

# CHAPTER

# 1

## INTRODUCTION TO FAMILY LAW PRACTICE

### KEY TERMS

Mediation      Settlement

**F**amily law is one of the most interesting, exciting, and dynamic areas of legal practice. If you like boxing, wrestling, or any of the other pugilistic arts, you will certainly enjoy being part of a legal team that tackles the knotty problems and ever-changing cultural, social, and economic issues that affect the American family.

Family law as a specialty evolved slowly, but now, in many jurisdictions, family law cases occupy more space on the civil court docket than any other type of matter. This increase has occurred because of changes in our society during the past forty years that have affected attitudes toward marriage, family, divorce, and parenting.

During the first half of the twentieth century in the United States, divorce was far less common than it is today. At the turn of the twentieth century, less than one in twenty marriages ended in divorce; since the mid-1970s, for every two marriages that took place in a given year, one divorce has occurred. Today, more than one-half of children under the age of eighteen are growing up in one-parent homes. As a result of this trend, many law firms devote their practice exclusively to family law; for other firms, the practice of family law comprises a large segment of the work produced. Both types of law firms increasingly employ paralegals in their family law department. These paraprofessionals, with the guidance of their supervisory attorneys, complete the myriad of tasks needed to provide thorough and effective representation to clients on family matters.

**FIGURE 1-1**

A paralegal who is both competent and enthusiastic about family law practice can provide valuable assistance to attorneys.



A paralegal who is both competent in and enthusiastic about family law practice can provide valuable assistance to attorneys who spend all or most of their time practicing family law. Employment opportunities for paralegals in this field of law will abound as long as individuals continue to seek attorneys to help them resolve their marital and family conflicts, and as long as there are paralegals whose training has provided them with a solid background in both family law theory and practice. The goal of this book is to provide the paralegal student, in a comprehensive and understandable manner, with just that type of theoretical and practical education.

## **FAMILY LAW THEORY**

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Family law theory provides the analytical framework for the body of substantive law used in courts to decide marital and family-related matters. These laws determine, regulate, and enforce the obligations of marriage and parenthood. They are made by the judicial branch of state governments as judges make decisions in their courtrooms and by the legislative branch as state legislators fashion and enact statutes. These common law and statutory decisions are not made arbitrarily, nor are they made in a vacuum without considering what is taking place in the society in which the laws will be enforced. When a law is being made, it is fashioned in a way that promotes the dominant views of the time on the proper, fair, or most enlightened way to handle the issues at hand. Legislation and judicial opinions reflect the values and attitudes of society. These values and attitudes produce the ideas that provide the theory or underlying rationale for resolving a legal issue in a particular manner. As values and attitudes change and as society acquires new information and knowledge related to various aspects of family law issues, new theories emerge and replace the earlier rationales for resolving disputes.

In the area of family law, courts and legislatures use many different approaches to address marital disputes and the issues arising from such disputes. These issues include

- ▼ Support and maintenance of family members,
- ▼ Care and custody of minor children, and
- ▼ Division of property on the breakup of the marital unit.

Over time, family law theory has grown and evolved as society has changed. The history of American family law presented in the next chapter demonstrates how differently family law issues have been treated during different time periods.

## **FAMILY LAW PRACTICE**

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### **COURT PROCEDURES**

In every jurisdiction, the judicial system provides specific procedures for bringing disputed substantive family law issues before the court. These procedures include

- ▼ Procedures for initiating family-related actions in a court,
- ▼ Procedures for acquiring and presenting evidentiary information,
- ▼ Procedures for providing temporary solutions to issues of support, custody, and visitation while a matter is pending, and
- ▼ Procedures for enforcing or modifying a court's orders.

Every state or jurisdiction has its own particular set of procedural rules to follow in the practice of family law. These rules are part of the jurisdiction's larger body of civil procedural law that governs how private parties may enforce their substantive legal rights through the court system. In the practice of family law, knowledge of the family court's procedural rules is essential.

### **OFFICE PROCEDURES**

It is equally essential to know the procedures that a law firm uses within its office to handle family law matters. Every law office has its own particular methods and practices for the following aspects of managing family law cases:

- ▼ Obtaining and recording information from clients,
- ▼ Setting up files,
- ▼ Preparing legal documents for filing in court,
- ▼ Docketing court dates,
- ▼ Recording the amount of time spent working on each file, and
- ▼ Billing clients for work done.

## **APPLYING FAMILY LAW THEORY TO FAMILY LAW PRACTICE**

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It is also very important to understand how family law theory is actually applied in the real world of family law practice. In many instances in a marital dispute, the issues such as property division, alimony, child support, and even child custody are worked out by the parties in a manner that is not consistent with the prevailing theoretical view or even the substantive statutory or common law guidelines. This happens when the parties work out an agreement to settle their differences.

## SETTLEMENT

Occasionally, spouses who have agreed to end their marriage are able to work out an agreement between themselves to resolve each of the issues arising from the marital breakup. This informal process of dispute resolution is called **settlement**. The parties themselves negotiate areas of disagreement and, through compromise, reach an agreement to present to the court. In doing so, each party usually forfeits a portion of what they might be fully entitled to in a court of law in exchange for a concession from the opposing party. This manner of settling family disputes may be accomplished by the parties acting alone or with the assistance of their attorneys.

## MEDIATION

Family or marital disputes may also be settled by the alternate dispute resolution procedure known as **mediation**. With the assistance of a trained mediator, who is either court provided and free or privately engaged and paid, the parties meet and attempt to resolve the issues surrounding the dissolution of their marriage. Mediators are not judges. They may suggest but not order solutions. The mediator attempts to have the parties participate in a give-and-take process to resolve the outstanding issues. If the parties come to an agreement in the mediation sessions, the agreement is not binding on them if they shortly afterward change their minds. However, if the parties incorporate the solutions agreed to in the mediation proceedings into a formal settlement document that is presented to the court and the court approves and enacts the agreement as a court order, the parties are then bound by it.

When the parties cannot forge an agreement on their own, the law is strictly applied on some or all of the issues involved. The parties go to trial and a judge, after hearing each side's arguments and reviewing their evidence, makes the decisions on how the disputed issues will be handled. These decisions become court orders that the parties must follow. Not infrequently, the party who has been least open to negotiation and compromise finds that the court's decision is far less favorable to him- or herself than the proposed settlement.

When the parties have agreed to a settlement and, forgoing a trial, present their agreement to the court, the judge does not have to automatically approve the

**FIGURE 1-2**

With the assistance of a trained mediator, the parties attempt to resolve the issues surrounding the dissolution of their marriage.



agreement and make it an order. Judges in family court have a great deal of discretion in deciding whether or not to approve an agreement that the parties present to the court. If an agreement appears to be particularly one sided, arousing the suspicion that the less favored spouse may have been coerced into signing the agreement, a judge may refuse to accept the unfair portions of the agreement and instead enter more equitable orders.

## **THE FAMILY PRACTITIONER'S ROLE IN THE DISSOLUTION PROCESS**

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The practice of family law involves as much negotiating as it does litigating. For instance, a common saying is that there are no winners in a divorce, and the children are the biggest losers. The family practice law firm that strives to favorably resolve its client's legal problems in a manner that creates the least amount of additional damage and pain to all individuals affected—and does so successfully—provides the greatest degree of service to the client. Whether the service involves the initial divorce proceeding, or a subsequent need to enforce or modify the alimony, child support, or custody order, the family practice lawyer who can meet the client's objectives with the least amount of court intervention will serve a client well.

All litigation is adversarial and can only escalate hostility between the adverse parties. In a family law practice, the clients' need for legal assistance arises from discord in the most personal and intimate areas of their lives. Much attention and concern should be given to the manner in which the controversy is handled and the consequences for all concerned of mishandling or insensitively handling the issues underlying the dispute. All staff members of the law office should be aware of the need to handle delicate matters with great care. With the very high divorce rate that exists today, both the many members of the court system and attorneys who practice a considerable amount of family law have become adept at treating all parties with respect and with understanding of the turmoil that accompanies the breakup of a marriage.

Divorces are much easier to obtain in the 1990s than they were in the 1890s. Most of the stigma attached to divorce has disappeared, and today's communities offer many resources to help divorcing spouses and their children deal with the difficult changes taking place. Community support for families going through this type of crisis is readily available today because of our society's acceptance of divorce. This was not always the case. For many centuries and for a number of decades in the twentieth century, there was enormous pressure from social, cultural, and certain religious institutions to preserve the marital union and nuclear family at almost any cost. The following chapter provides an historical glimpse of the nature of marriage and divorce over time and the values and attitudes that contributed to past and present views of both marriage and divorce.

### **REVIEW QUESTIONS**

1. Why has the specialty of family law practice grown during the last thirty years?
2. Name the two areas in which a paralegal needs training in family law.
3. Discuss the family law practitioner's role in the dissolution process.
4. Name the sources of substantive law that regulate the practice of family law.

5. Name the sources of procedural law that govern the practice of family law.
6. How do changing social ideas and moral values affect the status of substantive family law?
7. Name three issues family courts address in a family law dispute.
8. Name three types of family law conflicts in which the judicial system provides specific procedures to bring the matter before the court.
9. Name three typical office procedures used in a family law practice.
10. In a family law matter, how do the procedures of settlement and mediation operate and what is their value to resolving conflicts between spouses or the nonmarital parents of minor children?

## EXERCISES

1. Go to your local public library and locate United States Census figures for 1950, 1970, and 1990. For each of those years, locate the divorce rate per marriages and the number of one-parent households. Prepare a written summary of this information.
2. Go to your local law library and locate the statutes for your state and the specific title, chapters,

or sections of those statutes that address substantive family law matters. Photocopy these. Prepare a written summary of each statute regulating family law, identifying the statute name and statute number and describing briefly the area of family law the statute addresses.

3. Go to your local law library and locate the case law digest for your state. Find the digest topic that addresses family law. Prepare a summary of this digest topic, including the name of the major sections and subsections of the topic, and describe the type of issues that the cases in this section and subsection address.

4. Locate a copy of the rules of court or the practice book for your state. Locate the section that contains procedural rules for the practice of family law. Prepare a written summary that briefly describes the content of the procedural rules in this section.

5. Call the clerk's office of a state court in your area and ask to speak to the family law clerk or the supervisor of the family relations division of the court. Ask the clerk or supervisor if the court offers free and either mandatory or optional participation in mediation services for parties involved in a dissolution or custody dispute.

# CHAPTER

# 2

## THE ROOTS AND TRADITIONS OF AMERICAN FAMILY LAW

### KEY TERMS

Alienation of affection	No-fault divorce
Annulment	Paternity action
Breach of promise to marry	Separate maintenance
Legal separation	

**M**uch of American legal tradition has its roots in the common law decisions of England. However, centuries before the creation of the English common law, ancient legal systems developed rules to govern the rights and responsibilities of spouses and other family members. These ancient rules left their mark on later legal systems. In ancient Greece, a married woman was chattel, the legal property of her husband with no rights of her own. For centuries afterward, marriage was a formal arrangement in society in which women were subservient to men. Although in various cultures, at different points in history, women did possess some legal rights, they generally occupied a legal status that was inferior to that of men. In the United States, it was not until the passage of the Married Women's Property Acts that American women were allowed to own property in their own name. For this and many other equally compelling reasons, women were often reluctant to initiate legal proceedings to end their marriages.

Marriage, for many centuries, was a very strong social institution that contributed to the stability of society. Christianity transformed marriage from a mere social institution into a sacrament, a holy union lasting for eternity—"What God

has brought together, let no man put asunder.” Marriage was a legally and morally sanctioned relationship between a man and a woman, functioning as one social and economic unit. Spouses were responsible for the care of each other and jointly responsible for the care and maintenance of children, the issue of their union. However, divorce was not unheard of even in the earliest of times. In ancient times, a form of divorce took place when a woman left her husband or when a husband cast out his wife. In both instances, the husband remained in the family home and retained possession and control of the children of the marriage since they were regarded as chattel, pieces of personal property owned by the husband. In the Christian Western European civilizations of the Middle Ages, church and state were intertwined and the state enforced the doctrines of the Christian church, including the proscription against divorce.

Until the mid-1500s, there was one Christian church for all of Western Europe. This was the Roman Catholic Church with its seat of power vested in the Pope in Rome. In the 1530s when King Henry VIII wished to divorce his queen, Catherine of Aragon, and marry Anne Boleyn, the Roman Catholic Church refused to give Henry VIII a dispensation to divorce and remarry. Henry VIII, as the head of the church in England, broke from Rome and established the Church of England. During the second half of the 16th century, several different religious groups arose in England, Scotland, Germany, and France, eventually resulting in the establishment of many new Christian sects, separate from the Church of Rome, which became branches of the Protestant movement. Originally, in the European countries where Protestantism prevailed, the church and state continued their close connection and the national religion became the prevailing Protestant denomination in the country. For instance, in Scotland, the established religion was Presbyterianism. In the American colonies settled by the Puritans, such as the Massachusetts Bay Colony, Puritanism became the state religion. In other of the thirteen original American colonies such as Virginia and the Carolinas, which were settled by Englishmen who remained loyal to the established Church of England, the Anglican religion became the official religion of the colony. However, despite the continuing connection of church and state, many of the now largely Protestant European nations and the Protestant colonies in America allowed at least what came to be called civil divorce. On the other hand, in the European countries where Roman Catholicism remained either the state religion or the religion embraced by the majority of inhabitants, civil divorce was much slower in coming. In Italy and the Republic of Ireland, civil divorce was not legally authorized until the second half of the twentieth century!

## **MARRIAGE, DIVORCE, AND FAMILY LAW FROM COLONIAL AMERICA TO THE TWENTIETH CENTURY**

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In colonial America, although marriage was regarded as a sacred union, the Puritans, who had settled the New England colonies, recognized and allowed divorce. They also sanctioned a form of legal separation known as “divorce of bed and board” under which the couple’s sacred union remained intact but they no longer cohabited. When a couple divorced or separated, colonial governments imposed on the husband the continuing obligation of economic support of his wife and their children.



When the thirteen original colonies broke away from England and formed a new nation, the state governments assumed the power to legally authorize and legally dissolve marriages. The new American nation provided specifically for the separation of church and state in its Constitution. There was to be no national religion nor were any of the new states allowed to establish any one religion as the official religion of that state. Henceforth, marriage and divorce as civil matters became separated from marriage and divorce as religious issues. In the eyes of the state, marriage was now viewed as a civil contract between two parties.

Under the marriage contract, each party had obligations to the other party. When one of the parties failed to perform an obligation of the marriage, he or she had breached the marital contract. The nonbreaching party could sue for a termination of the marriage contract and for damages from the other party as compensation for the harm caused by the breach. If the nonbreaching or “innocent” party proved that the marital contract had been breached, the court could terminate the marriage and, under the civil law, both parties were free to remarry. The state, through its court system, could order the offending or breaching party to compensate the other party and enter orders for the continuing support of the minor children of the marriage.

When each state government established either legislative or common law grounds for establishing breach of the marriage contract, these were commonly referred to as the grounds for divorce. When the female spouse alleged and proved grounds for divorce, the court almost always ordered the male spouse to continue to provide financial support to his former wife and his children. In many instances, even when a husband brought and won a divorce action against his wife, if the wife had been financially dependent on her husband for subsistence, the court ordered the husband to continue to provide for her financial support. However, enforcing these obligations was not always possible. Many ex-husbands disappeared from the court’s jurisdiction and many divorced women and their children suffered economic deprivation and frequently social isolation as well. As long as women lacked the ability to support themselves, divorce was not a practical alternative. Societal pressures from many avenues, including the church, the extended family, and the local community were also exerted to keep the family intact.

Political and economic forces also promoted the advantages of staying married. During the eighteenth century and for a good part of the nineteenth century, the intact family was the basic economic unit of the new American nation. When the United States was mainly an agrarian society, its financial health and political strength depended on the production and sale of agricultural products from thousands of small family farms. All family members were essential to the operation of these farms. Family members, even young children, contributed to the economic advancement of their family and the nation by performing one or more of the many chores needed to keep the farm running.

## **THE INDUSTRIAL REVOLUTION AND THE FAMILY**

The Industrial Revolution of the nineteenth century gave rise to the factory system in the United States and shifted the centers of economic activity from the country towns to the cities. In the early and middle years of the nineteenth century, many individuals left the family farms in the New England and Middle Atlantic states to work in the cities. Throughout the second half of the 1800s the large influx of immigrants from Europe added to the population of urban centers.

Frequently mothers, fathers, and even young children worked in city factories. Eventually laws were passed to protect children from working at early ages.

Some women then began to stay at home to care for their children. When this occurred, the husband became the person primarily responsible for the family's financial support. He also usually became the family member with predominant economic power. Men had the ability to obtain credit in their own names, whereas women could only obtain credit under their husband's, father's, or brother's signature. Even married women who continued to work in mills and factories and later in offices and stores had inferior economic power because these women were frequently paid far less than their male counterparts. Single women fared no better in the workplace. In fact, except for low-paying jobs in factories or low-paying positions as domestic servants, there were few employment opportunities for women in nineteenth-century America.

As time went by, "respectable" married women were not expected to work. Even well-educated, married women who, when single, had held positions as schoolteachers or nursing professionals had few or no opportunities to work for

### FIGURE 2-1

As time went by, respectable married women were not expected to work, but rather stay home, do housework, and take care of the children.



pay. Many school systems prohibited married women from working as teachers; other school systems would not hire women with young children. Hospitals frequently instituted similar exclusionary policies for staff nurses.

As a result of these constraints, married women did not often consider divorce as a solution to a failing or unhappy marriage. Many women feared that they would have no means of supporting themselves or their children. Further, divorce carried a social stigma. Divorced women were not well accepted in many communities. The children of divorced mothers were often excluded from neighborhood play and not welcome in the homes of their friends who came from intact families.

Despite the many negative consequences of divorce for both women and men, and especially for children, the divorce rates rose at a slow but steady pace throughout the nineteenth century and into the early decades of the twentieth century. In the 1880s, one out of sixteen American marriages ended in divorce.

## **FAMILY LAW FROM THE DAWN OF THE TWENTIETH CENTURY TO THE PRESENT DAY**

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By 1900, there was one divorce for every twelve marriages. Undoubtedly, industrialization and urbanization played some part in this increase, if for no other reason than that these social and economic developments decreased the value of the intact family as an economic unit while providing women a meager increase in opportunities for paid employment outside the home.

However, divorce did occur during the first half of the twentieth century. Courts, when granting a divorce, usually ordered a husband to make weekly alimony payments and support payments for the maintenance of his former spouse and his children. Mothers were always awarded custody of children unless they were deemed in some way unfit or unless they abandoned the children and did not seek custody. Society continued to frown on divorce. To get a legal divorce, one party had to bring a civil suit and prove one of a limited number of grounds before the court would grant a decree of divorce. Typically, most states granted a divorce if one party proved the other committed adultery, abandoned them, or was a habitual drunkard. Eventually many states added grounds known as intolerable cruelty and mental cruelty. Even if parties agreed to divorce, one party had to sue the other party alleging one of these grounds. If the other party did not challenge the allegations, the judge would grant a divorce.

## **TYPES OF ACTIONS IN THE AREA OF FAMILY LAW**

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At the turn of the century, the number of suits for divorce, although increasing, still represented a small percentage of the legal actions that were marriage or family related. Some of these other related matters, such as actions to establish paternity, continue to be a part of today's family court calendar. Other actions such as petitions for annulment or actions for legal separation and spousal maintenance have greatly decreased, and yet other actions, such as suits for breach of promise to marry and alienation of affections, have virtually disappeared from the court's dockets.

## BREACH OF PROMISE TO MARRY

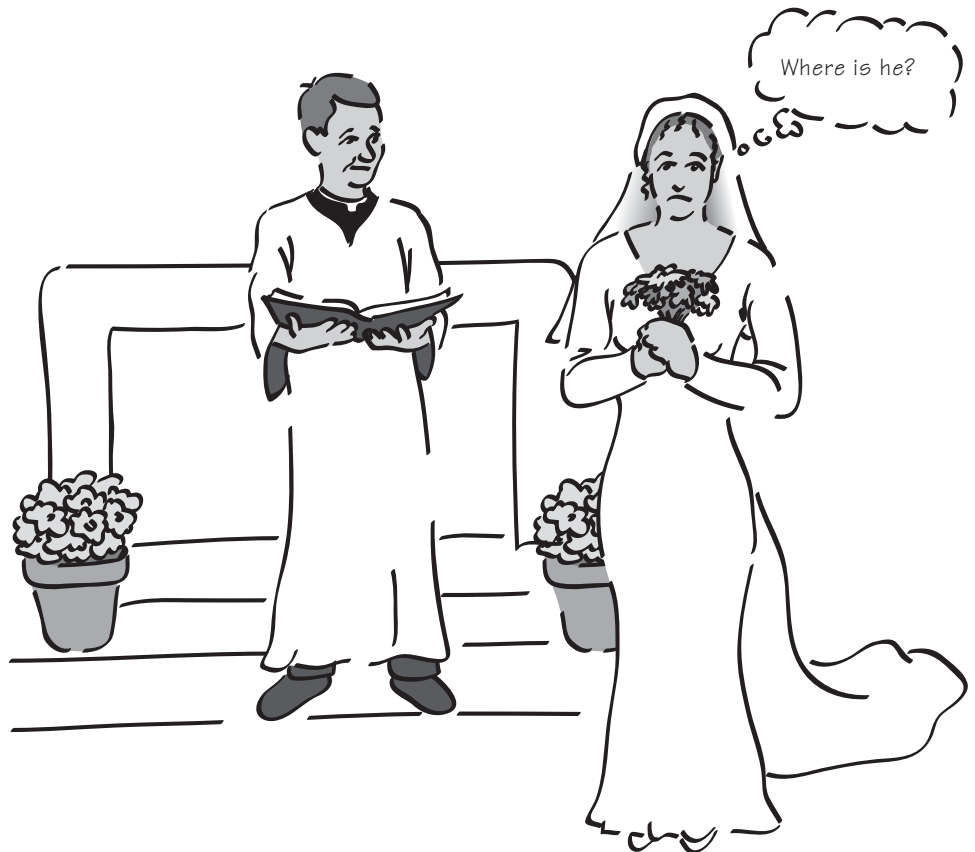
The **breach of promise to marry** action is an excellent example of a legal action whose time has passed because of changed moral and social attitudes. Throughout the nineteenth century and for the first few decades of the twentieth century, a woman could and frequently did sue a man for breach of promise if the man had promised to marry her and failed to do so. Lawsuits were frequently filed for breach of promise in instances where a man made the promise to marry a woman and, relying on the promise, the woman engaged in sexual intercourse with the man and subsequently became pregnant. When the man refused to marry the woman she brought a suit for breach of promise.

### “Breach of Promise”—The Distressed Damsel’s Remedy

The following cases deal with actions for the breach of a promise to marry. They clearly demonstrate that this legal action was a creature of the times. The opinion rendered in the 1818 case of *Wightman v. Coates* sets out the important legal, social, and moral reasons for court authority and intervention to uphold the legality of the contract to marry and to impose money damages on a party who breaches this contract. This opinion also set out the evidentiary standard for proving that such a promise-to-marry contract existed and that the promise was broken and, hence, the contract breached.

#### FIGURE 2-2

Legal actions called *breach of promise to marry* were frequently filed by women who were left standing at the altar.



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**WIGHTMAN V. COATES**

15 MASS. 1, 8 AM. DEC. 77 (1818)

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Assumpsit on a promise to marry the plaintiff, and a breach thereof by refusal, and having married another woman. . . .

PARKER, C. J., delivered the opinion of the Court. Respectable counsel having expressed doubts upon the point reserved in this case, and having also suggested an opinion that the action was of a nature to be discountenanced rather than favored, we have given more consideration to the case than our impression of the merits of the objections would have required.

We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties, of suitable age to contract, agree to pledge their faith to each other, and thus withdraw themselves from that intercourse with society which might probably lead to a similar connection with another,—the affections being so far interested as to render a subsequent engagement not probable or desirable,—and one of the parties wantonly and capriciously refuses to execute the contract which is

thus commenced, the injury may be serious, and circumstances may often justify a claim of pecuniary indemnification. . . .

As to the technical ground upon which the objection to the verdict now rests, we entertain no doubts. The exception taken is that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence from which such a promise may have been inferred; and the jury were instructed that if, from the letters written by the defendant, as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn. . . .

A mutual engagement must be proved, to support this action; but it may be proved by those circumstances which usually accompany such a connection. No case has been cited in support of the defendant's objection. On the contrary, it is very clear, from all the *English* cases, that a promise may be inferred, and the direct proof is not necessary. . . .

Judgment on the verdict.

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Almost 100 years after *Wightman v. Coates* praised the action on breach of promise as a societal necessity, American courts were still providing remedies for “damsels in distress.” However, an issue had arisen and it was not always clear how to handle it.

In the case of *Rieger v. Abrams*, a woman who was grievously wronged had pursued remedies in two separate lawsuits. In one, she sought damages for seduction under a tort theory. After this action was completed, she sued her seducer for breach of his promise to marry her. The trial court decided that she had already had her day in court because the seduction suit was based on the same dastardly behavior of her former lover. The wronged woman appealed this decision to the Supreme Court of Washington State. That court upheld the decision saying that her breach of promise claim was barred by the legal principle of *res judicata* (Latin for “the thing has already been adjudicated and ruled on”).

This case is important because it established limits to the number of legal penalties that can be levied for this type of wrongful conduct. But it is also interesting because of the colorful language used to describe the dastardly conduct of the deceptive suitor and the humiliating aftereffects the naïve damsel suffered at the scoundrel's hands.

**RIEGER V. ABRAMS**

98 WASH. 72, 167 PAC. 76 (1917)

SUPREME COURT OF WASHINGTON

**PARKER, J.**

The plaintiff, Mattie Rieger, seeks recovery of damages from the defendant, Robert Abrams, for breach of promise of marriage which she alleges was made by him and accepted by her. Judgment was rendered by the superior court for King county in his favor, denying the relief prayed for by her, upon the facts admitted in the pleadings. The judgment was rendered upon motion made in that behalf, and rested upon the theory that the facts so admitted showed that, in another action prosecuted by her in that court, a judgment was rendered which became a final adjudication of her rights in the premises. From this disposition of the cause the plaintiff has appealed to this court. . . .

. . . Appellant in her final amended complaint in this action, after alleging that at all times in question both she and respondent were over 21 years old and unmarried, alleges:

“That on or about the 1st day of August, 1915, at said city of Seattle, defendant proposed marriage to plaintiff, and upon his urgent solicitations, representations to plaintiff, and his request the plaintiff thereafter, to wit, on or about the 15th day of August, 1915, in good faith, accepted said proposal, and she and said defendant thereupon mutually and verbally agreed, in consideration of love and affection, and of reasons aforesaid, to intermarry each with the other, within a reasonable time thereafter, which defendant then and there represented to plaintiff would be as soon as he could arrange his business affairs therefor, not longer than three or four weeks from said last mentioned date. . . . That on or about the 1st day of September, 1915, at the city of Seattle, the defendant, by reason of the relation and confidence which plaintiff had learned to repose in him as aforesaid, and by reason of the affection which she had grown to feel for him, and of their constant association together, and by reason of defendant’s promise and their engagement to marry, did then and there by many endearments and solicitations, and under promise of marriage, and by subtly inducing plaintiff to drink intoxicating liquors, to wit, beer and wine to the extent of stupefying and intoxicating her, and against plaintiff’s consent and insistent remonstrance, wickedly seduce, debauch, and carnally know her, and thereafter, by repeated promises to early marriage, induced plaintiff to continue said sexual intercourse with said defendant, whereby she became sick and pregnant with child. . . . That at all times prior to said last-mentioned date, plaintiff had been a chaste and virtuous woman, happy in her self-esteem and the confidence and esteem of her said child and friends, and theretofore

having at all times borne an unquestioned reputation for chastity and virtue. . . . That said defendant has disregarded, and still disregards, his said promise of marriage with said plaintiff as aforesaid, and has not taken with her to be his wife, although reasonable time for the purpose has long since elapsed, and though frequently requested by said plaintiff, said defendant, on or about the \_\_\_\_ day of January, A.D. 1916, positively refused to make his said promises good, he has hitherto refused, and still refuses, to marry the plaintiff. . . . That by reason of said defendant’s failure to keep and perform his promise and agreement to marry this plaintiff, she has lost all the advantage and social position which said marriage afforded her, and caused her to suffer great pain, humiliation, mental anguish, and mortification, all to her great damage in the sum of \$50,000.”

Respondent in his final second amended answer to appellant’s amended complaint, after denying the allegations thereof above quoted, alleges as a second affirmative defense facts showing the commencement and prosecution to final judgment in the superior court for King county of an action by appellant against him as follows:

[The Washington Supreme Court then quotes from the final amended complaint which the wronged woman had filed in an earlier suit for seduction which she won and in which she was awarded \$500.00 in damages. The complaint stated the same sad facts.

The woman’s lawyers argued that her lover was liable to her in both the previous seduction suit, a tort action, and the current breach of promise matter, a civil action. The Washington Supreme Court thought otherwise.]

. . . We are unable to read appellant’s final amended complaint in the former action and her final amended complaint in this action and reach any other conclusion than that they plead in substance the same facts upon which recovery is sought, and upon which judgment was awarded her, in the former action. We find alleged in each of these complaints the same promise of marriage, the same continued course of illicit relations induced by the promise of marriage, and the same breach of the promise of marriage, each of which facts is pleaded in each of the complaints with substantially equal precision and given substantially equal prominence therein. It seems plain to us that appellant has in each of these actions pleaded facts so related to each other that her right of recovery in each thereof must be considered as resting upon the same alleged wrong.

We do not overlook the fact that the real question here for consideration is whether or not the claim of damage made by appellant for breach of promise of marriage was



rendered *res judicata* against her by the judgment rendered in her favor in the former action, instead of the converse of the proposition. Nor do we overlook the fact that seduction does not necessarily involve a breach of promise of marriage, though the latter is probably the most common inducement put forward to effect seduction. Of course, where seduction is induced apart from a promise of marriage, a recovery of damages therefor by the one seduced would not be a bar to recovery by her of damages for a breach of such promise. It may be also conceded that, where damages for seduction are recovered by a parent or some one entitled thereto other than the one seduced, such recovery would not be a bar under any circumstances to her recovery for breach of promise of marriage. But our present problem is not so conditioned. We have here the identical parties to both actions. We have here the identical facts in each action, in substance, finally pleaded by appellant as a basis for her recovery. It is true she alleged in the former action that she was damaged because of the seduction, and in this one that she is damaged because of the breach of promise of marriage. These allegations, we

think, however, must be regarded as only her conclusions and claims as to the extent of her damage. Both of these would have been equally appropriate concluding allegations in her complaint in each of the actions, and would not have changed the facts upon which her recovery must in its final analysis rest. So far as the question of *res adjudicata* is concerned, we think it is of no consequence as to whether the plaintiff may in her complaint evidence her intention to proceed upon the theory of recovering damages for seduction or for breach of promise of marriage, assuming of course that the facts alleged are so related as to show but one wrong, as we think the pleadings in appellant's former action and in this action do show. . . .

We conclude that appellant has had her day in court upon all of the issues here presented, and that the judgment rendered in the former action *res judicata* of all her rights in the premises. A trial of this action upon the issues raised by the final pleadings filed herein would be but a retrial of the issues finally raised by the pleadings, and upon which judgment was rendered in the former action.

The judgment is affirmed.

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### **“Lack of Virtue” Before and During the Engagement—The Most Effective Defense to a Breach of Promise Action**

In 1936, the Court of Appeals of Kentucky reversed the lower court's judgment awarding damages in a breach of promise action because the woman's sexual encounters with other men both prior to and during the engagement period invalidated the engagement agreement. In this decision, which clearly reflects an earlier time's strong disapproval of a woman's rights to sexual freedom, the court found that, because of the woman's "lewd and lascivious conduct," there was no "contract of marriage."

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#### **BARRETT V. VANDER-MUELEN**

264 KY. 441, 94 S.W.2D 983 (1936)

COURT OF APPEALS OF KENTUCKY

#### **OPINION OF THE COURT BY STANLEY, COMMISSIONER—REVERSING.**

This appeal is from a judgment for \$15,000 on account of a breach of promise to marry. . . .

The plaintiff pleaded and proved a mutual promise to marry was made in October, 1930, and after a series of postponements, the engagement was broken by the defendant in January or in June, 1933. The defendant denied both in pleading and proof ever having promised to marry the plaintiff. He also alleged that both before and

after the time stated in the petition that the engagement was entered into, the plaintiff was and is a woman of bad moral character and not virtuous, which was unknown to the defendant at all times, and "the defendant especially pleads and relies upon the bad character and morals and lack of virtue of the plaintiff in bar" of her claim and right of recovery. That was traversed. It is admitted in pleading and proof that the parties had engaged in repeated sexual relations. Testimony was admitted which tended to prove immorality and misconduct on the part of the plaintiff with other men *after* the date of the alleged contract to

marry. The defendant testified that he was ignorant of all of that prior to the institution of this suit. It is not necessary to notice the pleading or evidence further.

However, the court excluded evidence of particular occasions of immorality on the part of the plaintiff with other men *prior* to the time she testified the engagement to marry was entered into. The appellant maintains this was error. The appellee's responsive argument is that since the defendant was ignorant of the claimed meretricious conduct, her incontinence or unchastity could not and did not cause the breach; hence the evidence was irrelevant and incompetent. 9 CJ 337; *Edmonds v. Hughes*, 115 Ky. 561, 74 S.W. 283, 24 Ky. Law Rep. 2467; *Watson v. Bean*, 208 Ky. 295, 270 S.W. 801. We think appellee misconstrues the rule.

It is the legal as well as moral duty of persons who have plighted mutual vows to marry to preserve themselves during betrothal pure and blameless; and if a betrothed woman prostitutes her person to another man, it will mar her action for breach of the marriage contract. Contracts to marry, like contracts of marriage, are peculiar and distinguishable from ordinary contracts, since they establish a relation of extreme confidence between the parties and alter their status. The presumption of virtue always exists. If upon the strength of that presumption and in innocence of any misconduct one enters into an agreement to marry, and it develops that the other contracting party was not of that purity of virtue so impliedly represented and relied upon, there is fraud which vitiates the contract and the right of renunciation at any time arises. If such misconduct after marriage is sufficient in law to justify a divorce, a fortiori, it is a sufficient justification for not marrying. So it is that the guilt of one party and the innocence of the other constitutes for the latter a complete defense to an action for breach of contract; but conduct merely immodest, falling short of actual unchastity, does not. . . . And this is so even if the defendant did not know of plaintiff's unchastity until after the action is brought. *Colburn v. Marble*, 196 Mass. 376, 82 N.E. 28, 134 Am. St. Rep. 564. The law is thus stated in Schouler, Marriage, etc., section 1293. . . .

In this case the plaintiff's claims were that she was virtuous and the defendant had promised to marry her and refused, while the defendant's contentions were that she was unchaste and there was no promise. With these conflicting propositions, the evidence of unchastity of the one both before and after the engagement, and of innocence of the other was competent. Hence the rejection of the evidence was prejudicial error.

The second instruction given was as follows:

"If you believe from the evidence that the defendant, Thomas L. Barrett, agreed and promised to marry the plaintiff, Bessie Vander-Muelen, and she accepted said proposal, as set out in instruction No.1, and if you further believe from the evidence that the plaintiff, Bessie Vander-Muelen, had been guilty of such lewd and lascivious conduct as proved her to be unchaste, then you will consider such fact, if such is the fact, in mitigation of the damages, if any, that you will award to the plaintiff under instruction No. 3."

Evidence of unchastity or of bad reputation for virtue both before and after the engagement is competent for the purpose of reducing the recovery or in mitigation of damages where the defendant had knowledge of it. 4 R.C.L. 173. Under the respective claims of the parties, the defendant's being that plaintiff was guilty and he ignorant, such an instruction was improper.

The defendant offered the following instruction, which was refused: "If you believe from the evidence that before or after the plaintiff claims to have become engaged to marry the defendant, that said plaintiff was a lewd, unvirtuous, or immoral woman, and this fact was unknown to the defendant, then the law is for the defendant and you shall so find, even though you may believe that there was a contract of marriage between the plaintiff and the defendant."

This instruction was substantially correct, and it, or one like it, should have been given. Strictly speaking, there was no "contract of marriage," but a claimed contract to marry.

It is not necessary and we do not pass upon any other question raised. Wherefore, the judgment is reversed.

## ALIENATION OF AFFECTION

Also, in the early years of this century the husband or the wife could sue a third party for becoming romantically or sexually involved with his or her spouse and interfering with or breaking up the marriage. This type of action, known as **alienation of affection**, has also met its demise because of changing cultural attitudes about the causes for marital breakups and because of more liberal attitudes toward not only divorce but also toward marital infidelity.

## COMMON LAW MARRIAGE DISSOLUTIONS

By the end of the nineteenth century, the institution known as common law marriage was recognized in most states in the United States as a legal form of marriage



that carried with it all of the rights and obligations of a ceremonial and statutorily memorialized union. Common law marriages were numerous in frontier states and in rural areas where the parties were often geographically distant from the county or municipal offices that issued marriage licenses. However, common law marriages also existed in urban areas. Today, many states have statutorily abolished common law marriage. Legal proceedings that affect common law marriages are becoming increasingly rare because so few states permit or recognize the formation of a common law marriage within their boundaries. However, states that do recognize common law marriages do adjudicate their dissolution. In addition, some states do not recognize the formation of a common law marriage within the state, but will recognize as legally valid a common law marriage formed in a state where common law marriage is legal. In these states, the courts will adjudicate the dissolution of these marriages as long as other jurisdictional requirements have been met.

### What Is a Common Law Marriage?

In states where common law marriage is legal, a relationship is recognized as a common law marriage when two individuals live together and hold themselves out to the world as husband and wife. Each party must possess the legal capacity to marry. For example, each party must be mentally competent, of legal age, and neither party can be already married to another.

A valid common law marriage is as legally binding as a ceremonial marriage, and children who are the issue of such a union are legitimate.

### Why Choose Common Law Marriage

People may opt for a common law marriage for these reasons:

- ▼ *Convenience.* In the nineteenth century, while the frontier was being settled, parties pledged themselves to each other without benefit of clergy or state officials because they were miles away from either religious or governmental institutions.
- ▼ *Personal preference.* Some couples opposed and wished to avoid intrusion by either church or state. For instance, in the early decades of the twentieth century, many free-spirited individuals known as *Bohemians* lived in the Greenwich Village section of New York and scorned the legal and religious trappings of conventional society as bourgeois and artificial. Their common law marriages were often political or societal statements. Some Bohemians went even further with their protests and embraced “living together” instead of any legally binding arrangement.
- ▼ *Poverty.* Some couples simply had no money for a church wedding or for an official ceremony and the attendant costs of a marriage license and blood tests.

## ANNULMENT

**Annulments** are alive and well in the United States today as the accompanying recent and much-publicized case illustrates. The winning contestant on the short-lived “Who Wants to Marry a Millionaire” television show soon discovered that sometimes it’s not easier to *stay* married to a rich man than a poor man.

1 COMA  
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EIGHTH JUDICIAL DISTRICT COURT

10

CLARK COUNTY, NEVADA

11

12

Darva Conger.

13

Plaintiff,

14

vs.

CASE NO. D251297

15

Richard Scott Rockwell,

DEPT NO. C

16

Defendant.

17

18

19

COMPLAINT FOR ANNULMENT

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21

I.

22

Plaintiff entered into marriage ceremony in the City of Las Vegas, County of  
 23 Clark, State of Nevada, on or about the 8th day of February 2000, having first secured a  
 24 marriage license from the County Clerk of Clark County Nevada.

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II.

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There are no minor children the issue of said purported marriage.

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III.

There is no community property of the parties hereto.

IV.

The marriage has not been consummated and the parties to the marriage have not cohabitated at any time.

V.

The grounds for the annulment are fraud, pursuant to N.R.S. 125.340, and all equitable grounds pursuant to N.R.S. §125.350, including, but not limited to, mutual mistake in that the contract of marriage does not express the true intentions of the parties with regard to the marriage.

VI.

Plaintiff was a contestant on a televised show entitled "Who Wants to Marry A Millionaire" which was broadcast on February 15, 2000 (hereinafter the "Show"). The producers of the Show and the Fox Network (hereinafter "Fox"), the network that aired the Show, brought fifty female contestants to Las Vegas, Nevada, from all over the United States to compete on the Show for "the opportunity to marry a millionaire" and in exchange for certain gifts and prizes. The Defendant was the "millionaire" for whom the contestants competed. Each of the fifty contestants applied for a marriage license in Nevada so that if chose, the Show could conclude with a marriage ceremony, to be broadcast live, purporting to unite the perfect strangers as man and wife. The wedding ceremony, and the contest, were intended to draw millions of viewers and thereby generate significant revenues for the producers of the Show and Fox. Neither the contestants nor the Show's producers seriously contemplated creating a proper marriage. In fact, the Show's producers and Fox had each of the contestants and the defendant sign

1 an annulment agreement prior to the Show as a guaranty of the contestants' right to an  
2 annulment.

3  
4 VII.

5 *As part of the Show and for entertainment purposes*, Plaintiff and Defendant  
6 agreed to be married on television with the understanding that the marriage was not of  
7 legal force and effect and could be annulled following the show's televised broadcast.  
8 Plaintiff, at the time she entered into the marriage, did not intend to become the actual  
9 wife of the Defendant in law or in fact. Plaintiff is informed and believes that Defendant  
10 did not intend to become the husband of Plaintiff in law or fact.

11  
12 VIII.

13 At the time she entered into the purported marriage, Plaintiff relied in good faith  
14 on the erroneous assertions of the Defendant and/or the Show's producers regarding  
15 Defendant and his background. Defendant and/or the Show's producers misrepresented  
16 material facts regarding Defendant's personality and his background to Plaintiff. Plaintiff  
17 was unaware that Defendant had a history of problems with his prior girlfriends and was  
18 the subject of at least one restraining order for threatening and dangerous behavior. Had  
19 Plaintiff known the true and complete material facts at the time she entered into the  
20 purported marriage, she would not have taken the action that she did. Plaintiff could not  
21 reasonably discover the true facts regarding Defendant prior so the marriage since even  
22 Defendant's identity was concealed from her until its revelation on live television just  
23 moments before the purported marriage.

24  
25 IX.

26 The marriage is the result of a mutual mistake of fact and was entered into solely  
27 for an entertainment purpose. The parties did not intend that the marriage should be of  
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1 operative legal force or effect. Moreover, Plaintiff's purported consent is invalidated by  
2 the misrepresentations upon which she reasonably relied.

3  
4 WHEREFORE, Plaintiff prays that said purported marriage of plaintiff and  
5 defendant may be, by an Order of the above-entitled Court, declared to be null and void  
6 *ab initio* for the reasons hereinabove set forth, and for such other and further relief as to  
7 the Court may deem just and proper.

8  
9 DATED: March 3, 2000 LAW OFFICES OF JOHN D. HANOVER

10  
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Although *annulment* is not a totally unfamiliar term to the average layperson, most persons do not know how an annulment differs from a marital dissolution or divorce action. The legal theory underlying an annulment action is quite different from the action for divorce or dissolution of marriage. A person institutes a divorce or dissolution of marriage action to end a valid existing marriage. A person initiates an annulment proceeding to obtain a judicial decision that a valid marriage does not exist nor ever existed between that person and another party.

Just as a common law marriage may be legally formed without a formal ceremony, a formal ceremony does not always establish legal marriage. In an annulment action the court is called on to legally declare that despite ceremonial and state procedures, no legal marriage was formed or exists. A court may grant an annulment even if the parties obtained a marriage license and went through a marriage ceremony providing that the petitioning party alleges and proves that at the time of the marriage ceremony, an impediment existed to the forming of a legally valid marriage. The petitioning party must introduce evidence of facts or circumstance which the state legislature or state common law has determined constitute an impediment to the forming of a valid marital union.

Typical grounds for annulment can include incapacity because of minority age status, mental incompetence, one or both parties' involvement in the existence of a still legally valid marriage, the inability of one party to consummate the marital union through sexual intercourse, and fraud that is material to the decision to marry (such as lying about one's reproductive ability, withholding knowledge of one's own infertility, or withholding material information about one's criminal history or the state of one's health).

A person seeking an annulment must be one of the parties to the marriage, unless a party is legally a minor or mentally incompetent. In such instance, the party's parent, legal guardian, or conservator can bring the action. The person bringing the annulment action must institute an annulment proceeding in a family court.

## Grounds for Annulment

As just summarized, a court can annul a marriage on proof of one of the following grounds:

1. Lack of capacity to enter into a valid marriage because:
  - a. One or both parties were underage or were already married.
  - b. One or both of the parties were not legally mentally competent.
  - c. The couple is too closely related by blood.
  - d. The couple is physically unable to consummate the marriage.
2. Lack of proper intent in that:
  - a. One or both spouses were mentally disabled to the extent of *not* being able to understand or appreciate the nature of marriage.
  - b. One or both parties were entering the marriage with no intention of entering a marital relationship, or living in the marriage. For instance, at one time in the United States, a noncitizen could acquire U.S. citizenship by marrying a U.S. citizen. In many cases the citizen agreed to the marriage for monetary compensation, and sometimes did not meet the other person until the day of the ceremony and never saw the person again.

3. *Duress*. One party or both parties were forced into marriage by parents or others under threat of death or bodily harm.
4. *Fraud*. One party married the other party without knowing vital information about the other party, which, if it had been disclosed prior to the marriage, would have resulted in the first party not wishing to marry the other. Examples include failure to disclose infertility, a criminal history of felonious conduct, an incurable illness, or a history of severe mental illness.

## Void versus Voidable Marriage

When a court is satisfied that the petitioning party has proven that a legal impediment existed at the time the marriage ceremony took place, the court may declare a marriage null and void. In some jurisdictions, where only certain grounds are proven, the court may be limited to declaring the marriage “voidable” rather than “void.” For instance, where a petitioning party has brought an annulment action based on the legal incapacity due to minority age, if both parties are now of legal age, the court may issue a decision giving the petitioning party the legal right to void the marriage. However, if that party has reconsidered their decision to annul the marriage, the marriage may continue because the court will not void the marriage on its own initiative. Conversely, a court will always declare a marriage null and void on proof that one or both parties entered into a prior valid marriage and is still legally married to the party of the prior marriage.

## LEGAL SEPARATION

An action for a **legal separation** is similar to a divorce or dissolution action in that specific grounds must be alleged and proven. The grounds that can be alleged are usually the same grounds that can be alleged in a divorce proceeding. Historically, an action for legal separation was brought by a spouse who desired to avoid the legal, social, or religious ramifications of a divorce but nevertheless wished to live apart from the other spouse. Legal separations are not as common today, but the action has survived and is still available to the spouse who wishes to pursue that course of action rather than divorce.

Courts granting legal separations may, when appropriate, order one spouse to provide for the financial support of the other spouse by making periodic payments to the spouse. Most courts will order the noncustodial spouse to pay child support to the custodial spouse for the minor children. Courts may also order an equitable distribution of marital property or may incorporate into the separation decree the parties’ separation agreement in which the parties themselves have negotiated a division of the marital estate.

After a legal separation, both parties retain certain marital rights and obligations which are extinguished after a divorce is final. For instance, a spouse may still have to provide medical insurance coverage for the other spouse and will still be able to have that spouse covered under any family policy. Similarly, if an individual’s pension plan, on that individual’s death, calls for the payment of either a lump sum or partial or full periodic pension payments to the person’s spouse, the spouse who has obtained a legal separation rather than a divorce will be eligible for such a benefit. In addition, if one party to a legal separation dies intestate, his or her spouse will be entitled to a statutory spousal share of the estate. If the deceased spouse had a will, then the other spouse may elect to receive either what

was bequeathed to him or her in the will or to receive the statutory spousal share, and will usually select whichever amount is greater.

A legal separation also places limitations on spouses. The most restrictive limitation is that because the parties are still legally married, neither party is free to remarry.

## SEPARATE MAINTENANCE

An action for **separate maintenance** is similar to a legal separation. The marriage is still valid and neither party is legally free to remarry. In addition, an action for separate maintenance affirms the continuation of the marriage and enforces the legal obligations of each spouse in the marriage. An action for separate maintenance does not expressly or necessarily authorize a husband or wife to live apart; however, a wife's refusal to cohabit with her husband is sanctioned and authorized. Actions for separate maintenance are less common today than in the nineteenth century and during the first half of the twentieth century. Sometimes they were initiated by a wife whose husband was about to go abroad or to another part of this country to work or to perform military service. On other occasions, the action for separation was a precursor to a divorce action brought during a period of marital discord or during a trial separation.

## PATERNITY ACTIONS

**Paternity actions** are alive and well in the United States. In such a proceeding, the petitioning party, usually the child's mother, requests that the court hold a hearing to establish whether a particular man is the child's biological father. In many jurisdictions, a child born during an existing valid marriage is presumed to be the child of the husband. This presumption can be overcome by a conclusive showing that the husband had no access to the child's mother during the period of possible conception, by proof that the father was sterile during that period, or by medical evidence, such as the results of a blood test or DNA test that clearly rule out the husband as the biological father. When the mother of a child is unmarried at the time of a child's birth, the party seeking to establish the child's paternity may request that the court order a DNA testing of the possible father.

## THE TRANSITION TO CONTEMPORARY FAMILY LAW THEORY AND PRACTICE

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By the 1960s attitudes toward divorce were changing. Many young people no longer feared the severe sanctions imposed by their religious faith. Also some religious groups took a more compassionate view of couples in a bad marriage. Traditional religious institutions lost much influence over individuals and society in the 1960s when people began to question all aspects of American culture, including women's roles and women's rights, constraints on employment opportunities for women, and constraints on sexual freedom and reproductive choices.

Prior to the 1960s, fault played a central role in both the granting of divorce and in the determination of the amounts set for alimony awards and the distribution of marital property. Beginning in the mid-1960s and growing strong in the 1970s, public support emerged for what came to be known as **no-fault divorce**. Beginning in the 1970s, a number of state legislatures modified existing divorce



laws to include the ground that the marital union or marital relationship had broken down irretrievably. This ground did not place fault for the breakdown on either party. The spouse seeking the divorce and bringing the legal action had merely to testify under oath that the marriage had broken down irretrievably and that there was no possibility of reconciliation. This change plus the many societal changes mentioned earlier resulted in many more divorces than previously.

In addition, the 1970s witnessed the beginnings of a trend toward awarding custody to fathers even when mothers were not deemed unfit. Many custody battles ensued as mothers' work schedules paralleled fathers' in terms of time spent away from home.

Divorce actions also increased dramatically in segments of the married population where individuals previously never considered severing their marital ties. Older women, frequently with the support of and at the urging of their adult children, sought divorces after decades of troubled marriages. These women demanded a fair share not only of what they and their husbands had acquired during the marriage, but also a fair share of their husbands' pensions and Social Security benefits.

Another development arising from new social conditions dealt with health care provisions. With the advent of comprehensive health insurance and the skyrocketing costs of health care, courts routinely ordered the noncustodial spouse, often the father, to maintain his minor children and sometimes his former spouse on his health plan. Women with superior health plans through their employers also sometimes were required to cover former spouses and children even if they were not the children's custodial parent. Further, with women making large salaries, men began to seek alimony from former wives and courts began awarding it to them!

The increase in the number of divorces gave rise to an increase in second and third marriages. With this higher rate of divorce and remarriage, prenuptial agreements also increased in both number and complexity.

The trend toward easy and frequent divorce continued through the 1980s and 1990s. The mid-1990s saw the beginnings of social and political action to once again make divorces harder to obtain. Laws surrounding the severing of the marital relationship may well come full circle by the twenty-first century!

### **Family Law Attorneys Reject Return to Fault-Based Divorce Finds ABA Survey**

WASHINGTON, DC, Oct. 18—Eighty-four percent of family lawyers oppose rescinding no-fault divorce laws according to a survey released today by the American Bar Association Section of Family Law.

"No-fault" divorce, available in some form in all 50 states, allows spouses to divorce without the assignment of blame. Prior to the adoption of no-fault laws in the 1970s, spouses were required to establish such fault-based grounds as adultery or mental or physical cruelty to obtain a divorce.

Legislatures in states such as Idaho, Michigan, and Iowa are among those currently examining their divorce laws and considering new legislation that is termed more "pro-family." Proposals typically include the establishment or extension of waiting periods before the divorce can be finalized; special education for parents so they understand the impact of divorce on their children; and returning to fault-based divorces. "Bad idea" say most of the more than 1,400 attorneys who responded to the ABA survey, when asked if there should be a return to fault-based divorce.

*Continued on next page*

The overwhelming majority of respondents, nearly 84 percent, say they do not support a return to fault-based divorces. Further, more than two-thirds (69 percent) of the respondents do not agree that there is a direct correlation between the increase in the divorce rate in this country and the advent of the no-fault divorce 20 years ago.

“Divorce is one of the most complex issues of our time,” says Los Angeles attorney Ira Lurvey, chair of the 11,000-member ABA Family Law Section. “No single magic bullet is the answer. Fault was taken out of divorce 25 years ago to promote harmony and reduce fighting. Putting it back in will do little more than return those evils, plus an increased divorce rate. We don’t get progress by going back to the past.”

However, nearly one-third (30 percent) of respondents support two systems of divorce based on whether the divorcing spouses were parents, while 66 percent do not support such a differentiation.

Respondents indicate support for the idea that no-fault divorce helps families weather the storm of divorce better than they did under fault-based systems.

Two-thirds of respondents (67 percent) agree that no-fault divorces are typically quicker than fault-based divorces; More than two-thirds indicate that no-fault divorces are less expensive than fault divorces (69 percent); and 65 percent agree that no-fault divorces typically are less acrimonious than fault divorces.

Proponents of a return to fault-based divorce say it will cure a host of ills related to the dissolution of marriage. Most respondents in the ABA survey, however, disagree. When asked whether or not these problems would be solved by divorce by fault the percentage of lawyers saying “no” were:

financial disparity between the divorcing spouses—women consistently fare worse (86 percent); the abandonment of the family by those who are unwilling or cannot abide the mandatory waiting periods currently in place in 24 states (88 percent); and unfairness to victims of domestic violence who occasionally are treated with bias by the courts and/or in the mediation process (85 percent).

“What may help is a retraining program for all of us. We live in a world of false expectations and mixed messages. Marriage is not necessarily bells and whistles forever. It is hard work, caring and being selfless. Those are commodities often in short supply these days,” said Lurvey. Respondents are more split on whether no-fault divorces are emotionally easier on the children involved. While nearly 58 percent agree that no-fault divorces are emotionally easier on children from the marriage, more than one-third (37 percent) do not agree.

When asked to consider the impact of no-fault divorce on the fathers’ rights movement in custody, just over one-fourth (26 percent) of survey participants agree that no-fault divorce is more equitable in custody, while 59 percent do not agree.

More than half of respondents (54 percent) agree that judges still do consider fault in divorce today.

“Judges do consider fault, and in some states are required to do so, but almost exclusively in the division of property, not in granting the divorce,” said Lurvey.

The survey of approximately 6,000 of the nation’s top matrimonial lawyers was conducted via fax. 1,462 attorneys participated in the survey, yielding an approximate response rate of 24 percent.

*Source:* ABA Press Release, “Family Law Attorneys Reject Return to Fault-Based Divorce Finds ABA Survey,” American Bar Association, 750 N. Lake Shore Dr., Chicago, IL, 60611; 312-988-5000, [info@abanet.org](mailto:info@abanet.org). Copyright American Bar Association. All rights reserved. Reprinted by permission.

## REVIEW QUESTIONS

1. What status did the Greek legal system assign to a married woman?
2. How did the Married Women's Act of 1913 improve the status of women?
3. How did Christianity view marriage?
4. How did the rise of the various branches of Protestant religions change the concepts of marriage and divorce?
5. What was "divorce of bed and board"?
6. How did marriage and divorce become civil matters instead of religious matters in the American colonies?
7. Early in U.S. history, how was the issue of spousal support and child support handled?
8. How was a marital dissolution or divorce action similar to a breach of contract action?
9. What is meant by *grounds* for divorce and what were some of the grounds for divorce in the early years of the United States?
10. What were the early social and economic factors that discouraged a woman from seeking a dissolution of her marriage?
11. How did the Industrial Revolution change the character of the American family?
12. How did the Industrial Revolution affect a married woman's economic position?
13. In early America, why was divorce considered a stigma?
14. What were the most frequently used grounds for divorce in 1900?
15. Name two family law court actions that have virtually disappeared.

## EXERCISES

1. Go to your local public library. Look in the history section for a book on the history of marriage. Review this book and summarize information found on marriage, divorce, and the rights of spouses and children at various periods in history and in various countries and civilizations. Also find a social history of ancient Greece, medieval England, nineteenth-century England, and colonial America. Summarize information on marriage and family rights and obligations for these time periods.
  2. Go to your law library and locate your state's statute books from 1900, 1920, 1940, and 1950. Find the sections that deal with marriage, divorce, annulments, and paternity. Write a summary of the various statutes from each period and what changes were made from edition to edition.
    3. Go to your local law library. Find your state's digest of cases. Locate the topics that deal with divorce, custody, annulment, and paternity. Find case summaries on each of these subjects for cases between 1800 and 1960. In case law reporters, find and copy older cases on as many of these four subjects as possible. Summarize three to five older cases and show how the law changed between 1800 and 1960 on any or all of these four subjects.
      4. At your local law library, find a copy of the Married Women's Act of 1913 and provide a written summary of its main points.
        5. At your local law library, find an older case dealing with the issue of alienation of affection or breach of promise. Prepare a case brief.

# 4

## CHAPTER

### **PRENUPTIAL AGREEMENTS, COHABITATION, AND SAME-SEX MARRIAGE**

#### **KEY TERMS**

Antenuptial agreement	Marriage statute
Beneficiary	Miscegenation laws
Cohabitation agreement	Post-nuptial agreement
Constructive trust	Premartial agreement
Defense of Marriage Act	Prenuptial agreement
Domestic partnership	Public policy
Express contract	Quasi-contract
Expressed trust	Resulting trust
Full faith and credit clause	Same-sex marriage
Fundamental right	Second glance doctrine
Implied partnership	Trustee
Implied trust	Unconscionable
Implied-in-fact contract	

## PRENUPTIAL AGREEMENTS

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### INTRODUCTION

Prior to marriage, the parties involved may choose to enter into a contract that determines their respective rights upon dissolution of the marriage or the death of one of the parties. These arrangements are called **antenuptial agreements**, **premarital agreements**, or **prenuptial agreements**. A prenuptial agreement is a contract entered into between two parties who intend to marry. Occasionally, this document addresses how the responsibilities and property rights will be handled during the marriage—who will pay the bills, who will support children from a prior marriage, who will pay the mortgage, how the children’s upbringing will be handled, and who will care for the children’s day-to-day needs. Frequently, the prenuptial agreement focuses on the disposition of the parties’ estates in the event of divorce or death.

Once exclusively a staple in the legal arsenal of the rich and famous, more and more couples are now considering prenuptial agreements. These contracts were historically entered into by older men who married younger women. These men wished to protect their assets from potential “gold diggers” who were arguably marrying them for their money. Today, prenuptial agreements are popular among people who are entering into second or third marriages. In these cases, one or both parties may come with baggage. The husband, for instance, may be obligated to pay alimony and child support to the former wife. The wife may have children from a previous relationship. Prenuptial agreements are also used by parties who have more assets or income than their spouse-to-be, and by those who wish to protect the inheritance rights of their adult children. Prenuptial agreements are also considered a means of financial and emotional self-defense in a society with a high divorce rate. In addition, young professionals who have postponed marriage until their thirties or forties resort to prenuptial agreements to protect assets they have accumulated.

Some parties enter into such agreements *after* the marriage has been performed. These contracts are called **post-nuptial agreements** and the elements are similar to those of prenuptial agreements.

A prenuptial agreement is not a very romantic topic to discuss with a prospective partner, even if it can save the parties a great deal of grief in the long run. Money is also a very delicate topic to discuss under any circumstances and even more difficult to interject into a personal relationship. Talk of money can dredge up old childhood wounds and expose embarrassing habits that have formed in adulthood.

Prior to 1970, prenuptial agreements were frowned on by the courts. Judges often found these contracts void against public policy because they contemplated the end of the marital relationship. The state government had an interest in preserving the institution of marriage. The prevailing view was that prenuptial agreements facilitated divorce because they encouraged the spouse in the position to benefit most from the contract to put less effort into preserving the marital relationship. Courts were also protective of women’s interests, fearing that men, who traditionally had more assets and business savvy, would leave women destitute in the event of divorce. For many centuries, a woman’s traditional position was that of homemaker and child rearer. Many women lacked the education and finances to negotiate on an equal level with men. Prenuptial agreements were introduced

into our legal system by men who had greater assets and greater business sophistication in legal matters. The courts feared that if prenuptial agreements were enforced, women would be unable to support themselves and would have to rely on public assistance.

The 1960s and 1970s brought many social changes to the institution of marriage, such as the advent of the women's liberation movement and no-fault divorce. No-fault divorce removed the traditional fault grounds that were once required to be proven by the moving spouse in order to obtain a divorce (i.e., abandonment, adultery, intemperance). The changing role of women propelled them to pursue higher education, greater opportunities in the workplace, and, as a result, economic independence. The women's liberation movement also demanded equal treatment under the law. Courts eventually did away with the legal presumptions that aimed to protect women in the legal system. Judicial attitudes progressed to the point where prenuptial agreements were enforced because it made sense in this era. Prenuptial agreements allowed prospective spouses to enter into a marriage with more predictability since they could now get their legal and financial house in order.

In 1970, the Florida Supreme Court, in *Posner v. Posner*, 233 So.2d 381 (Fla. 1970), paved the way for family courts around the country to hold that prenuptial agreements made in contemplation of marriage were not invalid per se. While the prenuptial agreement in this case was invalidated because of nondisclosure of assets, it was not struck down on public policy grounds. The following *Posner* excerpt illustrates the historical progression of prenuptial agreements in our legal system.

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## VICTOR POSNER, PETITIONER V. SARI POSNER, RESPONDENT

233 SO.2D 381 (1970)

SUPREME COURT OF FLORIDA

MARCH 25, 1970

### ROBERTS, JUSTICE.

... Both parties had appealed to the appellate court for reversal of the decree of the Chancellor entered in a divorce suit—the wife having appealed from those portions of the decree awarding a divorce to the husband and the sum of \$600 per month as alimony to the wife pursuant to the terms of an antenuptial agreement between the two parties. . . .

... The three appellate judges . . . each took a different position respecting the antenuptial agreement concerning alimony. Their respective views were (1) that the parties may validly agree upon alimony in an antenuptial agreement but that the trial court is not bound by their agreement; (2) that such an agreement is void as against public policy; and (3) that an antenuptial agreement respecting alimony is entitled to the same consideration

and should be just as binding as an antenuptial agreement settling the property rights of the wife in her husband's estate upon his death. They have certified to this court, as one of great public interest, the question of the validity and binding effect of an antenuptial agreement respecting alimony in the event of the divorce or separation of the parties. . . .

... At the outset we must recognize that there is a vast difference between a contract made in the market place and one relating to the institution of marriage.

It has long been the rule in a majority of the courts of this country and in this State that contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy. . . .

... At common law. The so-called "matrimonial causes," including divorce, were cognizable only in the

Ecclesiastical Courts. Because of the Church's view of the sanctity of the nuptial tie, a marriage valid in its inception would not be dissolved by an absolute divorce *a vinculo matrimonii*, even for adultery—although such divorces could be granted by an Act of Parliament. Therefore, the divorce was only from bed and board, with an appropriate allowance for sustenance of the wife out of the husband's estate. See *Ponder v. Graham*, 1851, 4 Fla. 23; *Chitty's Blackstone*, Vol. I, Ch. XV, 432, 431. We have, of course, changed by statute the common-law rule respecting the indissolubility of a marriage valid in its inception; but the concept of marriage as a social institution that is the foundation of the family and of society remains unchanged. . . . Since marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses. . . .

. . . The state's interest in the preservation of the marriage is the basis for the rule that a divorce cannot be awarded by consent of the parties . . . this court said that it "would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it;" . . .

. . . And it is the same policy that is the basis for the rule that an antenuptial agreement by which a prospective wife waives or limits her right to alimony or to the property of her husband in the event of a divorce or separation, regardless of who is at fault, has been in some states held to be invalid . . . *Crouch v. Crouch*, 1964, 53 Tenn.App. 594. . . . The reason that such an agreement is said to "facilitate or promote the procurement of a divorce" was stated in *Crouch v. Crouch*, *supra*, as follows: "Such contract could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited. In other words, a husband could through and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a small fee less than he would otherwise have to pay."

Antenuptial or so-called "marriage settlement" contracts by which the parties agree upon and fix the property rights which either spouse will have in the estate of the other upon his or her death have, however, long been recognized as being conducive to marital tranquility and thus in harmony with public policy. See *Del Vecchio v. Del Vecchio*, Fla.1962, 143 So. 2d 17, in which we prescribed the rules by which the validity of such antenuptial or postnuptial property settlement agreements should be tested. Such an agreement has been upheld after the death of the spouse even though it contained also a provision settling their property rights in the event of divorce or separation – the court concluding that it could not be said this provision "facilitated or tended to induce a separation or divorce." . . .

. . . In this view of an antenuptial agreement that settles the right of the parties in the event of divorce as well as upon death, it is not inconceivable that a dissatisfied wife—secure in the knowledge that the provisions for alimony contained in the antenuptial agreement could not be enforced against her, but that she would be bound by the provisions limiting or waiving her property rights in the estate of her husband—might provoke her husband into divorcing her in order to collect a large alimony check every month, or a lump-sum award (since, in this State, a wife is entitled to alimony, if needed, even though the divorce is awarded to the husband) rather than take her chances on being remembered generously in her husband's will. In this situation, a valid antenuptial agreement limiting property rights upon death would have the same meretricious effect, insofar as the public policy in question is concerned, as would an antenuptial divorce provision in the circumstances hypothesized in *Crouch v. Crouch*, *supra*, 385 S.W.2d 288.

There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our Nation and, as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the "sanctity" of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades. This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no "guilty" party—is being advocated by many groups and has been adopted by the State of California in a recent revision of its divorce laws providing for the dissolution of a marriage upon pleading and proof of "irreconcilable differences" between the parties, without assessing the fault for the failure of the marriage against either party.

With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail. . . .

We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists. And a tendency to recognize this change in public policy and to give effect to the antenuptial agreements of the parties relating to a divorce is clearly discernable. . . .

. . . We have given careful consideration to the question of whether the change in public policy toward divorce requires a change in the rule respecting antenuptial agreements settling alimony and property rights of the parties upon divorce and have concluded that such agreements should no longer be held to be void *ab initio* as “contrary to public policy.” If such an agreement is valid when tested by the stringent rules prescribed in *Del Vecchio v. Del Vecchio*, *supra*, 143 So. 2d 17, for ante- and

post-nuptial agreements settling the property rights of the spouses in the estate of the other upon death, and if, in addition, it is made to appear that the divorce was prosecuted in good faith, on proper grounds, so that, under the rules applicable to postnuptial alimony and property settlement agreements referred to above, it could not be said to facilitate or promote the procurement of a divorce, then it should be held valid as to conditions existing at the time the agreement was made. . . .

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## LEGAL REQUIREMENTS OF A VALID PRENUPTIAL AGREEMENT

The content of a prenuptial agreement, as well as any other contract, will depend on the intent of the parties. Some are very detailed documents covering specific aspects of married life, such as who will pay the bills and who will do the household chores. Exhibit 4–1 at the end of the chapter shows a sample prenuptial agreement. Prenuptial agreements, however, cannot bind parties during the marriage. For example, assume the parties agree in a prenuptial agreement that the husband will wash the dishes and take out the trash. This provision will not be enforced by the court. The court will not enforce those portions of a prenuptial agreement that govern the spouse’s respective duties during an intact marriage. These provisions are useful only to provide the couple with guidelines as to how they wish to conduct their day-to-day affairs.

## ACQUIRING THE NECESSARY DOCUMENTATION

The following information should be obtained from the client for review, whether the office is representing the spouse seeking the prenuptial agreement or the spouse reviewing the agreement. For each party, obtain

1. A list of assets and their current fair market value;
2. Income, both earned and unearned;
3. Debts and liabilities;
4. Previous divorce obligations owed to a former spouse, such as the following:
  - ▼ Alimony—What is the amount and duration of payments?
  - ▼ Child support—What is the amount and ages of children?
  - ▼ College expenses—Is the party obligated to pay higher education costs?
  - ▼ Insurance premiums—Must the party pay health, life, or disability insurance premiums?
  - ▼ Qualified Domestic Relations Orders (QDRO)—Are there any future rights to an employee pension that the client will receive or be required to pay out?
  - ▼ Tax obligations—Do either of the parties owe money to a local, state, or federal tax entity?
  - ▼ Lawsuits—Does either party anticipate receiving money damages or a settlement amount from a pending lawsuit?



- ▼ Legal judgments—Have any legal judgments been entered against the parties requiring payment of damages?
- ▼ Credit history—Have there been previous or pending bankruptcies?

## WHO SHOULD HAVE A PRENUPTIAL AGREEMENT?

The following parties should consider having a prenuptial agreement prepared:

- ▼ Parties who have children from a previous marriage whose financial interests they wish to protect,
- ▼ Parties who have significant assets or are very well compensated,
- ▼ Parties who anticipate a family inheritance, and
- ▼ Parties who wish to protect their separate property (property acquired prior to marriage).

If a party wants to ensure that assets pass to the children of a previous marriage, a prenuptial agreement is essential. A spouse enjoys statutory protections, such as these:

- ▼ An elective statutory share of the deceased spouse's estate (this share is usually elected if the deceased spouse left the surviving spouse nothing or very little in the will);
- ▼ Intestacy succession rights;
- ▼ Homestead rights in the principal; and
- ▼ Widow's allowance.

These rights are automatically conferred on the spouse by virtue of the legal marital status. A spouse may, however, waive these rights in the prenuptial agreement. Without a properly executed prenuptial agreement in effect, a surviving spouse is legally entitled to claim a portion of the deceased spouse's estate. An attorney may advise a client to sign a Qualified Terminal Interest Trust (QTIP). A QTIP is a trust naming the children as beneficiaries of the client's estate while allowing the surviving spouse access to the assets acquired during his or her lifetime. In addition, the attorney should also advise the client to write a new will, change beneficiary designations on insurance policies, trusts, annuities, and other retirement plans to safeguard the current spouse.

Parties who are well compensated or have significant assets may also seek the protection of a prenuptial agreement. The client may be well advised by the attorney to keep the money he or she has already amassed in a separate account and not to commingle these funds with marital property.

## KNOW YOUR STATE LAW

The following jurisdictions have adopted the Uniform Premarital Agreement Act:

Arizona	Iowa	Nevada	Rhode Island
Arkansas	Kansas	New Jersey	South Dakota
California	Maine	North Carolina	Texas
Hawaii	Montana	North Dakota	Utah
Illinois	Nebraska	Oregon	Virginia

The full text of the Uniform Premarital Agreement Act is provided in Appendix A. The model act provides guidelines for parties who wish to enter into a prenuptial agreement. Check your state statutes if you live in a state that has adopted this act.

Other jurisdictions may have adopted a modified version of the model act or have their own state laws addressing this issue. It is essential to check your state's statutory *and* case law, because laws vary from jurisdiction to jurisdiction. California, for instance, does not allow elimination or modification of a spouse's right to receive alimony at the time of divorce. When the California legislature adopted the Uniform Premarital Agreement Act, it refused to codify language that gave the contracting parties the ability to eliminate or modify spousal support payments. In 1998, in *Pendelton v. Fireman* 98 Daily Journal DAR 3087 (1998), the California Appellate Court addressed the issue of spousal support waiver. The parties, a well-educated and well-to-do couple, contracted in a prenuptial agreement that neither one would ask for alimony in the event of a divorce. Both parties were represented by independent counsel at the time of entering into the agreement. Four years later, they found themselves in divorce court. The wife, now asking for alimony, argued that the agreement was void against California public policy. **Public policy** is a belief generally held by a majority of the public as to the desirability or rightness or wrongness of certain behavior. In this case, the trial court agreed with the wife. The California Appellate Court reversed, upholding the waiver on the grounds that California case law rather than the statutory law should prevail on the issue of spousal support and that waivers and limitations no longer violate public policy. The case is currently on appeal before the California Supreme Court.

## THE INTENT OF THE PARTIES MUST BE CLEAR

In drafting a prenuptial agreement, it is important to express the intentions of the parties. This requires a clear statement of each party's intent. It may be necessary for the parties' attorneys to prepare and/or review several drafts of the agreement before the final document memorializes each party's intent to his or her own satisfaction and that of the other party.

## COMPLIANCE WITH THE STATUTE OF FRAUDS

The Statute of Frauds requires that promises made in contemplation of marriage must be in writing and signed by the party to be charged.

## ADEQUATE DISCLOSURE

Prospective spouses have a duty to fully disclose their financial status. This is essential since parties who intend to marry share a confidential relationship and mutual trust. Sometimes a person may not be fully aware of the prospective spouse's financial status. Most jurisdictions require the parties to attach an accurate financial statement to the agreement. The extent of disclosure is different in each state. The safest approach is to provide a detailed disclosure of all income, expenses, assets (fair market value), and liabilities. Each party should also disclose assets in which the party may have a future interest, such as an inheritance or a trust fund distribution.

The paralegal may assist by helping the client to obtain a description and, when appropriate, the fair market value of the following:

- ▼ IRAs, pensions, 401k funds, deferred profit sharing compensation;
- ▼ Securities, stocks, bonds, commodities, real estate;
- ▼ Collectibles (artwork, antiques, guns, coins, stamps, jewelry);
- ▼ Royalties from patents, copyrights, trademarks;
- ▼ Future interests (inheritances, trusts); and
- ▼ Beneficiary designations.

Essentially, the contracting parties should have knowledge of the extent of the other's estate.

## ADVICE OF INDEPENDENT COUNSEL

The proponent of the prenuptial agreement must give the other party the opportunity to have an independent attorney of her choice review the agreement. An attorney reviewing a prenuptial agreement will advise a client of what she is legally entitled to as a spouse and what she will be giving up by signing this document. It is not advisable for the attorney drafting a prenuptial agreement to refer the opposing party to an attorney. This may later raise the specter of conflict of interest. Additionally, one lawyer should not draft such an agreement for both parties, because this would also present a conflict.

A prospective spouse should not be pressured into signing a prenuptial agreement. For instance, the document should not be slipped under a bustling bride's nose on the morning of the wedding. A party should have ample opportunity to seek counsel.

## FAIRNESS

In order for a prenuptial agreement to be valid, it must not be **unconscionable**. An agreement is unconscionable when it is so unfair to one party that the court will refuse to enforce it. Courts regularly review contracts on the basis of "fairness." In business settings, the parties enter into contracts as arm's length transactions. The courts protect the freedom of contract in business transactions. Prospective spouses, however, are in a confidential relationship and may be pressured into signing for fear that otherwise the marriage will not go forward. Therefore, prospective spouses are more susceptible to undue influence, thus alerting the courts to the possibility of unconscionability.

Courts will generally enforce a prenuptial agreement unless one party can prove that it promotes divorce (e.g., a large, enticing property settlement upon divorce); the contract was entered into with the intent to divorce; or that the agreement was unfairly executed without benefit of independent counsel. A prenuptial agreement will be enforced as long as the proponent of the agreement (the spouse claiming the agreement's enforceability) adequately disclosed income and assets to the opposing spouse and that at the time of entering into the agreement, the opposing spouse was not under undue pressure to sign. In some jurisdictions, the agreement is unenforceable if it was deemed "unfair" at the time of signing.

## ASSESSING THE CLIENT'S POSITION REGARDING THE ENFORCEABILITY OF THE PRENUPTIAL AGREEMENT

The law office will either be representing the party who originally proposed that a prenuptial agreement be prepared and executed and now seeks its enforcement or the party who agreed to its execution but who now seeks legal representation to oppose the enforcement. In either case, the first aspect to review is what circumstances existed during the formation of the contract. The court will generally uphold a prenuptial agreement unless the parties possessed unequal bargaining power. If both parties had similar financial and educational backgrounds at the time of the execution, the court will most likely uphold the agreement.

The second aspect to consider is what circumstances exist at the time one of the parties seeks enforcement of the agreement. The courts apply the “**second glance doctrine**” in order to protect spouses from changes in circumstances that occurred since the date of the formation of the prenuptial agreement. The courts will not enforce the contract due to unconscionability if enforcing the contract “today” would be unfair in light of the current circumstances. The contract must be fair and reasonable to the relinquishing spouse. The court may overrule the prenuptial agreement if enforcement would cause a spouse to become a charge of the state or greatly reduce his standard of living.

### EXAMPLE

*Jonathan and Shannon enter into a prenuptial agreement. Shannon waives away her right to alimony. Later, Shannon gets sick with Parkinson's disease and cannot work or support herself. Is the prenuptial agreement enforceable? No.*



Provisions may not take effect for years. Fairness and reasonableness are subjective tests to be determined by the courts after reviewing the totality of circumstances, such as the parties' health, financial status, intellectual and business savvy, existence of dependent children, and current standard of living.

## THE CONTRACT MUST BE ENTERED INTO VOLUNTARILY

Any contract must be a “meeting of the minds.” This means that each party must understand and agree to the terms of the contract. If a person is forced to sign a premarital agreement, or is under pressure to sign, or signs for fear that otherwise the marriage will not go forward, the contract can later be declared void by the court.

## JURISDICTION

A prenuptial agreement should include a clause indicating which state's law will control. Language such as “This prenuptial agreement shall be construed under the laws of the State of Massachusetts” should be incorporated into the document. Under traditional contract law, when the agreement is silent, the construction and validity of an agreement is determined by the law of the jurisdiction where the agreement was originally signed. Unlike contract law, family law is steeped in pub-

lic policy concerns and the state reviewing the contract for enforcement has jurisdiction over disputes.

A party may have entered into a prenuptial agreement in a jurisdiction where the terms were valid under that state's laws, but the parties moved to a state that disfavors prenuptial agreements or certain provisions. Under the Uniform Premarital Agreement Act, the law of the state where enforcement of the agreement is sought controls.

## UNENFORCEABLE PROVISIONS

The court may invalidate certain provisions of a prenuptial agreement while enforcing others if the agreement contains provisions for the care, custody, and support of the couple's union. These provisions are usually not enforceable. The court decides these issues according to the "child's best interest standard." Like other contractual arrangements, the court may invalidate some provisions of the prenuptial agreement while enforcing other provisions.

# COHABITATION

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## INTRODUCTION

**Cohabitation agreements**, either express or implied, are contracts entered into by unmarried individuals who live together or plan to live together. Prior to the late 1970s, cohabiting couples were left to resolve their legal differences by themselves. Courts did not recognize sexual relationships outside of matrimony. These relationships were viewed as void against public policy. The courts also refused to recognize these relationships because recognition would erode the traditional family unit. But our society has seen an increase in the number of couples who have chosen to live together without the benefit of marriage. At one time in our social history, living together was considered scandalous. Now, for heterosexual couples, it is a matter of preference or convenience. For same-sex couples, cohabitation agreements and domestic partnerships (valid in only a few jurisdictions and also available to heterosexual couples) are the only option available since no jurisdiction has legalized same-sex marriage.

## WHY COHABITATION?

In the case of heterosexual couples, a variety of reasons exist for choosing a cohabitation arrangement rather than the institution of marriage:

1. Fear of the greater level of commitment and perceived greater level of responsibility that formal marriage appears to bring.
2. Some couples feel the commitment they make to each other to cohabit is just as serious and binding as a formal marriage; however, they are aware that future events could change the relationship and weaken the strength of the commitment. If unforeseen events change the nature of the relationship, it is easier and less expensive to loosen the bonds.

3. Women have attained greater financial independence. This has helped to alleviate the rush to the altar in order to find someone who could care for them financially.
4. Some individuals, male and female, have considerable assets and choose not to marry at all for fear of losing those assets.
5. Some individuals have been through the financial and emotional trauma of a divorce, or even multiple divorces, and have no desire to remarry.

Despite the increased public acceptance of cohabitation, the law still favors traditional marriage. A preference for marriage is reflected throughout state and federal statutory schemes, such as:

- ▼ Intestate succession;
- ▼ Right of election;
- ▼ Disposition of a deceased spouse's body;
- ▼ Community property and tenancy by the entirety as concurrent ownership schemes;
- ▼ Loss of consortium damages in civil matters;
- ▼ Marital privilege protecting communications between spouses in evidentiary proceedings;
- ▼ Immigration privileges;
- ▼ Social Security benefits;
- ▼ Workers' compensation benefits;
- ▼ Federal and state tax benefits;
- ▼ Health insurance;
- ▼ Medical leave; and
- ▼ Mutual obligation to financially support each other.

Another very important benefit of marriage is access to the family courts to dissolve the relationship. The family courts also have the power to order a division of the assets and impose obligations such as alimony, child support, and custody. Generally, cohabitants, unless they have children together, have no access to the family court and must rely on the civil court to resolve disputes, unless they are able to amicably resolve their differences.

## **MARVIN V. MARVIN**

In response to the very sharp increase in cohabitation arrangements that occurred in the late 1960s and early 1970s, the law had to change to make some accommodations for resolving disputes between cohabiting partners. The first case to recognize the rights of cohabitants was *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). In *Marvin*, the plaintiff and the defendant had lived together for a period of seven years. During this period, the plaintiff agreed to give up her career and provide domestic services for the defendant. In exchange, the defendant agreed to financially support the plaintiff and share any assets that were accumulated. This agreement was *not* memorialized in writing.

When the relationship ended, the plaintiff sued the defendant on a contractual basis for support and a division of the assets. The trial court dismissed her case

and she appealed. On appeal, the California Supreme Court held that the contract between the parties was valid and remanded the case to the trial court to be judged on its merits. The parties had accumulated approximately one million dollars in assets. However, these assets were titled in the name of the defendant.

The defendant attacked the validity of the contract by raising the long-standing public policy argument. According to the defendant, a contract that included sexual relations was void. The California Supreme Court held that as long as sexual relations were not the sole consideration, the court should disregard that provision and enforce the lawful provisions of the agreement.

The next step was to determine the remedies available to the parties. While *Marvin* is a landmark case in the area of cohabitation, these remedies vary from state to state. First, the court had to decide what type of contract was in effect:

1. **Express contract.** This would require an express agreement between the parties regarding the specific terms. The high court recognized that in a romantic relationship, parties do not generally negotiate the terms of their roles and expectations, let alone reduce them to a writing.
2. **Implied-in-fact contract.** In an implied-in-fact contract, the intention of the parties is inferred by their conduct. For example, a person goes to a restaurant and orders ham and eggs. The waiter brings him his food and he consumes the meal. There is an implied contract that the consumer intends to pay for the meal. In supporting an implied contract action in a cohabitation case, examining the conduct of the parties is essential. How did the parties conduct themselves during their relationship? What contributions, both monetary and nonmonetary, did the parties bring to the relationship? Were assets commingled in joint accounts?
3. **Quasi-contract.** Quasi-contracts are contractual obligations that are imposed upon the parties by the court. No actual contract has been entered into by the parties. The court takes this position when it appears that one party has been so unjustly enriched that the court creates a contract to avoid unfairness to the other party.
4. **Implied partnership.** When a cohabiting couple works on a business enterprise that is owned by one of the parties, the court creates an implied partnership. The court assesses the financial status of the business and distributes the assets and liabilities just as such a distribution would occur upon the dissolution of a business partnership.
5. **Implied trust.** A trust is a legal relationship where one party, the **trustee**, holds legal title to property for the benefit of the **beneficiary**. Most trusts are **expressed trusts**, in which the terms have been negotiated by the parties. Implied trusts are created by the court to avoid an injustice. One type of trust is a **resulting trust**. In a resulting trust, one party provides the funds for property, while title is in the other party's name.

#### EXAMPLE

*Mary has enough money for a down payment on a house, but has poor credit. John has excellent credit and can qualify for a mortgage in his sole name. With Mary's down payment, John agrees to split the mortgage payments and purchases the house, which is titled in his name only. John and Mary move into the house and live there for ten years together. During this time, Mary contributes to the mortgage*

*payments and household expenses. The relationship deteriorates and Mary and John break up. Mary moves out of the house because John has become verbally abusive. Mary may sue for her interest in the house on a resulting trust theory.*



6. **Constructive trust.** A constructive trust is imposed by the court to avoid unjust enrichment when there is no intent between the parties to create a trust.

While the Marvin court established a variety of legal remedies for litigating cohabitants, it did not approve of treating cohabiting couples as married couples:

. . . [W]e 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. [Marvin v. Marvin, 557 P.2d 106, 122 (1976)]

## SAME-SEX MARRIAGE

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### INTRODUCTION

Same-sex couples find themselves in the same legal position as cohabiting heterosexual couples. The one difference between the two is that, if they so choose, heterosexual couples have the option of legalizing their union, while same-sex couples do not.

The sexual revolution wrought about many social changes, one of which has been the opening of the closet door. The current headlines indicate that members of the gay community are demanding not only social acceptance and equal rights, but also the right to enter into marital relationships. This idea, however, is not yet widely accepted by society, and triggers many emotional reactions from those who wish to preserve the traditional type of marriage—a union between a man and a woman.

Every social movement has a defining moment in its history. The gay liberation movement was born during the Stonewall riots in New York City in 1969. Since then, the gay rights movement has sought to remove the stigma that has so long been attached to this lifestyle. This stigma affects familial, legal, economic, and social aspects for a gay person. Legal and religious institutions in particular have condemned the gay lifestyle. While many state laws have been repealed, there are still laws on the books that criminalize sodomy or other gay conduct. Homosexuality is also considered a sin in many religious traditions.

To date, no state has legalized **same-sex marriage**—a legal marriage between members of the same sex who are entitled to the same rights and privileges as heterosexual married couples.

### DOMESTIC PARTNERSHIPS

A **domestic partnership** is an arrangement between same-sex couples or opposite-sex couples who cannot or who choose not to marry, but live together just like a married couple. Several states, including California and Vermont, have





# STATUTES

## VERMONT STATUTES ANNOTATED TITLE 23, SECTION 1.15

An Act Relating to Domestic Partnerships

§ 1202. Requisites of a Valid Domestic Partnership

For a domestic partnership to be established in Vermont, it shall be necessary that the parties satisfy all of the following criteria:

- (1) Have a common residence.
- (2) Consider themselves to be members of each other's immediate family.
- (3) Agree to be jointly responsible for one another's basic living expenses.
- (4) Neither be married nor a member of another domestic partnership.
- (5) Not be related by blood in a way that would prevent them from being married to each other as prohibited by chapter 1 of this title.
- (6) Each be at least 18 years old.
- (7) Each be competent to enter into a contract.
- (8) Each sign a declaration of a domestic partnership as provided for in section 1203 of this title.

enacted Domestic Partnership Acts, which protect each party in the event of a breakdown of the relationship. A domestic partnership agreement works like a prenuptial agreement in that it spells out who is responsible for what in the event of a breakup.

## MARRIAGE STATUTES

Every state has a **marriage statute**. This is a law passed by a state legislature that indicates who may marry. This is the same statute that tells us, for instance, that a man cannot marry his niece because they are too close in consanguinity and this union could violate public policy. Marriage statutes vary from state to state. Some statutes explicitly forbid a marriage between members of the same sex by specifying that marriage must be between a man and a woman. In these jurisdictions, same-sex marriages are prohibited.

In other jurisdictions, the marriage statute is silent as to who may marry. When the statute is silent as to definitions, these jurisdictions also prohibit same-sex marriage because they apply the "plain meaning" and dictionary definition of the word "marriage."

## THE LEGAL BATTLE FOR RECOGNITION OF SAME-SEX MARRIAGE

The advocates of same-sex marriage contend that the prohibition against same-sex marriage violates the Establishment Clause of the First Amendment of the Constitution because the state is establishing a religion (i.e., the prohibition reflects Judeo-Christian biblical views against homosexual conduct). Courts have rejected this argument, ruling that a legitimate governmental interest is served by prohibiting marriages between members of the same sex. It is the view of many courts that states should sanction only marriages that are capable of procreating—reproducing children. The courts have also believed that preserving the traditional family unit will discourage children and youth from viewing homosexuality as an acceptable lifestyle.

## THE FOURTEENTH AMENDMENT ARGUMENT

Marriage is considered a **fundamental right** in our system of jurisprudence. Advocates of same-sex marriage have argued that denying homosexuals the right to marry on the basis of their sex violates the Fourteenth Amendment. A classification resulting in the denial of a fundamental right may only be upheld where it is necessary to accomplish a compelling state interest and achievement of that goal cannot be done by less restrictive means.

In 1967, the U.S. Supreme Court struck down a Virginia statute that prohibited interracial marriages. This statute and similar legislation were known as **miscegenation laws** and were enforced in many states. The Virginia statute at the time read as follows:

All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process. (Virginia Code Ann. 750-57)

In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held that marriage is a fundamental right which cannot be restricted by states unless there is a compelling state interest. Courts have rejected this application of this holding to decide the legality of same-sex marriage and routinely uphold laws passed by state legislatures who prohibit same-sex marriage. Many courts employ the rationale that upholding such statutes discourages the illegal activity of sodomy and encourages procreation.

## THE STATE EQUAL RIGHTS AMENDMENT ARGUMENT

Another theory of attack used by same-sex marriage advocates has been states' Equal Rights Amendments.

Equality of rights under the law shall not be denied or abridged on account of sex. (Ex. **Colo. Const. Art. II Section 29.**)

A state's Equal Rights Amendment would bar sex-based classifications, even though the classification may be based on a compelling state interest. There is no federal Equal Rights Amendment (ERA). Efforts to pass an ERA to the U.S. Constitution failed on several occasions with protestors alleging that it would lead to women serving in military combat, unisex toilets, and . . . same-sex marriage.

One state that has received a lot of attention in the same-sex marriage controversy has been Hawaii particularly, because of the case of *Baehr v. Miike* (formerly *Baehr v. Lewin*), 74 Haw. 530, 852 P.2d 44 (1993). Hawaii was the first state in the country in which a court of law was asked to determine if same-sex couples have the right to a legally recognized marriage. In December 1990, several same-sex couples applied for marriage licenses and were denied. The couples filed a lawsuit against the Hawaii State Department of Health contending that the marriage statute was unconstitutional because it prohibited same-sex couples from obtaining marriage licenses on the basis of sex and sexual orientation. In October 1991, the plaintiffs' complaint was dismissed by the trial court on the grounds of failure to state a claim on which relief could be granted. The plaintiffs appealed this decision to the Supreme Court of Hawaii. On May 1, 1993, Hawaii's highest court stunned the nation when it reversed the trial court's ruling and remanded the case for a new trial. The court held that restrictions on same-sex marriages may violate the state's Equal Protection Clause because it prohibited same-sex couples from obtaining a marriage

license on the basis of gender. Couples were entitled to protection under the state's Equal Rights Amendment and could not be denied a marriage license based on compelling state interests. This would require the legal test of strict scrutiny.

On remand, it was up to the Hawaii State attorney general to prove a compelling state interest—that the state of Hawaii was justified in its restrictions. The state's position was that marriage is for the promotion and rearing of children by heterosexuals only. It is in the children's best interest to be raised by their biological parents and states have interests in promoting the development of children.

The plaintiffs presented expert testimony that confirmed that children of gay parents are no different developmentally than children raised by heterosexual couples. In addition, the plaintiffs argued that the State's argument is flawed because the state places children in foster care and because many children are raised in single-parent homes.

While the Baehr case progressed through the Hawaiian court system, the Hawaii Legislature in 1994 reacted to the decision by amending its marriage statute to expressly state that marriage is between a man and a woman.



## STATUTES

### HAWAII REVISED STATUTES §572-1

**§572-1 Requisites of valid marriage contract.** In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that:

- (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as the whole blood, uncle and niece, aunt and nephew, whether the relationship is the result of the issue of parents married or not married to each other;
- (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to 572-2;
- (3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;
- (4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;
- (5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;
- (6) The man and woman to be married in the State shall have duly obtained a license for that purpose from the agent appointed to grant marriage licenses; and
- (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and the woman to be married and the person performing the marriage ceremony by all physically present at the same place and time for the marriage ceremony.

In December 1996, the trial court ruled in favor of the plaintiffs and issued an injunction ordering the state to issue marriage licenses to the same-sex couples. The next day, the state filed a motion to stay the injunctions until the State had the opportunity to appeal the case. The motion was granted and no licenses were issued to the plaintiffs.

In April 1997, The Hawaii legislature closed this issue by passing a constitutional amendment stating that the legislature could limit marriage to a man and a woman.

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**NINIA BAEHR, GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON,  
JOSEPH MELILLO, V. LAWRENCE MIIKE, DIRECTOR OF THE DEPARTMENT OF HEALTH, STATE  
OF HAWAII**

SUPREME COURT OF THE STATE OF HAWAII

CIV. NO 91-1394-05

FILED ON DECEMBER 11, 1995

**SUMMARY OF DISPOSITION ORDER**

Pursuant to Hawaii Rules of Evidence (HRE) Rules 201 and 202 (1993), this court takes judicial notice of the following: On April 29, 1997, both houses of the Hawaii legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawaii Constitution (the marriage amendment). *See* 1997b House Journal at 922; 1997 Senate Journal at 766. The bill proposed the addition of the following language to article I of the Constitution: “**Section 23.** The legislature shall have the power to reserve marriage to opposite-sex couples.” *See* 1997 Haw. Sess. L. H.B. 117 §2, at 1247. The marriage amendment was ratified by the electorate in November, 1998.

In light of the foregoing, and upon carefully reviewing the record and the briefs and supplemental briefs submitted by the parties and amicus curiae and having given due consideration to the arguments made and the issues raised by the parties, we resolve the defendant-appellant Lawrence Miike’s appeal as follows:

On December 11, 1996, the first circuit court entered judgment in favor of plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo (collectively, “the plaintiffs”) and against Miike, ruling (1) that the sex-based classification in Hawaii Revised Statutes (HRS) §572-1 (1985) was “unconstitutional” by virtue of being “in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution,” (2) that Miike, his agents, and any person acting in concert with or by or through Miike were enjoined from denying an application for a marriage license

because applicants were of the same sex, and (3) that costs should be awarded against Miike and in favor of the plaintiffs. The circuit court subsequently stayed enforcement of the injunction against Miike.

The passage of the marriage amendment placed HRS §572-1 on new footing. The marriage amendment validated HRS §572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS §572-1 no longer is. In light of the marriage amendment, HRS §572-1 must be given full force and effect.

The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS §572-1 is now a valid statute, the relief sought by the plaintiffs is unavailable. The marriage amendment has rendered the plaintiffs’ complaint moot.

Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

IT IS FURTHER ORDERED that the circuit court shall not enter costs or attorney’s fees against the plaintiffs.

DATED: Honolulu, Hawaii, December 9, 1999.

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**Baehr** sent shock waves throughout the country. In response, many jurisdictions amended their marriage statutes, defining marriage as a union between a man and a woman. States feared that if Hawaii legalized gay marriage, same-sex partners would go to Hawaii, get married, then return to their state of domicile and demand that their marriage be recognized under the **full faith and credit clause** of the U.S. Constitution. The full faith and credit clause states that states must honor the

public acts, records, and judicial proceedings of every other state. U.S. Const. Art. IV, §1. If a heterosexual couple marries in Hawaii, then moves to Ohio, the state of Ohio must legally recognize the marriage.

In May 1996, the U.S. Congress enacted the **Defense of Marriage Act** (DOMA). The act protects the traditional definition of marriage as a union between a man and a woman in the United States Code and bars same-sex couples from enjoying federal benefits, regardless of how their states redefine marriage, either through statute or judicial act. Marriage is referenced in many federal laws such as tax, bankruptcy, immigration, Social Security, and military justice. DOMA also ensures that states would not be forced to recognize same-sex marriages performed in states that have sanctioned such unions.

### **DEFENSE OF MARRIAGE ACT, 28 U.S.C. SECTION 1738C (1996)**

#### **Sec. 2. Powers Reserved to the States.**

(a) IN GENERAL—Chapter 115 of title 28 United States Code, is amended by adding after section 1738B the following:

*“Sec. 1738C. Certain acts, records, and proceedings and the effect thereof*

*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 person of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”*

#### **Sec. 3. Definition of Marriage**

IN GENERAL – Chapter 1 of Title 1, United States Code, is amended by adding at the end the following:

*“Sec. 7. Definition of ‘marriage’ and ‘spouse’*

*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 a wife.”*

Another battle for the recognition of same-sex marriage is being waged in the state of Vermont. On December 20, 1999, the Vermont Supreme Court reached a landmark decision in the case of *Baker v. State*. The state’s highest court held that three same-sex couples who applied for marriage licenses and were denied had the right to the same benefits of marriage as their heterosexual counterparts—that is, an absolute right to legal marriage benefits under Vermont law. The court extended the Common Benefits Clause of the Vermont Constitution to include the right of same-sex couples to marry. The court also retained jurisdiction in the case. Therefore, if the Vermont legislature is unable to provide a remedy to same-sex couples according to the court’s ruling, the court will do so on its own. As of April 2000, the Vermont legislature passed Bill H-847, creating civil unions for same-sex couples. This statute will grant same-sex couples numerous state benefits of marriage, including tax benefits, inheritance rights, and the right to make medical decisions.

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**STAN BAKER, ET AL. V. STATE OF VERMONT, ET AL.**

VERMONT SUPREME COURT

DOCKET NO. 98-032

NOVEMBER TERM, 1998

DECEMBER 20, 1999

**AMESTOY, C. J.**

May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples? That is the fundamental question we address in this appeal, a question that the Court knows arouses deeply-felt religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of the issues properly before us provides no exception for the controversial case. The issue before the Court, moreover, does not turn rather on the statutory and constitutional basis for the exclusion of same-sex couples from the more secular benefits and protections offered married couples.

We conclude that under the Common Benefits Clause of the Vermont Constitution, which, in pertinent part, reads, That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community, Vt. Const., ch. I, art. 7., plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel “domestic partnership” system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Plaintiffs are three same-sex couples who have lived together in committed relationships for periods ranging from four to twenty-five years. Two of the couples have raised children together. Each couple applied for a marriage license from their respective town clerk, and each was refused a license as ineligible under the applicable state marriage laws. Plaintiffs thereupon filed this lawsuit against defendants—the State of Vermont, the Towns of Milton and Shelburne, and the City of South Burling-

ton—seeking a declaratory judgment that the refusal to issue them a license violated the marriage statutes and the Vermont Constitution.

The State, joined by Shelburne and South Burlington, moved to dismiss the action on the ground that plaintiffs had failed to state a claim for which relief could be granted. The Town of Milton answered the complaint and subsequently moved for judgment on the pleadings. Plaintiffs opposed the motions and cross-moved for judgment on the pleadings. The trial court granted the State’s and Town of Milton’s motions, denied plaintiffs’ motion, and dismissed the complaint. The court ruled that the marriage statutes could not be construed to permit the issuance of a license to same-sex couples. The court further ruled that the marriage statutes were constitutional because they rationally furthered the State’s interest in promoting “the link between procreation and child rearing.” This appeal followed.

**I. THE STATUTORY CLAIM**

Plaintiffs initially contend the trial court erred in concluding that the marriage statutes render them ineligible for a marriage license. It is axiomatic that the principal objective of statutory construction is to discern the legislative intent. . . . While we may explore a variety of sources to discern that intent, it is also a truism of statutory interpretation that where a statute is unambiguous we rely on the plain and ordinary meaning of the words chosen. . . . [W]e rely on the plain meaning of the words because we presume they reflect the Legislature’s intent. . . .”

. . . Vermont’s marriage statutes are set forth in Chapter 1 of Title 15, entitled “Marriage,” which defines the requirements and eligibility for entering into a marriage, and Chapter 105 of Title 18, entitled “Marriage Records and Licenses,” which prescribes the forms and procedures for obtaining a license and solemnizing a marriage. Although it is not necessarily the only possible definition there is no doubt the plain and ordinary meaning of “marriage” is the union of one man and one woman as husband and wife. . . .

. . . Further evidence of the legislative assumption that marriage consists of a union of opposite genders may be found in the consanguinity statutes, which expressly prohibit a man from marrying certain female relatives. . . . In addition, the annulment statutes explicitly refer to “husband and wife” . . . as do other statutes relating to married couples. . . .

. . . These statutes, read as a whole, reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman. . . .

## II. THE CONSTITUTIONAL CLAIM

Assuming that the marriage statutes preclude their eligibility for a marriage license, plaintiffs contend that the exclusion violates their right to the common benefit and protection of the law guaranteed by Chapter I, Article 7 of the Vermont Constitution. They note that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse’s medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections. They claim the trial court erred in upholding the law on the basis that it reasonably served the State’s interest in promoting the “link between procreation and child rearing.” They argue that the large number of married couples without children, and the increasing incidence of same-sex couples with children, undermines the State’s rationale. They note that Vermont law affirmatively guarantees the right to adopt and raise children regardless of the sex of the parents, see 15A V.S.A. §1-102, and challenge the logic of a legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them—and their children—the same security as spouses.

In considering this issue, it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. . . .

. . . “[O]ur constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, it extends back to Vermont’s days as an independent republic. It is an independent authority, and Vermont’s fundamental law.”

. . . [W]e turn to the question of whether the exclusion of same-sex couples from the benefits and protections incident to marriage under Vermont law contravenes Article 7. The first step in our analysis is to identify the nature of the statutory classification. As noted, the marriage statutes apply ex-

pressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex.

Next, we must identify the governmental purpose or purposes to be served by the statutory classification. The principal purpose the State advances in support of the excluding of same-sex couples from the legal benefits of marriage is the government’s interest in “furthering the link between procreation and child rearing”. . . .

. . . [T]he reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children. . . . The Vermont Legislature has not only recognized this reality, but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such efforts. . . . The State has also acted to expand the domestic relations laws to safeguard the interests of same-sex parents and their children when such couples terminate their domestic relationship. . . .

. . . Therefore, to the extent that the State’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently. . . .

. . . The question thus becomes whether the exclusion of a relatively small but significant number of otherwise qualified same-sex couples from the same legal benefits and protections afforded their opposite-sex counterparts contravene the mandates of Article 7. It is, of course, well settled that statutes are not necessarily unconstitutional because they fail to extend legal protection to all who are similarly situated. . . .

. . . While the laws relating to marriage have undergone many changes during the last century, largely toward the goal of equalizing the status of husbands and wives, the benefits of marriage have not diminished in value. On the contrary, the benefits and protections incident to a marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, preference in being appointed as the personal representative of a spouse who dies intestate, the right to bring a lawsuit for the wrongful death of a spouse, the right to bring an action for loss of consortium, the right to workers’ compensation survivor benefits, the right to spousal benefits statutorily guaranteed to public

employees, including health, life, disability, and accident insurance, the opportunity to be covered as a spouse under group life insurance policies issued to an employee, the opportunity to be covered as the insured's spouse under an individual health insurance policy, the right to claim an evidentiary privilege for marital communications, homestead rights and protections, the presumption of joint ownership of property and the concomitant right of survivorship, hospital visitation and other rights incident to the medical treatment of a family member, and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce . . . (citations omitted).

. . . The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law—protecting children and “furthering the link between procreation and child rearing”—the exclusion falls substantially short of this standard. The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts. Promoting a link between procreation and child rearing similarly fails to support the exclusion. . . .

. . . Thus, viewed in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from

the benefits incident to a civil marriage license under Vermont law.; . . .

#### . . . F. Remedy

It is important to state clearly the parameters of today's ruling. Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law. While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. . . .

. . . We hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion. . . .

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While California passed a domestic partnership act, California Code Family Code §297 *et seq.*, it took a step backward in March 2000 by passing Proposition 22. California's Proposition 22 bars the state from recognizing same-sex marriages performed in other states. It declares that only unions between a man and a woman are valid. Interestingly, this bill was sponsored by Republican State Senator Pete Knight, whose gay son was one of the opponents of the bill.



## EXHIBIT 4-1

**Sample Prenuptial Agreement (Author unknown)**

WHEREAS, the parties are contemplating a legal marriage under the laws of the State of Connecticut; and

WHEREAS, it is their mutual desire to enter into this Agreement whereby they will regulate their relationship toward each other with respect to the property each of them own and in which each of them has an interest;

NOW, therefore, it is agreed as follows:

1. That the properties of any kind or nature, real, personal or mixed, wherever the same may be found, which belong to each party, shall be and forever remain the separate estate of said party, including all interests, rents and profits which may accrue therefrom.
2. That each party shall have at all times the full right and authority, in all respects, the same as each would have if not married, to use, enjoy, mortgage, convey and encumber such property as may belong to him or her.
3. That each party may make such disposition of his or her property as the case may be, by gift or will during his or her lifetime, as each sees fit; and in the event of the decease of one of the parties, the survivor shall have no interest in the property of the estate of the other, either by way of inheritance, succession, family allowance or homestead.
4. That each party, in the event of a legal separation or dissolution of marriage, shall have no right as against the other by way of claims for support, alimony, property division, attorney's fees and costs.
5. This Prenuptial Agreement shall be construed under the laws of the State of Connecticut.

Dated this 10th day of May, 2001

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
Witness

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
Witness

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Date)

**REVIEW QUESTIONS**

1. Define prenuptial agreement.
2. Why would a couple contemplating marriage enter into a prenuptial agreement?
3. What are the legal requirements for a valid prenuptial agreement?
4. Why is the advice of independent counsel so important for the purpose of reviewing a prenuptial agreement?
5. Define cohabitation.
6. Why are some couples choosing a cohabitation arrangement as opposed to a more traditional marriage?
7. In the landmark case of *Marvin v. Marvin*, what remedies did the California Supreme Court set forth for cohabitants?
8. List the legal benefits available to couples who are legally married.
9. In your opinion, should same-sex couples be allowed to marry?
10. Define domestic partnership.

**EXERCISES**

1. Research your state's prenuptial agreement statute. Does your state follow the Uniform Premarital Agreement Act? A modified version? A state version?
2. Review your state's case law on prenuptial agreements. Read and brief a recent case in this area of the law.
3. Research your state's law on cohabitation agreements. What remedies does your state confer on cohabiting couples?
4. Review your state's marriage statute. In your jurisdiction, who may marry? Does your jurisdiction specifically prohibit marriage between persons of the same sex?
5. Does your state recognize domestic partnerships? If so, what rights and responsibilities do domestic partners have in your jurisdiction?