COMMON-LAW MARRIAGE IN THE CONTEMPORARY UNITED STATES

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ABSTRACT

This article will offer a short history of common-law marriage in the United States as well as the current use of the concept. The article will also offer information concerning requisites for a valid Common-law marriage relationship to be established, with some reference to typical cases in the United States.

Key-words

Marriage. Common Law. Marital relationship

RESUMO

Este artigo apresenta uma breve referência histórica a respeito do casamento no Common Law americano, assim como desenvolve o uso comum do seu conceito. O artigo também apresenta os requisitos necessários para a celebração válida do casamento no Common-Law, fazendo-se referência a casos concretos presentes na jurisprudência dos Estados Unidos.

Palavras-chave

Casamento. Common Law. Relação marital

1. HISTORY AND CURRENT STATUS OF COMMON-LAW MARRIAGE IN THE UNITED STATES

Common-law marriage had its origin in the informal forms of marriage known in Europe prior to the reformation. Prior to the Council of Trent in 1563 marriage was regarded as a private affair rather than a matter in which legal institutions had an interest. Other than in situations involving noble or very wealthy families, where a great deal of wealth was at stake in the union of their children, marriage tended to be entered into with a minimum of formality. Two persons, perhaps in the presence of other members of their community,

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would agree to be married and then simply live together as husband and wife.[2] The essence of the institution of marriage at the time was a combination of the agreement of the parties, cohabitation as man and wife, and community recognition of their status.[3]

Marriage was regarded as a private contract based upon natural law among the leadership of the Roman Catholic Church prior to 1563. In fact, when the Council of Trent promulgated the 1563 decree, making the validity of marriage depend upon its being performed in the presence of a priest and before two witnesses, the decree was opposed by 56 prelates, who were of the opinion that the church had no power to nullify the effect of a sacrament based on natural law.[4]

Even after formal marriage, validated by church authorities or the State, became accepted on the European Continent, informal marriage continued to exist as an institution in England until abolished by Parliamentary Act in 1753. Therefore, one should recognize that the requirement of formal marriage is a relatively recent requirement of Anglo-American law.

With the establishment of English Common-Law in the American colonies the common-law marriage was transferred to North America. In the Massachusetts Bay Colony, settled by the Puritans,[5] elaborate laws concerning marriage were enacted, requiring licensing, registration and formal ceremony. Thus, common-law marriages were not allowed in the Massachusetts Bay Colony because of the influence of the Puritans.

Other states such as New York, not controlled by the Puritans, based their reception to informal marriage on the English Common-Law. Many of the colonies in North America were established before the Act of Parliament abolishing common-law marriages in 1753 in England, and in any event, the Parliamentary Act in question did not apply to the colonies, thus the American colonies continued to evolve recognizing the validity of common law marriage.

Chancellor Kent wrote an opinion in 1809 holding a common-law marriage valid in New York because, asserted the Chancellor, such was consistent with

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[3] *Id.*

[4] *Id.* at 718-19.

[5] *See* FRIEDMAN, Lawrence M. *A history of American Law*. 2d. ed. New York: Simon & Schuster, 1985; BLOOMFIELD, Maxwell. *American Lawyers in a changing society*. Cambridge:, Harvard University Press, 1976.

English Common-law.[6] He also repeated this view in his commentaries on American law. Chancellor Kent is credited with establishing the common-law marriage doctrine in the United States.

A majority of the States of the United States recognized common-law marriage in 1920; however, in 1998 only eleven states and the District of Columbia allow the concept to serve as a basis for a valid marital union to come into existence.[7] The eleven states, in addition to the District of Columbia are: Alabama, Colorado, Idaho, Iowa, Kansas, Montana, Pennsylvania, Rhode Island, South Carolina, Texas and Utah. One must recognize, however, that the doctrine allowing common-law marriage affects persons residing outside the eleven states and the District of Columbia because the validity of a marriage in the United States is generally determined by the laws of the forum in which the marriage was celebrated.[8] Thus, a common-law marriage entered into in a jurisdiction recognizing common-law marriage between persons then domiciled in that jurisdiction will be recognized by a jurisdiction which does not allow the creation of a common-law marriage if the couple subsequently moves to the latter jurisdiction.

2. REQUIRED ELEMENTS FOR ESTABLISHMENT OF A COMMON-LAW MARRIAGE AND EXAMPLES OF CURRENT APPLICATION

2.1. Requisites

A common-law marriage is generally described as having four elements:

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[6] *See* Fenton v. Reed, 4 Johns. 52 (N.Y. 1809).

[7] *See* Bowman, *supra* note 3 at 716. Several other States have, by statute, modified the requisites for a common-law marriage and recognize the validity of a statutory union similar to a common-law marriage.

[8] *See*. Restatement of The Law, Second, Conflict of Laws (1971), American Law Institute – Rules and Principles:
§ 187 LAW OF THE STATES CHOSEN BY THE PARTIES
(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue unless either.
(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
(…)

a. the parties must have the capacity to enter into the marital contract;[9]

b. the parties must enter into a present agreement to be married (*per verba de presenti*) rather than an agreement to marry in the future;[10]

c. the parties must cohabit (no specific period of cohabitation is required) in order to be married;[11] and,

d. the most important requisite, the parties must hold themselves out to the community as husband and wife, consequently having the reputation among family, friends and neighbors as husband and wife.[12]

Judicial precedent generally recognizes there cannot be a secret, or clandestine, common-law marriage. A party alleging a common-law marriage must present witnesses who knew the couple as husband and wife. Documents such as letters exchanged between the two, hotel registers, hospital and medical records, income tax returns, joint checking accounts and other such evidence of the relationship can be used.

2.2. Examples of current application

The most typical of contemporary common-law marriage cases involves situations where the parties live together after going through a formal divorce

[9] *See* Adams v. Boan, 559 So. 2d 1084 (Ala. 1990) (sixteen year old female has capacity to create a common law marriage without the consent of her parents); Copeland v. Richardson, 551 So. 2d 353 (Ala. 1989) (parties that previously had been married to each other have capacity to create common law marriage without any formal ceremony); Aaberg v. Aaberg, 521 So. 2d 1375, 1376 (Ala. 1989); Coleman v. Aubert, 531 So. 2d 881, 883 (Ala. 1988); Rickard v. Trousdale, 508 So. 2d 260, 261 (Ala. 1987); Piel v. Brown, 361 So. 2d 90, 93 (Ala. 1978).

[10] *See* Adams, 559 So. 2d at 1086, 1087 (once consent is given, it is only irrevocable by death or divorce, but not by an extramarital affair); Copeland, 551 So. 2d at 355 (parties married previously to each other face no special burden to create a common law marriage); Coleman, 531 So. 2d at 882; Aaberg, 512 So. 2d at 1376; Etheridge v. Yeager, 465 So. 2d 378, 379-80 (Ala. 1985) (no formal ceremony or particular words are necessary but words of present assent are required at the time agreement to marriage took effect); Mills v. Bose, 435 So. 2d 1264, 1265 (Ala. 1983) (parties need not know legal effects of common law marriage at time mutual assent is given); Piel, 361 So. 2d 90, 93-4 (agreement can be inferred from circumstances); Skipworth v. Skipworth, 360 So. 2d 975, 976 (Ala. 1978) (lack of agreement cannot be inferred from intention of parties to obtain formal marriage); Krug v. Krug, 292 Ala. 498, 29 So. 2d 715, 718 (19974) (agreement to marriage must be "permanent and exclusive of all others"); Beck v. Beck, 286 Ala. 692, 246 So. 2d 420, 425 (1971).

[11] *See* Adams, at 1086; Copeland, at 354; Coleman, at 882; Aaberg, at 1376; Rickard, at 260; Etheridge, at 380; Mills, at 1265; Piel, at 93; Skipworth, at 977; Krug, at 718 (period of cohabitation can be very short if spouse is on combat duty during involuntary separation); Beck, at 428 (sexual intercourse is not required to comply with cohabitation).

[12] *See* Adams, at 1086, 1088 (failure to file joint tax returns during the "holding out" requirement); Copeland, at 354; Coleman, at 882; Aaberg, at 1376 (woman need not take last name of husband to meet the "holding out" requirement); Rickard, 508 So. 2d at 261; Etheridge, 465 So. 2d at 379; Mills, 435 So. 2d at 1265; Piel, at 95; Skipworth, 360 So. 2d at 977; Krug, 29 So. 2d at 718; Beck, 246 So. 2d at 425.

from a formalized marriage. In *Copeland v. Richardson*,[13] the parties were formally married in 1974 and lived together until 1981, when they were divorced. The former wife, Betty, moved back to live with her former husband, William, a year later in 1982 and continued to live with him until his death in 1987. After William's death his daughter by a prior marriage sought authority to probate his estate and Betty also sought the right as William's common-law wife.

The trial and appellate court held that a valid common-law marriage existed, stating that:

> [t]his Court has recognized valid common-law marriages between parties who were once formally married to each other, when the proof has been sufficient to establish common-law relationships.[14]

Here the evidence, with the common-law widow testifying, was that William asked her to "come and be my wife."[15] Several witnesses testified that William and Betty were recognized in the community as husband and wife, with William speaking of Betty as his wife on several occasions. They maintained a joint bank account and traveled together and also shared mutual duties for approximately five years after their formal divorce. This evidence was found to be satisfactory proof of a common-law marriage and the common-law widow prevailed. The most important requisite for common-law marriage was found to be present, the couple held themselves out to the community as husband and wife and, therefore, had the reputation as husband and wife among family, friends and neighbors.

Another interesting Alabama case, *Mills v. Livingston*,[16] held that "a lawful common-law marriage is formed without regard to what the parties consider the legal effect to be."[17] The Court, citing earlier precedent, asserted that:

the requirements in this state for a valid common-law marriage have been outlined numerous times by this court. No ceremony and no particular words are necessary. Instead, there must first have been a present agreement, that is, a mutual understanding to enter at the time into the marriage relationship, permanent and exclusive of all others. This agreement must be followed by public recognition of the existence of the 'marriage' and cohabitation or mutual assumption openly of marital duties and obligations."[18]

Another Alabama case, *Aaberg v. Aaberg*,[19] related to a "living together

[13] 551 So. 2d 353 (1989).
[14] *Id*. at 355 (citing Skipworth, 360 So. 2d 975; Huffmaster v. Huffmaster, 188 So. 2d 552 (Ala. 1966)).
[15] *Id*.
[16] 435 So. 2d 1264 (Ala. 1983).
[17] *Id*. at 1265 (quoting Smith v. Smith, 247 Ala. 213, 217, 23 So. 2d 605, 609 (1945); White v. White, 225 Ala. 155, 157, 142 So. 524, 525 (1932)).
[18] *Id*. at 1265 (quoting Beck v. Beck, 286 Ala. 692, 697-98, 246 So. 2d 420, 425-426 (1971))
[19] 512 So. 2d 1375 (Ala. 1987).

with intent to be married" when the "husband" was validly married to another woman at the time he began his relationship with his common-law wife.[20] The common-law husband and wife lived together for eleven years. The common-law husband obtained a divorce from his first "ceremonial" wife three years after he began living with his common-law wife. The Alabama Supreme Court held that a valid common-law marriage came into existence when the previous marriage ended. The testimony was very strong that the two persons treated each other as husband and wife and the Supreme Court of Alabama sustained the common-law marriage.

The Alabama Supreme Court noted in an earlier case that "it is a well-settled rule that if parties in good faith marry, when in fact a legal impediment exists to their marriage, and they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law presumes a valid common-law marriage."[21] This presumption has sustained a common-law marriage where the common-law husband and wife did not cohabit after the impediment was removed[22] because the husband was serving in, and later was killed, in Viet Nam. The parties did, however, continue to correspond and provide for each other as husband and wife both before and after the impediment was removed.

In regard to the "cohabitation" requirement the Alabama Supreme Court has held that:

> we think it may or may not, under the circumstances of the case, include sexual activity, but it does include such things as eating together, sharing household duties, payment of household expenses, holding themselves out as man and wife, and all of the numerous day-to-day mutual existence of married persons. We have said that in determining whether a relationship between a man and a woman amounts to a common-law marriage, the courts must determine each case on its own particular facts, having regard to the circumstances of the parties.[23]

In regard to the present agreement requisite, the Alabama Court, in *Skipworth v. Skipworth*,[24] held that a husband and wife who had been divorced from a ceremonial marriage and shortly thereafter "forgave each other," returning to marital relations for 12 years until his death, had a valid common-law marriage. The Court noted that in many instances "present agreement" is

[20] The common law has held that there can be no common law marriage where there is a prior impediment to marriage. *See* In re Estate of Fisher, 176 N.W. 2d 801, 804 (Iowa 1970) (a common law marriage could not have taken place until after existing marriage was terminated *via* divorce).

[21] *See* King v. King, 269 Ala. 468, 114 So. 2d 145, 147 (1959) citing Barnett v. Barnett, 262 Ala. 655, 80 So. 2d 626 (1955).

[22] *See* Krug v. Krug, 296 So. 2d 715, 719 (1974).

[23] Beck v. Beck, 246 So. 2d 420, 427 (1971).

[24] 360 So. 2d 975 (1978).

simply inferred from cohabitation and public recognition.[25]

Recognition of the common-law marriage doctrine protects the interests of both women and men who have been involved in informal marriages, especially the poor and uneducated. Today in America the social welfare benefits available to surviving spouses depend upon proof of valid marriages and the common-law marriage doctrine satisfies the validity requisite. Hence, this author is of the opinion that the common-law marriage doctrine serves as a valid safety net for deserving individuals and couples who have lived together as husband and wife without the benefit of a formal marriage ceremony.

3. THE PUTATIVE MARRIAGE DOCTRINE

The putative marriage doctrine protects the innocent party in a marriage which has been formally celebrated and is commonly assumed to be valid. The doctrine is designed to provide all the civil effects, i.e., the rights, privileges, and benefits, which are applicable to a legal marriage for parties to a void marriage when one or both of them had a good faith belief that the ceremonial marriage which was celebrated was legal and valid.

A putative marriage is a marriage which has been solemnized in proper form and celebrated in good faith by one or both of the parties but which, due to some legal defect, is either void or voidable. The doctrine developed from the Canon Law as an answer to protection of persons who went through a marriage ceremony in the good faith belief that the marriage was valid, when it was actually void because of some impediment, such as incapacity or prior outstanding valid marriage of one of the parties.

The doctrine developed solely in civil law jurisdictions (e.g., Spain & France) and has been a part of the family law of the State of Louisiana from the beginning of western occupation, codified in the Louisiana Civil Code since 1808.

The Spanish civil law rule governing putative marriages has affected not only the law of Louisiana, but the law of Texas and California as well.[26] Although Texas abolished Spanish law in 1840, upon becoming independent from Mexico, the Texas court in 1975 held that a putative spouse has all the incidents of a legal marriage as far as property division is concerned.[27]

The California putative marriage doctrine has also been preserved in the law, although the cases refer to equity and fundamental fairness as their foundation, rather than to California's Spanish legal culture. In fact, many states have recognized the putative marriage doctrine to protect the rights of

[25] *Id.* at 977 (citing Huffmaster v. Huffmaster, 279 Ala. 594, 188 So. 2d 552 (1966)).
[26] Christoper L. Blakesley, "The Putative Marriage Doctrine," 60 TUL. L. REV. 1, 9-10 (1985).
[27] *See* Davis v. Davis, 521 S.W. 2d 603, 605 (Tex. 1975).

innocent parties to a void marriage. Recently, several American states, including Illinois, Colorado, Minnesota, and Montana, have adopted the putative marriage doctrine by statute.[28] This is consistent with the Uniform Marriage and Divorce Act, Section 209, which enthusiastically recommends adoption of the putative marriage doctrine.[29]

"Good faith" is the most important element of the putative marriage doctrine. Good faith consists of being unaware of the cause which prevents the formation of the marriage or the defects in its celebration which caused its nullity. All States of the United States which recognize the putative marriage doctrine, or a variation thereof, have adopted the Spanish view which provides that the civil benefits which flow to the good faith putative spouse stop once either husband or wife has acquired knowledge of the cause of invalidity of the marriage or obtained enough evidence to require investigation and has failed to investigate.[30] Even so, contemporary American courts generally go to great lengths to find good faith to sustain property rights for a putative spouse.

Contra to common-law marriage, the putative marriage doctrine requires that some sort of ceremony must take place to allow a putative marriage to exist. The European sources of the putative marriage doctrine require a ceremony and the Louisiana Civil Code also appears to require one.[31] Generally, most American States that do not recognize common-law marriage also require a marriage ceremony as a prerequisite to a putative marriage being established.[32] States which recognize common-law marriage do not, however, require a ceremony to use the putative marriage doctrine.[33]

Currently in the United States Louisiana is the only State that applies the classic putative marriage doctrine, i.e., it establishes the community property regime that exists in a valid marriage. In Louisiana the putative spouses each have a right to an undivided one-half interest in the property gained during the marriage.[34]

This application of the putative marriage doctrine is not followed in Texas and California, two of the other States of Spanish heritage which have community property concepts. Generally, all States other than Louisiana utilize equitable principles to reach substantially similar relief.

4. CONCLUSION

One should recognize that State law in the United States does not universally allow the good faith party to a putative marriage to receive all the

[28] Blakesley, *supra* note 27, at 16.
[29] Unif. Marriage and Divorce Act § 209, 9A U.L.A. 116 (1979).
[30] Blakesley, *supra* note 27, at 21.
[31] Blakesley, *supra* note 27, at 23 (quoting LA. CIV. CODE ARTS. 117-118).
[32] *Id*. at 25.
[33] *Id*. at 27.
[34] *Id*. at 31.

benefits or rights which flow to a party of a valid marriage. Some States that follow the putative marriage doctrine deny alimony rights, others deny an equal division of the marital property or deny the right to dower.[35] Even so, most states, whether evolving from the civil law tradition or applying equitable relief, recognize that a good faith party to an invalid marriage is entitled to either alimony or at least some portion of the property acquired during the supposed marriage. Relief in a common-law marriage jurisdiction is, however, more consistent and in many cases, easier to prove. The common-law marriage doctrine provides the most comprehensive basis for relief for couples who cohabit with the intent to be married in common-law culture jurisdictions and should continue to be available to good faith men and women who cohabit and intend to live together as husband and wife.

5. REFERENCES

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FRIEDMAN, Lawrence M. *A history of American Law*. 2d. ed. New York: Simon & Schuster, 1985.

[35] Dower has been historically recognized in common law legal cultures as a concept which provides a life estate for widows in the real estate of the deceased husband in varying percentages, depending upon the share of the widow recognized in the particular state. Contemporary treatment of the concept, by statute, provides benefits in varying percentages throughout the United States, to the surviving spouse, not limited to the widow.