication between husband and wife); id. § 633.211(1) (surviving spouse receives decedent spouse’s entire estate in intestacy); id. § 633.236 (surviving spouse has right to elective share); id. § 633.272 (surviving spouse takes under partial intestacy if elective share not exercised); id. § 633.336 (damages for wrongful death). The Government Accounting Office, as of 2005, had identified more than 1000 federal legal rights and responsibilities derived from marriage. Isaak, 10 U. Pa. J. Const. L. at 607 n. 6.
the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County’s silence reflects, we believe, its understanding this reason cannot, under our Iowa Constitution, be used to justify a ban on same-sex marriage.

While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling. Consequently, we address the religious undercurrent propelling the same-sex marriage debate as a means to fully explain our rationale for rejecting the dual-gender requirement of the marriage statute.

It is quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly. Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation. The belief that the “sanctity of marriage” would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained-even fundamental-religious belief.

Yet, such views are not the only religious views of marriage. As demonstrated by amicus groups, other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion.

This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa’s same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them. See Iowa Const. art. I, § 3 (“The general assembly shall make no law respecting an establishment of religion....”). The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, “Marriage is a civil contract” and then regulates that civil contract. Iowa Code § 595.1A. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus

29 A survey in the Des Moines Register in 2008 found 28.1% of individuals surveyed supported same-sex marriage, 30.2% opposed same-sex marriage but supported civil unions, and 32% of respondents opposed both same-sex marriage and civil unions. Erin Jordan, About 6 in 10 Iowans back same-sex unions, poll finds, Des Moines Register, Nov. 26, 2008, at 4B. The Des Moines Register survey is consistent with a national survey by the PEW Research Center in 2003. This PEW survey found that 59% of Americans oppose same-sex marriage, and 32% favor same-sex marriage. Schuman, 96 Geo. L.J. at 2108. However, opposition to same-sex marriage jumped to 80% for people “with a high level of religious commitment,” with only 12% of such people in favor of same-sex marriage.
only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.

We, of course, have a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman. See Iowa Const. art. I, § 3 (“The general assembly shall make no law ... prohibiting the free exercise [of religion]...”). This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation. Knowlton v. Baumhover, 182 Iowa 691, 710, 166 N.W. 202, 208 (1918). This proposition is the essence of the separation of church and state.

As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals. This approach does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union, but considers, as we must, only the constitutional rights of all people, as expressed by the promise of equal protection for all. We are not permitted to do less and would damage our constitution immeasurably by trying to do more. * * *

In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage-religious or otherwise-by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person’s religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.

J. Constitutional Infirmity.

We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination.
We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa’s marriage statute, Iowa Code section 595.2, violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty. If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded. Iowa Code section 595.2 denies gay and lesbian people the equal protection of the law promised by the Iowa Constitution.

V. Remedy.

Because our civil marriage statute fails to provide equal protection of the law under the Iowa Constitution, we must decide how to best remedy the constitutional violation. The sole remedy requested by plaintiffs is admission into the institution of civil marriage. The County does not suggest an alternative remedy. The high courts of other jurisdictions have remedied constitutionally invalid bans on same-sex marriage in two ways. Some courts have ordered gay and lesbian people to be allowed to access the institution of civil marriage. See In re Marriage Cases, 183 P.3d at 453; Kerrigan, 957 A.2d at 480 (“definition of marriage necessarily must be expanded” to include same-sex couples); Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565, 571 (2004). Other courts have allowed their state legislatures to create parallel civil institutions for same-sex couples. See Lewis v. Harris, 188 N.J. 415, 908 A.2d 196, 221 (2006); Baker v. State, 170 Vt. 194, 744 A.2d 864, 887 (1999).

FYI

The Iowa Supreme Court’s opinion in Varnum was unanimous, and in April 2009 Iowa became the third state in the United States to recognize same-sex marriages, joining Massachusetts, see Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003), and Connecticut, see Kerrigan v. Connecticut, 957 A.2d 407 (Conn. 2008). One year after Varnum was decided, three of the seven Justices who participated in the decision were defeated in a judicial retention election. See A.G. Sulzberger, In Iowa, Voters Oust Judges Over Marriage Issue, N.Y. Times, Nov. 3, 2010.

Iowa Code section 595.2 is unconstitutional because the County has been unable to identify a constitutionally adequate justification for excluding plaintiffs from the institution of civil marriage. A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution. This record, our independent research, and the appropriate equal protection analysis do not suggest the existence of a justification for such a legislative classification that substantially furthers any governmental objective. Consequently, the language in Iowa Code section 595.2 limiting civil marriage
to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.

VI. Conclusion.

The district court properly granted summary judgment to plaintiffs. Iowa Code section 595.2 violates the equal protection provision of the Iowa Constitution. Our decision becomes effective upon issuance of procedendo.

AFFIRMED. All justices concur.

Points for Discussion

a. Same Sex Marriage Litigation

Same-sex marriages were valid in California for several months in 2008, following the decision in In re Marriage Cases, 183 P.3d 384 (Cal. 2008). California’s constitution was subsequently amended to prohibit recognition of same-sex marriages with the passage of Proposition 8 in November 2008. The California Supreme Court upheld Proposition 8 in Strauss v. Horton, 207 P.3d 48 (Cal. 2009), but ruled that marriages of same-sex couples performed in California prior to the effective date of Proposition 8 would remain valid. Federal court litigation challenging Proposition 8 under the U.S. Constitution has been underway since 2009. See Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. Hollingsworth v. Perry, __ U.S. __, 2012 WL 3134429 (2012).

Numerous state courts have also rejected challenges to state marriage laws brought by same-sex couples. See Conway v. Deane, 932 A.2d 571 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Li v. State of Oregon, 110 P.3d 91 (Or. 2005); Andersen v. King County, 138 P.3d 963 (Wash. 2006). In Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006), the New Jersey Supreme Court ordered the state legislature to extend the legal rights and benefits of marriage to same-sex couples, but allowed the legislature to accomplish this by enacting a civil union law.

Legislatures have also legalized same-sex marriage in some U.S. jurisdictions without court mandates, including New Hampshire (2009), New York (2011), Vermont (2009), and the District of Columbia (2009). A small number of Native American tribes permit same-sex marriage if one of the spouses is an enrolled tribal member.
b. Constitutional Amendments

Since the ruling in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), about thirty states have approved constitutional amendments prohibiting recognition of same-sex marriages. Another fourteen have enacted statutes that restrict marriage to opposite sex couples, although those statutes in Connecticut and Iowa have been held to violate the states’ constitutions in the litigation cited above. Many of these statutory or constitutional provisions also bar recognition of civil unions or domestic partnerships between same-sex couples.

Federal constitutional amendments regarding same-sex marriage have been proposed; one version introduced in Congress in 2004 would have provided that “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”

c. Same-Sex Marriage Recognition

The traditional choice of law rule, discussed earlier in this chapter, extends recognition to any marriage that is valid in the place of celebration, unless it is contrary to the strong public policy of the forum state. See *Restatement (Second) Conflict of Laws* § 283(2) (1971); Eugene F. Scoles, et al., *Conflict of Laws* §§ 13.7–13.6 (4th ed. 2004).

In states without an explicit statutory prohibition on recognition of same-sex marriages, how should the public policy exception be applied? Are the issues different if the same-sex couple was married in Canada or another foreign country? For a comprehensive analysis of the conflict of laws questions in this area, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143 (2005).

Make the Connection
Chapter 6 considers issues regarding jurisdiction to dissolve same-sex marriages.

Defense of Marriage Act (1996)

Section 2 of DOMA, codified at 28 U.S.C. § 1738C (2004), provides that:

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

Section 3 of DOMA, codified at 1 U.S.C. § 7, defines the terms “marriage” and “spouse” as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.”
d. Defense of Marriage Act

Congress passed the Defense of Marriage Act (DOMA) in 1996, in response to the argument that states might be required to recognize same-sex marriages celebrated in other states under the Full Faith and Credit Clause of the Constitution. Section 2 of DOMA addresses this issue, and §3 prevents same-sex couples with marriages that are valid under state law from obtaining the benefits or obligations of marriage under federal law, such as rights under the Social Security Act, the right to file joint federal income tax returns, or rights under immigration laws. Since the law was enacted in 1996, there has been an ongoing debate over the constitutionality of DOMA. See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997).

Challenges to the constitutionality of DOMA have focused on §3 and the denial of federal benefits to couples who are legally married under state law. In February 2011, U.S. Attorney General Eric Holder withdrew from defending DOMA in two cases brought against the federal government, after concluding that classifications based on sexual orientation warrant heightened scrutiny as a matter of equal protection and that §3 of DOMA failed to meet that standard. See Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, DOJ 11-223(Feb. 23, 2011), 2011 WL 641-582 (known as the “Holder letter”).

Same-sex married couples have argued successfully that DOMA was unconstitutional when applied to prevent them from filing joint bankruptcy petitions. See In re Somers, 448 B.R. 677 (Bankr. S.D. N.Y. 2011), and In re Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011). In two cases widely expected to be considered by the Supreme Court, the U.S. Court of Appeals for the First Circuit and the Second Circuit have held that §3 of DOMA was unconstitutional. See Massachusetts v. U.S. Department of Health and Human Services, 682 F.3d 1 (1st Cir. 2012); and Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), cert. granted sub nom. United States v. Windsor, ___ U.S. ___, 2012 WL 4009654 (2012).

**Go Online**

Revised estimates from the 2010 Census put the number of same-sex married couples in the United States at 131,729, with an additional 514,735 same-sex unmarried partner households. See also Dafne Lofquist, *Same-Sex Couple Households* (American Community Survey Briefs, Sept. 2011).

**Update**

For the Supreme Court ruling in *Windsor*, see FLEX Case 1.B.
## State Laws Recognizing Same-Sex Couple Relationships

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<td>Same-Sex Marriage</td>
<td>Connecticut</td>
<td>Kerrigan v. Cmm'r of Public Health, 957 A.2d 407 (Conn. 2008)</td>
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E. Unmarried Partners

Many couples are not permitted to marry in the United States, or chose to live together without marriage. These individuals and their families live with significant legal uncertainty, in terms of their financial and other rights and responsibilities to each other and to third parties. To the extent that unmarried couples have children together, the rules described in the chapters that follow have largely taken marriage out of the equation as a determinant of parental rights and responsibilities. Marriage is still relevant in many parentage determinations, however.

Formal substitutes for marriage such as civil union and registered partnership address these issues at the state level, conferring all or many of the rights and responsibilities of marriage on couples who fulfill the statutory requirements. Where these alternatives are not available, or for couples who choose not to marry, form a civil union or register their partnership, the law provides a much more limited set of rights and remedies.

1. Marriage Alternatives: Civil Union and Registered Partnership

Civil unions were instituted in Vermont in 2000 following the decision in Baker v. State of Vermont, 744 A.2d 864 (Vt. 1999). The Vermont legislation allowed same-sex couples to apply for a license from a town clerk and receive a certificate of civil union. Parties to a civil union have the same legal rights and obligations under state law as married individuals; if their relationship ends, the union must be dissolved through a divorce in a family court. See 1999 Vermont House Bill No. 847, codified at Vt. Stat. Ann. Tit. 15 §§ 1201-1207 and tit. 18 §§ 5160–5169 (2012). When Vermont legalized same-sex marriage in 2009, it allowed couples with civil unions the option of converting to marriage or retaining civil union status.

Like Vermont, New Jersey instituted civil union as an alternative to marriage for same-sex couples in the wake of the court’s decision in Lewis v. Harris, 908 A.2d 196 (N.J. 2006). New Jersey had already enacted a statewide domestic partnership registration program which made more a limited set of health care, property and inheritance rights available to same-sex couples and to opposite-sex couples age 62 or older. Civil union laws conferring substantially the same rights and obligations of marriage under state law were subsequently enacted in Delaware (2011), Hawaii (2011), Illinois (2011) and Rhode Island (2011). Changes have come frequently in this area: Connecticut enacted a civil union law in 2005, and then began to recognize same sex marriages in 2008. New Hampshire’s legislature enacted a civil union law in 2007, and then voted to legalize same sex marriage in 2011.
Another group of states have established registered partnership laws for same-sex couples. In California, Nevada, and Oregon, the rights and obligations of registered partners are substantially the same as those of married couples, while in Colorado, Maine, Maryland and Wisconsin registered same-sex couples receive a narrower range of protections.

In states that provide for domestic partnership or civil union, state statutes also provide for dissolution of these partnerships or unions. In states where this status is equivalent to marriage, dissolution follows the same rules applied to divorce. See, e.g., In re Domestic Partnership of Ellis, 76 Cal.Rptr.3d 401 (Ct. App. 2008) (applying putative spouse doctrine to registered partner).

Some registration are open to couples without a conjugal partner relationship, such as siblings. Registration in the District of Columbia is available to any two persons who are at least 18 and competent to contract who are not married or in another domestic partnership. D.C. Code § 32-702(i) (2012). See also Colo. Rev. Stat. §§ 15-22-101 to -112 (2012). Hawaii allows any two individuals who are legally prohibited from marrying under state law to declare a “reciprocal beneficiary” relationship, including siblings and other pairs of relatives, such as “a widowed mother and her unmarried son.” Haw. Rev. Stat. § 572C-1 et seq. (2012).

Recognition of Civil Union and Registered Partnership

At this time, marriage alternatives recognized in different states have no effect at the federal level. Moreover, because the definitions and incidents of civil union or registered partnership are slightly different in each state, it can be difficult for these couples to predict what consequences their relationship will have in other states. Some states with civil union or registered partnership laws have statutes addressing this question. See, e.g., Cal. Fam. Code §299.2 (2012); N.J. Stat. Ann. §§ 26:8A-6(c); 37:1-34 (2012).

How should a state, which does not recognize civil union or registered partnership, handle a case in which an individual seeking to marry in the state has a prior undissolved union or partnership from another state? See *Elia Warnken v. Elia*, 972 N.E.2d 17 (Mass. 2012), which treated a same-sex marriage in Massachusetts as bigamous and invalid when one of the partners had entered into a previous civil union in Vermont that had not been properly terminated.

**Problem 1-16**

Neil and John had lived together for many years when they traveled to a nearby state to formalize their relationship in a civil union ceremony. A year later, back in their home state, Neil was injured in a car accident, and he died following surgery at a local hospital. John would like to bring a wrongful death action against the hospital. The applicable statute provides that “The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death.” “Distributees” are defined in the statute to include a spouse, children, parents, parents’ children, grandparents, grandparents’ children, and grandparents’ grandchildren, in that order. Should John be permitted to bring the action? If Neil died without a will, can John inherit as his spouse? (See *Langan v. St. Vincent’s Hospital*, 802 N.Y.S.2d 476 (App. Div. 2005).)

**Global View: Recognition of Same-Sex Couple Relationships**

Same-sex partnerships were first extended legal recognition at the national level in the Scandinavian countries, beginning with Denmark’s Registered Partnership Act in 1989. More than a dozen countries around the world extend all or most of the legal rights of marriage to same sex couples, either through marriage or new institutions such as civil union or registered partnership. In addition, a significant group of countries have established some type of alternative status that is available to same-sex couples, often with significant differences from marriage, such as the PACS (*pacte civil de solidarité*) in France. For a sense of the complexity that these differences generate within Europe, see Ian Curry-Sumner, *Interstate Recognition of Same-Sex Relationships in Europe*, 13 J. Gender Race & Just. 59 (2009) (listing 17 European countries with different registration schemes).
2. Cohabitation Relationships

One of the most dramatic changes in family life over the past generation has been a steep increase in the number of cohabiting couples, which has taken place as marriage rates have dropped and the age of first marriages has increased. A majority of couples who marry live together first, but most cohabiting couples do not go on to marry. Cohabitation relationships are generally shorter in duration than marriages, and marital relationships that are preceded by cohabitation seem to be less stable in the aggregate, although it is not clear whether there is a causal link between premarital cohabitation and marital instability. Patterns of marriage and cohabitation are significantly different based on factors such as race, ethnicity, education and economic status. See Pamela J. Smock and Wendy D. Manning, Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy, 26 Law & Pol’y 87 (2004), Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 J. L. & Fam. Stud. 1 (2007).
Demographers have concluded that at least half of all cohabiting couples live with children, and a substantial portion of nonmarital children are born to cohabiting parents. Data collected in 2008 showed that of the 4 million women who had given birth in the previous year, 1.5 million (or 38%) were unmarried, separated, or married but with an absent spouse. Of those 1.5 million mothers, 425,000 (or 28%) were living with a cohabiting partner. See Jane Lawler Dye, Fertility of American Women: 2008 (Current Population Reports, 2010)

Despite these broad trends, the law of cohabitation has not changed significantly in most states in the past thirty years. As a result, cohabiting couples may have particular need of legal advice to address problems that are not governed by statutes or other sources of law. As you read the materials in this section, consider how well these principles address the range of legal issues for cohabiting couples.

**Marvin v. Marvin**

557 P.2d 106 (Cal.1976)

TOBRINER, Justice.

During the past 15 years, there has been a substantial increase in the number of couples living together without marrying.¹ Such nonmarital relationships lead to legal controversy when one partner dies or the couple separates. Courts of Appeal, faced with the task of determining property rights in such cases, have arrived at conflicting positions: two cases (In re Marriage of Cary (1973) 34 Cal. App.3d 345, 109 Cal.Rptr. 862; Estate of Atherley (1975) 44 Cal.App.3d 758, 119 Cal.Rptr. 41) have held that the Family Law Act (Civ.Code, § 4000 et seq.) requires division of the property according to community property principles, and one decision (Beckman v. Mayhew (1974) 49 Cal.App.3d 529, 122 Cal.Rptr. 604) has rejected that holding. We take this opportunity to resolve that controversy and to declare the principles which should govern distribution of property acquired in a nonmarital relationship.

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¹ “The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabited ten years ago.” (Comment, In re Cary: A Judicial Recognition of Illicit Cohabitation (1974) 25 Hastings L.J. 1226.)
We conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

In the instant case plaintiff and defendant lived together for seven years without marrying; all property acquired during this period was taken in defendant’s name. When plaintiff sued to enforce a contract under which she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for defendant, thus leaving him with all property accumulated by the couple during their relationship. Since the trial court denied plaintiff a trial on the merits of her claim, its decision conflicts with the principles stated above, and must be reversed.

1. The factual setting of this appeal

Since the trial court rendered judgment for defendant on the pleadings, we must accept the allegations of plaintiff’s complaint as true, determining whether such allegations state, or can be amended to state, a cause of action. We turn therefore to the specific allegations of the complaint.

Plaintiff avers that in October of 1964 she and defendant “entered into an oral agreement” that while “the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined.” Furthermore, they agreed to “hold themselves out to the general public as husband and wife” and that “plaintiff would further render her services as a companion, homemaker, housekeeper and cook to * * * defendant.”

Shortly thereafter plaintiff agreed to “give up her lucrative career as an entertainer [and] singer” in order to “devote her full time to defendant * * * as a
companion, homemaker, housekeeper and cook;” in return defendant agreed to “provide for all of plaintiff’s financial support and needs for the rest of her life.”

Plaintiff alleges that she lived with defendant from October of 1964 through May of 1970 and fulfilled her obligations under the agreement. During this period the parties as a result of their efforts and earnings acquired in defendant's name substantial real and personal property, including motion picture rights worth over $1 million. In May of 1970, however, defendant compelled plaintiff to leave his household. He continued to support plaintiff until November of 1971, but thereafter refused to provide further support.

On the basis of these allegations plaintiff asserts two causes of action. The first, for declaratory relief, asks the court to determine her contract and property rights; the second seeks to impose a constructive trust upon one half of the property acquired during the course of the relationship.

Defendant demurred unsuccessfully, and then answered the complaint. Following extensive discovery and pretrial proceedings, the case came to trial. Defendant renewed his attack on the complaint by a motion to dismiss. Since the parties had stipulated that defendant’s marriage to Betty Marvin did not terminate until the filing of a final decree of divorce in January 1967, the trial court treated defendant’s motion as one for judgment on the pleadings augmented by the stipulation.

After hearing argument the court granted defendant’s motion and entered judgment for defendant. Plaintiff moved to set aside the judgment and asked leave to amend her complaint to allege that she and defendant reaffirmed their agreement after defendant’s divorce was final. The trial court denied plaintiff’s motion, and she appealed from the judgment.

2. Plaintiff’s complaint states a cause of action for breach of an express contract

In Trutalli v. Meraviglia (1932) 215 Cal. 698, 12 P.2d 430, we established the principle that nonmarital partners may lawfully contract concerning the ownership of property acquired during the relationship. We reaffirmed this principle in Vallera v. Vallera (1943) 21 Cal.2d 681, 685, 134 P.2d 761, 763, stating that “If a man and woman [who are not married] live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property.”

In the case before us plaintiff, basing her cause of action in contract upon these precedents, maintains that the trial court erred in denying her a trial on the merits of her contention. Although that court did not specify the ground for its conclusion that plaintiff’s contractual allegations stated no cause of action, defendant offers some four theories to sustain the ruling; we proceed to examine them.
Defendant first and principally relies on the contention that the alleged contract is so closely related to the supposed “immoral” character of the relationship between plaintiff and himself that the enforcement of the contract would violate public policy. He points to cases asserting that a contract between nonmarital partners is unenforceable if it is “involved in” an illicit relationship, or made in “contemplation” of such a relationship. A review of the numerous California decisions concerning contracts between nonmarital partners, however, reveals that the courts have not employed such broad and uncertain standards to strike down contracts. The decisions instead disclose a narrower and more precise standard: a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services.

* * *

Although the past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting, we can abstract from those decisions a clear and simple rule. The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. Thus the rule asserted by defendant, that a contract fails if it is “involved in” or made “in contemplation” of a nonmarital relationship, cannot be reconciled with the decisions.

The three cases cited by defendant which have declined to enforce contracts between nonmarital partners involved consideration that was expressly founded upon an illicit sexual services. In Hill v. Estate of Westbrook, supra, 95 Cal.App.2d 599, 213 P.2d 727, the woman promised to keep house for the man, to live with him as man and wife, and to bear his children; the man promised to provide for her in his will, but died without doing so. Reversing a judgment for the woman based on the reasonable value of her services, the Court of Appeal stated that “the action is predicated upon a claim which seeks, among other things, the reasonable value of living with decedent in meretricious relationship and bearing him two children * * *. The law does not award compensation for living with a man as a concubine and bearing him children. * * * As the judgment is, at least in part, for the value of the claimed services for which recovery cannot be had, it must be
reversed.” (95 Cal.App.2d at p. 603, 213 P.2d at p. 730.) Upon retrial, the trial court found that it could not sever the contract and place an independent value upon the legitimate services performed by claimant. We therefore affirmed a judgment for the estate. (Hill v. Estate of Westbrook (1952) 39 Cal.2d 458, 247 P.2d 19.)

In the only other cited decision refusing to enforce a contract, Updeck v. Samuel (1954), 123 Cal.App.2d 264, 266 P.2d 822, the contract “was based on the consideration that the parties live together as husband and wife.” (123 Cal. App.2d at p. 267, 266 P.2d at p. 824.) Viewing the contract as calling for adultery, the court held it illegal.

The decisions in the Hill and Updeck cases thus demonstrate that a contract between nonmarital partners, even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement. In sum, a court will not enforce a contract for the pooling of property and earnings if it is explicitly and inseparably based upon services as a paramour. The Court of Appeal opinion in Hill, however, indicates that even if sexual services are part of the contractual consideration, any severable portion of the contract supported by independent consideration will still be enforced.

* * *

Defendant secondly relies upon the ground suggested by the trial court: that the 1964 contract violated public policy because it impaired the community property rights of Betty Marvin, defendant’s lawful wife. Defendant points out that his earnings while living apart from his wife before rendition of the interlocutory decree were community property under 1964 statutory law (former Civ.Code, §§ 169, 169.2) and that defendant’s agreement with plaintiff purported to transfer to her a half interest in that community property. But whether or not defendant’s contract with plaintiff exceeded his authority as manager of the community property (see former Civ.Code, § 172), defendant’s argument fails for the reason that an improper transfer of community property is not void ab initio, but merely voidable at the instance of the aggrieved spouse.

In the present case Betty Marvin, the aggrieved spouse, had the opportunity to assert her community property rights in the divorce action. The interlocutory and final decrees in that action fix and limit her interest. Enforcement of the contract between plaintiff and defendant against property awarded to defendant by the divorce decree will not impair any right of Betty’s, and thus is not on that account violative of public policy.

Defendant’s third contention is noteworthy for the lack of authority advanced in its support. He contends that enforcement of the oral agreement between
plaintiff and himself is barred by Civil Code section 5134, which provides that “All contracts for marriage settlements must be in writing * * *.” A marriage settlement, however, is an agreement in contemplation of marriage in which each party agrees to release or modify the property rights which would otherwise arise from the marriage. (See Corker v. Corker (1891) 87 Cal. 643, 648, 25 P. 922.) The contract at issue here does not conceivably fall within that definition, and thus is beyond the compass of section 5134.9

* * *

In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner’s earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

In the present instance, plaintiff alleges that the parties agreed to pool their earnings, that they contracted to share equally in all property acquired, and that defendant agreed to support plaintiff. The terms of the contract as alleged do not rest upon any unlawful consideration. We therefore conclude that the complaint furnishes a suitable basis upon which the trial court can render declaratory relief. The trial court consequently erred in granting defendant’s motion for judgment on the pleadings.

3. Plaintiff’s complaint can be amended to state a cause of action founded upon theories of implied contract or equitable relief

As we have noted, both causes of action in plaintiff’s complaint allege an express contract; neither assert any basis for relief independent from the contract. In In re Marriage of Cary, supra, 34 Cal.App.3d 345, 109 Cal.Rptr. 862, however, the Court of Appeal held that, in view of the policy of the Family Law Act, property accumulated by nonmarital partners in an actual family relationship should be divided equally. Upon examining the Cary opinion, the parties to the present

9 Our review of the many cases enforcing agreements between nonmarital partners reveals that the majority of such agreements were oral. In two cases (Ferguson v. Schuenemann, supra, 167 Cal.App.2d 413, 334 P.2d 668; Cline v. Festersen, supra, 128 Cal.App.2d 380, 275 P.2d 149), the court expressly rejected defenses grounded upon the statute of frauds.
case realized that plaintiff’s alleged relationship with defendant might arguably support a cause of action independent of any express contract between the parties. The parties have therefore briefed and discussed the issue of the property rights of a nonmarital partner in the absence of an express contract. Although our conclusion that plaintiff’s complaint states a cause of action based on an express contract alone compels us to reverse the judgment for defendant, resolution of the Cary issue will serve both to guide the parties upon retrial and to resolve a conflict presently manifest in published Court of Appeal decisions.

Both plaintiff and defendant stand in broad agreement that the law should be fashioned to carry out the reasonable expectations of the parties. Plaintiff, however, presents the following contentions: that the decisions prior to Cary rest upon implicit and erroneous notions of punishing a party for his or her guilt in entering into a nonmarital relationship, that such decisions result in an inequitable distribution of property accumulated during the relationship, and that Cary correctly held that the enactment of the Family Law Act in 1970 overturned those prior decisions. Defendant in response maintains that the prior decisions merely applied common law principles of contract and property to persons who have deliberately elected to remain outside the bounds of the community property system.\footnote{We note that a deliberate decision to avoid the strictures of the community property system is not the only reason that couples live together without marriage. Some couples may wish to avoid the permanent commitment that marriage implies, yet be willing to share equally any property acquired during the relationship; others may fear the loss of pension, welfare, or tax benefits resulting from marriage (see \textit{Beckman v. Mayhew}, supra, 49 Cal.App.3d 529, 122 Cal.Rptr. 604). Others may engage in the relationship as a possible prelude to marriage. In lower socioeconomic groups the difficulty and expense of dissolving a former marriage often leads couples to choose a nonmarital relationship; many unmarried couples may also incorrectly believe that the doctrine of common law marriage prevails in California, and thus that they are in fact married. Consequently we conclude that the mere fact that a couple have not participated in a valid marriage ceremony cannot serve as a basis for a court’s inference that the couple intend to keep their earnings and property separate and independent; the parties’ intention can only be ascertained by a more searching inquiry into the nature of their relationship.}

Janet and Paul Cary had lived together, unmarried, for more than eight years. They held themselves out to friends and family as husband and wife, reared four children, purchased a home and other property, obtained credit, filed joint income tax returns, and otherwise conducted themselves as though they were married. Paul worked outside the home, and Janet generally cared for the house and children.

In 1971 Paul petitioned for “nullity of the marriage.” Following a hearing on that petition, the trial court awarded Janet half the property acquired during the relationship, although all such property was traceable to Paul’s earnings. The Court of Appeal affirmed the award.
Reviewing the prior decisions which had denied relief to the homemaking partner, the Court of Appeal reasoned that those decisions rested upon a policy of punishing persons guilty of cohabitation without marriage. The Family Law Act, the court observed, aimed to eliminate fault or guilt as a basis for dividing marital property. But once fault or guilt is excluded, the court reasoned, nothing distinguishes the property rights of a nonmarital “spouse” from those of a putative spouse. Since the latter is entitled to half the “quasi marital property” (Civ. Code, § 4452), the Court of Appeal concluded that, giving effect to the policy of the Family Law Act, a nonmarital cohabitant should also be entitled to half the property accumulated during an “actual family relationship.” (34 Cal.App.3d at p. 353, 109 Cal.Rptr. 862.)

* * *

If Cary is interpreted as holding that the Family Law Act requires an equal division of property accumulated in nonmarital “actual family relationships,” then we agree with Beckman v. Mayhew that Cary distends the act. No language in the Family Law Act addresses the property rights of nonmarital partners, and nothing in the legislative history of the act suggests that the Legislature considered that subject. The delineation of the rights of nonmarital partners before 1970 had been fixed entirely by judicial decision; we see no reason to believe that the Legislature, by enacting the Family Law Act, intended to change that state of affairs.

But although we reject the reasoning of Cary and Atherley, we share the perception of the Cary and Atherley courts that the application of former precedent in the factual setting of those cases would work an unfair distribution of the property accumulated by the couple. Justice Friedman in Beckman v. Mayhew, supra, 49 Cal.App.3d 529, 533, 122 Cal.Rptr. 604, also questioned the continued viability of our decisions in Vallera and Keene; commentators have argued the need to reconsider those precedents. We should not, therefore, reject the authority of Cary and Atherley without also examining the deficiencies in the former law which led to those decisions.

The principal reason why the pre-Cary decisions result in an unfair distribution of property inheres in the court’s refusal to permit a nonmarital partner to assert rights based upon accepted principles of implied contract or equity. We have examined the reasons advanced to justify this denial of relief, and find that none have merit.

First, we note that the cases denying relief do not rest their refusal upon any theory of “punishing” a “guilty” partner. Indeed, to the extent that denial of relief “punishes” one partner, it necessarily rewards the other by permitting him to retain a disproportionate amount of the property. Concepts of “guilt” thus cannot justify an unequal division of property between two equally “guilty” persons.
Chapter 1  Marriage and Its Alternatives

Other reasons advanced in the decisions fare no better. The principal argument seems to be that “[e]quitable considerations arising from the reasonable expectation of ** benefits attending the status of marriage ** are not present [in a nonmarital relationship].” (Vallera v. Vallera, supra, 21 Cal.2d at p. 685, 134 P.2d 761, 763.) But, although parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain. The parties may well expect that property will be divided in accord with the parties’ own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort. We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried persons.22

The remaining arguments advanced from time to time to deny remedies to the nonmarital partners are of less moment. There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event the better approach is to presume, as Justice Peters suggested, “that the parties intend to deal fairly with each other.” (Keene v. Keene, supra, 57 Cal.2d 657, 674, 21 Cal.Rptr. 593, 603, 371 P.2d 329, 339 (dissenting opn.).)

The argument that granting remedies to the nonmarital partners would discourage marriage must fail; as Cary pointed out, “with equal or greater force the point might be made that the pre–1970 rule was calculated to cause the income producing partner to avoid marriage and thus retain the benefit of all of his or her accumulated earnings.” (34 Cal.App.3d at p. 353, 109 Cal.Rptr. at p. 866.) Although we recognize the well-established public policy to foster and promote the institution of marriage, perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy.

In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.

22 In some instances a confidential relationship may arise between nonmarital partners, and economic transactions between them should be governed by the principles applicable to such relationships.
We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware, as we have stated, of the pervasiveness of nonmarital relationships in other situations.

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.

We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. As we have explained, the courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration. We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties’ lawful expectations.24

The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust (see Omer v. Omer (1974) 11 Wash.App. 386, 523 P.2d 957) or resulting trust (see Hyman v. Hyman (Tex.Civ.App.1954) 275 S.W.2d 149). Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward. (See Hill v. Estate of Westbrook, supra, 39 Cal.2d 458, 462, 247 P.2d 19.)25

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24 We do not seek to resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895. (See Norman v. Thomson (1898) 121 Cal. 620, 628, 54 P.143; Estate of Abate (1958) 166 Cal.App.2d 282, 292, 333 P.2d 200.) Thus we do not hold that plaintiff and defendant were “married,” nor do we extend to plaintiff the rights which the Family Law Act grants valid or putative spouses; we hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person.

25 Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.
Since we have determined that plaintiff's complaint states a cause of action for breach of an express contract, and, as we have explained, can be amended to state a cause of action independent of allegations of express contract, we must conclude that the trial court erred in granting defendant a judgment on the pleadings.

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed herein.

Take Note!
Justice Clark dissented from the second part of the Marvin opinion. He agreed that a contract between the parties should be enforced, but he did not think that in the absence of a contract an award should be made in reliance upon "general equitable principles."

* * *

After the case was remanded to the trial court, Judge Arthur K. Marshall rejected Ms. Marvin's claim to half of the property, but awarded her $104,000, or the equivalent of $1,000 per week for two years, "for rehabilitation purposes." The complete text of Judge Marshall's opinion is reproduced in 5 Fam. L. Rep. 3077 (1979); see also Henry H. Foster, Jr. & Doris Jonas Freed, Marvin v. Marvin: New Wine in Old Bottles, 5 Fam. L. Rep. 4001 (1979). Judge Marshall found that there was no express contract between the parties, and no basis for a constructive trust or a resulting trust. He based his award on footnote 25 of the Marvin decision, noting her recent resort to unemployment insurance benefits, the fact that her return to a career as a singer was doubtful, and the fact that the market value of Lee Marvin's property at time of separation exceeded $1,000,000. On appeal, the $104,000 award was reversed. The California Court of Appeals held that the rehabilitative support awarded by the trial court was not within the issues framed by the pleadings and that, as the plaintiff had benefited economically and socially from her association with the defendant, the defendant had no equitable obligation to provide support for her. Marvin v. Marvin, 176 Cal.Rptr. 555 (Ct.App.1981).

For more on what followed the case, see Ann Laquer Estin, Ordinary Cohabitation, 76 Notre Dame L. Rev. 1381 (2001).

26 We do not pass upon the question whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship is entitled to support payments from the other party after the relationship terminates.
Points for Discussion

a. Express Contracts

The first part of Marvin holds that unmarried cohabitants may make enforceable contracts concerning their financial and property affairs. This principle is widely accepted by courts around the country, which routinely enforce express contracts made by cohabitants; see, e.g., Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998); Boland v. Catalano, 521 A.2d 142 (Conn. 1987). Courts in a few jurisdictions have refused to enforce cohabitation contracts, however. See Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Rehak v. Mathis, 238 S.E.2d 81 (Ga. 1977); and Schwegmann v. Schwegmann, 441 So.2d 316 (La.App. 1983), cert. denied 467 U.S. 1206 (1984).

Should cohabitation agreements be tested for disclosure and fair dealing? Wilcox v. Trautz, supra, concluded that a cohabitation agreement is enforceable “so long as it conforms to the ordinary rules of contract law.” What defenses might be asserted in a case seeking enforcement of a cohabitation contract? How does the law governing cohabitation contracts compare with the rules for premarital and marital agreements?

b. Implied Contracts and Equitable Relief

The second branch of Marvin holds that even in the absence of any contract, relief may be granted based on an “implied contract” theory or on equitable grounds, such as implied partnership, constructive trust, resulting trust, or quantum meruit. The use of these equitable remedies to compensate unmarried cohabitants at the end of their relationship is discussed in the next case and the notes that follow it.

Courts in other states disagree on whether to enforce implied agreements between cohabitants. In Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980), the court refused to follow this aspect of Marvin, finding “an implied contract such as was recognized in [Marvin] to be conceptually so amorphous as practically to defy enforcement, and inconsistent with the legislative policy enunciated in 1933 when common law marriages were abolished in New York . . ..” In contrast, Watts v. Watts, 405 N.W.2d 303 (Wis. 1987), followed Marvin. See also Goode v. Goode, 396 S.E.2d 430 (WVa. 1990). In some of these cases it is unclear whether the court is finding an implied-in-fact contract or an implied-in-law contract. What kind of evidence would be sufficient to prove that an unmarried couple had an unspoken agreement regarding their financial rights and responsibilities to each other? See, e.g., Cook v. Cook, 691 P.2d 664 (Ariz. 1984) (finding agreement from parties’ course of conduct).

Claims for “palimony”—ongoing support payments after the termination of a cohabitation relationship—are recognized in California based on Marvin, but the overwhelming weight of authority around the country rejects this kind of claim. See Devaney v. L’Esperance, 949 A.2d 743 (N.J. 2008). Although New Jersey did allow palimony claims, as described in Devaney, these cases were superseded by statute in 2010, and “palimony” contracts are no longer enforceable in New Jersey unless the terms are in writing and both parties were represented by counsel.

c. Common Law Marriage

How does the court in Marvin deal with the fact that California had abolished common law marriage? Is there any distinction between common law marriage and the relationship of the parties in Marvin? How does the remedy granted in Marvin differ from the rights available to a common-law spouse?

Other courts have felt constrained by state laws abolishing common law marriage in deciding how far to allow claims by unmarried couples at the end of their cohabitation. See Morone, cited above, in which the parties lived together twelve years in a “marriage-like” relationship, had two children, and described themselves as husband and wife in various documents such as income tax returns and deeds to property. See also Hewitt, which concluded that enforcement of express cohabitation contracts would contravene the public policies reflected in the statutes governing marriage and divorce, particularly the law abolishing common law marriage in 1905. Why did most states abolish common law marriage? Are those reasons relevant to these cohabitation cases?

d. Consideration

What was the consideration alleged by Michelle Marvin in support of her contract claims? After Marvin, what would be considered an illicit or meretricious basis for a contract? See, e.g., Della Zoppa v. Della Zoppa, 103 Cal.Rptr.2d 901 (Ct. App. 2001).
Could one cohabitant enforce the other’s promise to make a gift of property? See, e.g., Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012).

e. Statutes of Frauds


f. Same-Sex Couples and Cohabitation Agreements

Courts generally provide the same range of remedies to same-sex cohabiting couples that are available to opposite-sex couples. See, e.g., Posik v. Layton, 695 So.2d 759 (Fla.Ct.App.1997); Weekes v. Gay, 256 S.E.2d 901 (Ga. 1979); Seward v. Mentrup, 622 N.E.2d 756 (Ohio Ct. App. 1993); Ireland v. Flanagan, 627 P.2d 496 (Or. Ct. App. 1981); Gormley v. Robertson, 83 P.3d 1042 (Wash. Ct. App. 2004). As with other cohabitant agreements, the question of meretricious consideration may be an issue these cases. See Whorton v. Dillingham, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988), which found that the sexual component of the consideration recited in the parties’ agreement was severable from the rest of the contract.

Express cohabitation agreements are especially important for same-sex couples living in jurisdictions where they are not permitted to marry. For example, in Posik, the court enforced an express written contract drafted by a lawyer requiring one partner to pay the other $2,500 per month for the remainder of her life on termination of their cohabitation. There is a useful introduction to cohabitation agreements in Cliford, Hertz et al., A Legal Guide for Lesbian and Gay Couples (15th ed. 2010).

Couples who cannot marry or utilize a substitute such as civil union or registered partnership may also use legal instruments such as wills and powers of attorney to accomplish some of the legal purposes that marriage would otherwise serve. See Joan M. Burda, Patricia A. Cain, Wendy S. Goffe and Tamara E. Kolz, Estate, Tax, and Benefits Planning for Unmarried Couples (2009); Courtney G. Joslin and Shannon P. Minter, Lesbian, Gay, Bisexual and Transgender Family Law (2008).
Chapter 1  Marriage and Its Alternatives

Client Counseling

If you had a wealthy client who was contemplating a Marvin relationship, what legal advice would you offer? Would you recommend some sort of contract, and if so, what should it provide? Would you give different advice depending on whether the client was in a same-sex or opposite-sex relationship?

Problem 1-17

After dating Russell for six years, based on his representation that he was getting a divorce from his wife, Gail quit her job as an elementary school teacher and moved into his apartment. Russell and Gail entertained and traveled extensively and maintained a lavish lifestyle, paid for by Russell, for eighteen years. When Russell broke up with Gail, he had still never gotten a divorce. Gail brought an action for promissory estoppel, fraud, breach of promise to marry, and intentional infliction of emotional distress. She alleges that if not for Russell’s repeated promises to divorce his wife, marry her, and support her for the rest of her life, she would ended the relationship years earlier. Should the court allow Gail’s claims to proceed? (See Norton v. McOsker, 407 F.3d 501 (1st Cir. 2005).)

Problem 1-18

Jon and Michael are a gay couple living in Virginia who have entered into a cohabitation agreement addressing their rights in shared property and providing a formula for income sharing over several years in the event their relationship ends. A recently enacted statute in the state, however, provides that:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

What effect, if any, does this statute have on their cohabitation agreement? (See Virginia Code § 20-45.3 (2012).)
Porter v. Zuromski
ZARNOCH, J.

Is this, as appellant contends, “nothing more than a palimony case,” or is it, as appellee argues, unjust enrichment of one partner in an unmarried relationship at the expense of the other, justifying the imposition of an implied trust? After a February 2009 bench trial, Anne Arundel County Circuit Judge Michele Jaklitsch sided with appellee/plaintiff Donna Zuromski, and against appellant/defendant, Sean Porter. This appeal of the circuit court’s decision calls upon us to address, for the first time, property rights issues oft-litigated in other jurisdictions. See Annot., Property Rights Arising From Relationship of Couple Cohabiting Without Marriage, 69 A.L.R.5th 219 (1999, 2010 Supp.) (“Cohabitation-Property Rights”). For reasons set forth below, we affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

This is a dispute over real property located on Washington Avenue in Shady Side, Maryland. In her March 31, 2007 Memorandum Opinion, the trial judge summarized the relevant facts in this case:

The parties were romantically involved from 1993 through June 2007. They became engaged to be married in 1995, but postponed their wedding after Plaintiff’s brother was injured in an accident in 1996. The parties lived with Plaintiff’s mother in Fort Washington, Maryland, for approximately three years, during which time Defendant assisted around the house and in caring for Plaintiff’s brother, and Plaintiff paid the rent of $600 each month to allow Defendant to save money for the parties. Defendant deposited his savings into a joint checking account held in both parties’ names.

In 1997, the parties decided to purchase a home together. Defendant found a house, and in February 1998, the parties applied for a mortgage loan together at Severn Savings Bank to finance the purchase. Because of Plaintiff’s credit score and impending bankruptcy filing (filed in May 1999), the parties were unable to qualify for a loan jointly. The parties then agreed that Defendant would apply for a mortgage loan again, this time in his name only. Defendant paid a down payment of $4500 from the parties’ joint checking account, and Plaintiff paid Defendant $3700 for her contribution toward the down payment. The parties agreed that
although Plaintiff could not qualify for a mortgage, the parties would act as joint owners of the property and Plaintiff would pay Defendant one half the mortgage expenses, and one half of all other property expenses each month.\footnote{This agreement was never reduced to writing.} The parties never had an agreement that Plaintiff would be a tenant; rather, they agreed that she was to be a joint owner. The parties agreed that Defendant’s name would appear on the deed, but he would hold the property for both parties.\footnote{Zuromski testified that in 2003 Porter again said he would put her name on the deed.} Defendant promised Plaintiff that in the future he would put Plaintiff’s name on the deed and that the property would be held in joint tenancy.

The parties made significant improvements to the house, with each of them working extensively to the best of their capabilities, and with the help of friends of both parties. Plaintiff’s mother’s friend, Allen Keller, installed the HVAC system with the understanding that the house was to be jointly owned by both Plaintiff and Defendant. Defendant’s friends installed drywall and other improvements.

Plaintiff paid one half of all mortgage, construction loan, utility, and other expense payments on the property until the parties’ relationship deteriorated in mid-2007. In January 2007, the parties ended their engagement, but the parties stayed together as a couple and Plaintiff continued making mortgage and home expense payments to Defendant. In May 2007, Defendant moved out of the parties’ shared bedroom in the house. In July 2007, on the termination of their romantic relationship, Defendant ordered Plaintiff to vacate the property. Defendant refused the Plaintiff’s request to divide the equity in the home, and he instituted a refinancing on the property which stripped a substantial portion of the equity out of the property.

On October 18, 2007, Zuromski filed a six-count complaint in the circuit court, asserting that Porter’s actions: 1) warranted imposition of a constructive trust; 2) required the establishment of a resulting trust; 3) unjustly enriched Porter; 4) constituted a promissory estoppel; 5) required entry of a declaratory judgment declaring that Zuromski was entitled to one-half ownership of the property; and 6) mandated injunctive relief. Porter answered and denied liability.

In February 2009, a two-day trial was held. The following month, the trial judge issued a memorandum opinion and order. The court found that Zuromski had “established the existence of a constructive trust as an equitable remedy for unjust enrichment.” It emphasized that in cases where only one party holds title, a constructive trust should be imposed, not only where fraud or misrepresentation exists, but also “when the circumstances render it inequitable for the party holding the title to retain it.” The court said that this standard was satisfied in this case.
The circuit court also found an additional basis for imposing a constructive trust. Porter, as holder of legal title to the property, was the dominant party in a confidential relationship.\(^7\)

Finally, the court said that, even absent a confidential relationship between the parties, it would find a constructive trust on the basis of unjust enrichment. As a result, the court declared that the parties each had an “undivided one half interest in the subject property as tenants in common.” It denied any specific monetary award, an injunction, and other claimed relief, but did not expressly address the resulting trust claim.\(^8\) The court declared that each party had an undivided interest in the property and appointed a trustee to transfer title and to cause a new deed to be prepared reflecting joint ownership. This appeal followed.

QUESTIONS PRESENTED

Porter has raised a single issue in this appeal:

On the facts of this case, did the trial judge commit reversible error by imposing a constructive trust on real property owned by Appellant and appointing a Trustee to transfer title to the same?

Zuromski has raised an alternative ground for upholding the judgment in the circuit court, which we have phrased as the following question:

Was there sufficient evidence before the trial court to support the imposition of a resulting trust?\(^10\)

DISCUSSION

1. Constructive Trust

A constructive trust is a remedy that converts the holder of legal title to property into a trustee for one who in good conscience should reap the benefits of the property. *Wimmer v. Wimmer*, 287 Md. 663, 668, 414 A.2d 1254 (1980). Its purpose is to prevent the unjust enrichment of the holder of the property. This remedy applies “where a property has been acquired by fraud, misrepresentation, or undue influence.”

\(^7\) Specifically, the court found:
The parties’ testimony indicates that Plaintiff and Defendant were engaged in an intimate romantic relationship and were planning marriage. Defendant purported to act in Plaintiff’s best interests when he discussed placing her name on the deed in the future. The parties’ sexual relationship was not the sole consideration for this agreement. Plaintiff had no reason to believe that Defendant may be motivated by anything other than his feelings for her and interest in a financially secure future together. Under the circumstances, Plaintiff was “justified in assuming” that Defendant would act in her best interest and that a written agreement establishing the joint tenancy was not required…. As such, this Court finds that a confidential relationship did exist between Defendant and Plaintiff.

\(^8\) Of course, the court was under no obligation to address the issue in light of the fact that the constructive trust count sought the identical relief pursued under the resulting trust theory.

or other improper method, or where the circumstances render it inequitable for the party holding the title to retain it. " Ordinarily, such factors must be shown by clear and convincing evidence. However, this rule changes, " [o]nce a confidential relationship is shown. Then, a presumption arises that confidence was placed in the dominant party and that the transaction complained of resulted from fraud or undue influence and superiority or abuse of the confidential relationship by which the dominant party profited." This presumption shifts the burden to the defendant to show the fairness and reasonableness of the transaction. Of course, our review of whether the trial judge's findings of fact on these points are supported in the record is governed by the clearly erroneous rule. See Md. Rule 8-131(c) (Appellate court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.").

A. Fraud

At the outset, Porter challenges some of these principles that guided the circuit court's decision. He particularly takes aim at the trial court's reliance on Hartsock v. Strong, supra, 21 Md. App. at 116, 318 A.2d 237, for the proposition that a constructive trust may arise from some equitable principle independent of fraud. He suggests that Hartsock may have been weakened by our decision in Jahnigen v. Smith, 143 Md. App. 547, 795 A.2d 234 (2002), where, at one point in our opinion, we noted: "[T]he facts as presented do not support an action for constructive trust because there has been no allegation of misrepresentation, fraud, or other improper methods of obtaining title." However, Jahnigen flatly states that, in addition to fraud and these other grounds, a constructive trust may be found "where the circumstances render it inequitable for the party holding title to retain it." Moreover, just six months after Jahnigen was decided, we once again restated the principles governing imposition of a constructive trust, noting that the remedy could be invoked for inequitable circumstances independent of fraud. Turner v. Turner, 147 Md. App. 350, 421-22, 809 A.2d 18 (2002).

Porter also contends that Wimmer undercuts the circuit court decision here. In Wimmer, the Court of Appeals overturned the imposition of a constructive trust upon a one-half interest in a marital home purchased with the husband's funds and titled in his name. In rejecting the wife's claim, the Court emphasized that the wife parted with no money or labor with respect to the property and thus, the title holder was not unjustly enriched. The very facts found missing in Wimmer are present here. To be sure, the Wimmer court also noted that the husband made no misrepresentations as to the title to the property. But Wimmer is clearly not a case of absence-of-fraud equals no-claim. It is one "where the circumstances [did

12 A confidential relationship exists “where one party is under the domination of another or where, under the circumstances, such party is justified in assuming that the other will not act in a manner inconsistent with his or her welfare.” Bass v. Smith, 189 Md. 461, 469, 56 A.2d 800 (1948).
not] render it inequitable for the party holding the title to retain it,” because he was not unjustly enriched at the expense of the plaintiff. Thus, nothing in Wimmer suggests that Zuromski would have to make a showing of fraud in order to prevail here.

B. Palimony

Porter denigrates Zuromski’s constructive trust claim as a palimony action not recognized in this State. This argument is misplaced here. The appellee was not seeking “alimony from or for a pal.” See Attorney Grievance Commission v. Ficker, 319 Md. 305, 320, 572 A.2d 501 (1990).14 Nor was her lawsuit an action for support. See Annot. “Palimony Actions for Support Following Termination of Nonmarital Relationships, 21 A.L.R.6th 351 (2005, 2010 Supp.). It was not “based on” promises or commitments to marriage, see Miller v. Ratner, 114 Md.App. 18, 50, 688 A.2d 976 (1997), or predicated upon meretricious sexual services. Ficker, 319 Md. at 319, 572 A.2d 501; Baxter v. Wilburn, 172 Md. 160, 162-63, 190 A. 773 (1937). Rather, Zuromski’s claim arises from her financial contributions to the property and the unjust enrichment that would consequently occur if Porter retained sole title to the house.

C. Joint Banking Account

Porter contends that “[a] key element of Appellee’s case and the trial court’s decision was that the parties established a joint bank account into which Appellant deposited virtually all of the funds while Appellee used her money to pay rent to her mother, in whose house the parties were living.” He goes on to argue that “[t]he law is that no gift of Appellant’s funds to the Appellee was complete until she withdrew them from that joint account, which she did not do, and that, to the extent Appellant may have withdrawn any funds she had deposited into that account, a gift from her to him was completed at that time.”

A fair reading of the trial court’s opinion does not support the contention that the joint banking account for the house was a “key element” of the decision to impose a constructive trust. What was critical was that Zuromski made substantial financial contributions toward the purchase of the house and paid half of the mortgage charges and other home expenses.

This is not a case where one party to a joint banking account claims an interest in property purchased with funds withdrawn solely by the other account holder, exclusively for his own purposes. See Hamilton v. Caplan, 69 Md.App. 566, 586, 518 A.2d 1087 (1987). Nor does Zuromski assert that Porter’s withdrawal of funds from the account were improper. See Kornmann v. Safe Deposit & Trust

14 Ficker discusses the many permutations of the term “palimony” 319 Md. at 318-22, 572 A.2d 501.
Co., 180 Md. 270, 23 A.2d 692 (1942). Rather, when the Shady Side property was purchased in 1999, both parties drew checks on the account to pay the down payment: Porter’s was payable to the lender and Zuromski’s was payable to Porter, apparently to be endorsed and paid over to the mortgage holder. This record belies the contention that these withdrawals and others by Zuromski were gifts to Porter. On the contrary, she withdrew funds in accordance with the couple’s plan to save money for a home, and their agreement to pay for it jointly—a factor that supports a finding of a constructive trust. See 76 Am.Jur.2d Trusts, supra at § 132 (“[A] constructive trust is independent of any agreement between the parties—although the existence of some agreement may serve as a factor in determining whether to impose a constructive trust ...”).

D. Appellant’s Other Legal Objections

A volley of additional legal arguments from Porter’s scattershot attack on the circuit court decision all miss their target. He contends that the trial court should not have ignored his testimony that he never intended that Zuromski have title to the property. However, a constructive trust is independent of any agreement between the parties. Restatement of the Law, Restitution at § 160 Comment b. (“A constructive trust is imposed not because of the intention of the parties but because the person holding the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property.”); 76 Am.Jur.2d Trusts § 132 (2005) (“A constructive trust is independent of any agreement between the parties ...”). Even if the circuit court found Porter’s testimony credible, it would have not called into question the trial judge’s conclusion that, by operation of law, a constructive trust was required to be imposed.

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E. Sufficiency of Evidence

Porter’s question presented asks whether “[o]n the facts of this case” the trial court erred by imposing a constructive trust. In our view, the answer to this question is a resounding “no.”

The evidence in this case clearly supports the imposition of a constructive trust. Porter testified that he told Zuromski he would put her on the title to the property, but privately he never really intended to do so. Such conduct smacks of misrepresentation if not fraud. But fraud need not be found here to uphold the circuit court’s judgment. Zuromski’s monetary and non-monetary investments in the property demonstrated that she clearly relied on Porter’s representation that she would become co-owner of the house. In our view, these circumstances would render it inequitable for Porter to retain exclusive title and would justify imposition of a constructive trust.
On this record, the same result is reached if Porter's conduct is examined as an abuse of a confidential relationship. We think there is no doubt that a confidential relationship existed between the parties. This Court recently noted that, in the context of prenuptial agreements, while there is no presumption that spouses are in a confidential relationship, an engaged couple could occupy a confidential relationship. *Lasater v. Guttmann*, 194 Md.App. 431, 459 n. 19, 5 A.3d 79, 95 (2010). Out of state cases, more directly on point, also recognize that couples cohabitating or planning to marry can be parties to a confidential relationship, the breach of which can lead to imposition of a constructive trust on property. *See Hatton v. Meade*, 23 Mass.App.Ct. 356, 502 N.E.2d 552, 557 (1987); *Hudson v. DeLonjay*, 732 S.W.2d 922, 929 (Mo.App.1987); *Rhue v. Rhue*, 189 N.C.App. 299, 658 S.E.2d 52, 59 (2008). *See generally Cohabitation-Property Rights*, supra, 69 A.L.R.5th at § 3.

Other factors support the finding of a confidential relationship here. Porter's sole name on the title made him a dominant party in the relationship and, by his representation that he would put Zuromski on the title, she was justified in assuming that Porter would not act inconsistent with her welfare. Porter's attempt to profit from the relationship by solely retaining title to the property abused the confidential relationship, shifting the burden to him to show the fairness and reasonableness of his action. On this record, he has failed to meet this burden and a constructive trust was justified.

2. Resulting Trust

In the alternative, Zuromski contends that the record before the trial court also supported the finding of a resulting trust. In *Jahnigen*, supra, 143 Md.App. at 558, 795 A.2d 234, we noted that “[w]here a transfer of property is made to one person, and only a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom said payment is made....” A resulting trust has also been described in the following fashion:

Under compelling circumstances, courts may impose a resulting trust. A resulting trust is not a trust at all, but rather it is an equitable remedy designed to prevent unjust enrichment and to ensure that legal formalities do not frustrate the original intent of the transacting parties. Such a trust is implied by law from the acts and conduct of the parties and the facts and circumstances which at the time exist and surround the transaction out of which it arises. Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold his or her legal title for the benefit of another, and there ordinarily being no fraud or constructive fraud involved.

76 Am.Jur.2d Trusts § 135.
One legal observer, seemingly predicting the scenario of this case, has said:

Resulting trusts, also known as purchase money resulting trusts, arise when one partner, intending the property bought to be for his or her benefit and not that of another, pays all or part of the purchase price but title is taken in the name of another.


Some of the facts of this case raise the possibility of a resulting trust and courts in other jurisdictions—where circumstances required—have found a resulting trust where unmarried cohabitants were involved. See *Cohabitation-Property Rights*, supra, 69 A.L.R.5th at § 3. However, this is an issue the circuit court did not decide, and we need not decide it here. For all of the reasons set forth above, we affirm the circuit court’s imposition of a constructive trust, its declaration that each party has an undivided interest in the property, and the appointment of a trustee to transfer title.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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Points for Discussion

**a. Constructive and Resulting Trusts**

What relief does the court award Ms. Zuromski in this case? Based on the discussion in *Porter*, what is the distinction between a constructive trust and a resulting trust? Why do you think the trial court based its ruling on the constructive trust theory? Resulting trusts are described in the *Restatement (Third) of Trusts* § 7 (2003); constructive trusts are discussed in the *Restatement (Third) of Restitution and Unjust Enrichment* § 55 (2011).

**b. Restitution-Based Remedies**

Courts have generally refused to order compensation for such contributions as household services, paying household expenses, raising or supporting children or stepchildren, or assisting with a partner's career. E.g. Maria v. Freitas, 832 P.2d 259 (Haw. 1992). See also Ann Laquer Estin, Ordinary Cohabitation, 76 Notre Dame L. Rev. 1381 (2001).

On restitution-based claims of cohabitants, see generally Restatement (Third) of Restitution and Unjust Enrichment § 28 (2011).

Problem 1-19

For the first four years of their relationship, Sandra and Dennis lived together in Sandra's apartment, where she paid the rent as well as all household expenses. Dennis saved his earnings for the down payment on a house. When Dennis had accumulated $11,000, he used it to purchase a house, which was titled in his name alone. Sandra and Dennis moved into the house and lived together there for eight years. Although they were engaged throughout this time, they never married. Dennis made all mortgage and tax payments; Sandra paid for groceries and the utility bills. She did the cooking, cleaning and laundry, and he did maintenance work. At the time their relationship ended, Dennis had $90,000 in equity in the house. Does Sandra have a claim against Dennis? (See Ward v. Jahnke, 583 N.W.2d 656 (Wis. Ct.App.1998).)

Problem 1-20

Kurt and Stephanie, both college students, lived together for 16 months. After they broke up, Kurt filed in small claims court, seeking reimbursement of $2500 worth of expenses he incurred on Stephanie's behalf during their relationship. These expenses included $800 for her share of the rent during the last four months they lived together, $640 toward her car payments, $300 for a plane ticket, and the rest for books, magazines, movie rentals and groceries. Can Kurt recover under either an implied contract or restitution theory? (See Soderholm v. Kosty, 676 N.Y.S.2d 850 (Justice Ct. 1998).)
Chapter 1 Marriage and Its Alternatives

Global View: Cohabitation Law

Judicial rulings and legislation in many Canadian provinces extend certain rights and protections to cohabitants in marriage-like or “common law” relationships at the federal and provincial level. See Julien D. Payne & Marilyn A. Payne, Canadian Family Law 45-63 (2d ed. 2006). Civil law countries including France extend some legal rights to a cohabiting partner, referred to as a concubine, and many Latin American countries recognize the de facto union or unión marital de hecho. Informal statuses that are not fully equivalent to marriage are not given any effect in legal proceedings in the United States. See, e.g., Bandsa v. Wheeler, 995 A.2d 189 (D.C. 2010); American Airlines v Mejia, 766 So.2d 305 (Fla. Ct. App. 22000).

Since 2002, legislation in New Zealand has extended property rights automatically to couples who have lived together for three years or more, including inheritance rights and a right to division of relationship property at the end of their “de facto relationship.” Couples may enter into an agreement to opt out of the statutory scheme. See generally Bill Atkin, The Challenge of Unmarried Cohabitation – The New Zealand Response, 37 Fam. L.Q. 303 (2003). What are the benefits and disadvantages of this approach? Would you favor enacting it into law in your jurisdiction?

Legal Effects of Unmarried Cohabitation

Cases such as Marvin and Porter address the financial claims and remedies that may be available between cohabitants at the end of their relationship, but do not address the question of whether and when cohabitation relationships should have broader legal consequences. Here are some of the other questions courts have considered.

(a) Should an unmarried cohabitant, on separation, be granted a share of the other partner’s pension rights? See Wilbur v. DeLapp, 850 P.2d 1151 (Or. Ct. App. 1993) (awarding share of pension rights).

(b) Should the surviving member of a cohabiting couple have the same inheritance rights as a spouse? See Olver v. Fowler, 168 P.3d 348 (Wash. 2007) (allowing distribution of jointly acquired property, but not partner’s separate property, under the “meretricious relationship” doctrine), and Northrup v. Brigham, 826

(c) Courts in some states treat a husband as the “equitable parent” of a child born to his wife during the marriage, even if that child is not his biological child, provided that he has treated the child as his own. Should the doctrine be extended to a cohabiting partner who lived with the child’s mother, supporting and caring for the child? See Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999).


(f) Should an automobile insurance policy that includes coverage for a policyholder’s “spouse” be construed to include a cohabiting partner? See Cole v. State Farm Insurance Company, 128 P.3d 171 (Alaska 2006).

(g) Should one partner be permitted to sue in tort if the other is negligently and seriously injured by a third party, in circumstances in which a spouse would have a claim for loss of consortium? Compare Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003) (allowing consortium claim) with Elen v. Sheldon, 758 P.2d 582 (Cal. 1988) and Medley v. Strong, 558 N.E.2d 244 (Ill. App. Ct. 1990) (no consortium claim). See also Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (cohabitant may have claim as bystander for negligent infliction of emotional distress).

(h) If the wage-earning member of a couple were killed in an industrial accident, should the other partner be entitled to recover workers’ compensation benefits? Should the partner recover for wrongful death if the decedent died as a result of another’s negligence? See Sykes v. Propane Power Corp., 541 A.2d 271 (N.J. Super. Ct. App. Div. 1988) (denying recovery). Cf. Or. Rev. Stat. 8 656.226 (2012), which provides that where an unmarried man and woman have cohabited “as husband and wife” for more than a year in Oregon and have children, the surviving cohabitant and children are entitled to workmen’s compensation as if there had been a legal marriage.

(i) Should a landlord’s refusal to rent an apartment to a cohabiting couple violate an ordinance or statute prohibiting discrimination based on marital status? Compare Donahue v. Fair Employment and Housing Commission, 2 Cal. Rptr.2d 32 (Ct. App. 1991), petition for review granted 825 P.2d 766 (Cal. 1992) review dismissed and cause remanded 859 P.2d 671 (Cal. 1993) (refusal to rent to
unmarried couple violated city ordinance) with *County of Dane v. Norman*, 497 N.W.2d 714 (Wis. 1993) (refusal did not violate ordinance).

### Ending Marriage?

The decline in marriage rates and rise in unmarried cohabitation, the advent of same-sex marriage and the invention of civil union and registered partnership laws have prompted writers from different political perspectives to call for abolishing state-sanctioned civil marriage, and replacing it with some other form of contract-based family regulation. See, for example, Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 Hofstra L. Rev. 201 (2003), which argues against laws that confer special privileges on marital relationships. See also *Symposium on Abolishing Civil Marriage*, 27 Cardozo L. Rev. 1155 (2006), and Elizabeth S. Scott, *A World Without Marriage*, 41 Fam. L.Q. 537 (2007).

### Further Reading: Cohabitation
