Comment, COMMON LAW MARRIAGE

I. Introduction

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

Common law marriages are no longer valid in most states.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

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

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

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

4 Idaho Code Ann. ST § 32-201 (2007).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 KAN. STAT. ANN. § 23-101 (2005).

19 S.C. CODE ANN. § 20-1-100 (1976).

20 Duster, 727 So.2d at 836.

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

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

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

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

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

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

II. History of Common Law Marriage

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

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

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

26 *Id.*

27 *Id.*

28 *Id.* at 857.

29 *Id.* at 858.

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

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

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

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

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

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

32 *Id.*

33 *Id.*

34 *Id.* at 24.

35 *Id.* at 13.

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

37 *Id.* at 18.

38 *Id.* at 32.

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

40 *Id.*

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

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

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

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

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

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

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

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

45 *Id.*

46 96 U.S. 76 (1877).

47 *Id.* at 81.

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

49 Friedman, supra note 39, at 203.

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

51 *Id.*

52 *Id.*

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

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

III. The Adoption of the Doctrine of Common Law Marriage

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

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

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

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

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

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

IV. General Requirements

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

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

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62 *Id.*

63 McLaughlin, 30 P. 651 at 653.

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

65 *Id.*

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

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

68 Adams, 2003 WL 133602, at *3.

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

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

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

70 *Id.*

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

72 *Id.*

73 *Id.*

74 *Id.*

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

76 *Id.*

77 *Id.*

78 West Encyclopedia of American Law (1998).

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

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

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

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

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

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

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

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

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

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

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

88 *Id.*

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

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

91 ID.

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

V. Why Common Law Marriage has been Abolished

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

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

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

93 *Id.*

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

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

96 *Id.*

97 *Id.*

98 Garza, supra note 94, at 544.

99 Bowman, supra note 43, at 733.

100 *Id.* at 732.

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

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

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

102 McLaughlin, 30 P. at 655.

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

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

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

106 *Id.* at 932.

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

108 *Id.* at 382.

109 *Id.*

110 McLaughlin, 30 P. at 658.

111 McLaughlin, 30 P. at 655.

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

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

VI. Consequences of the Abolishment of Common Law Marriage

A. *Negative Consequences*

1. *Impact on Women*

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

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112 *Id.* at 658.

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

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

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

116 Garza, supra note 94, at 544.

117 MCLAUGHLIN, 30 P. at 658.

118 Wallace, supra note 113 at 248.

119 Bowman, supra note 43, at 755.

120 *Id.*

121 *Id.*

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

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

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

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

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

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

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

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

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

3. *Impact on Minorities*

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

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

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139 Bowman, supra note 43, at 767.

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

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

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

143 *Id.*

4. *Impact on Children*

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

B. *Positive Consequence*

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

VII. Conclusion

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

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

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

145 Dubler, supra note 64, at 969.

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

147 *Id.*

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

Jennifer Thomas