Chapter 3

Marriage and Cohabitation

CHAPTER OBJECTIVES

After reading this chapter and completing the assignments, you should be able to:

- Describe how the word *marriage* is used in family law.
- Explain what legal concepts are associated with a traditional marriage.
- Explain what the legal requirements are to enter into a valid marriage.
- Explain what steps some states are taking to reduce the number of divorces.
- Discuss the societal changes that are impacting the law relating to marriage and cohabitation.
- Understand some of the reasons a couple might need a prenuptial agreement or a cohabitation agreement.

Every family law textbook has a chapter devoted to marriage. After all, it is fundamental to the understanding of family law. These chapters used to be relatively simple because most people readily understood the concepts of marriage, and the law relating to marriage became fairly settled throughout the country after the 1970s.

This is no longer the case. In fact, the very definition of marriage is currently the topic of discussion throughout the United States and in many countries around the world.

Chapter 3 introduces paralegal students to the basic concepts relating to marriage. In addition, students will be given information associated with the volatile topics relating to marriage and cohabitation.

CLIENT INTERVIEW

Terri and Steve have known each other a number of years. As time went by, they became romantically involved. They have decided not to get married but instead just move in together. They have not discussed the details of things like who will pay what bills or other expenses. They both bring with them a number of personal items, such as a television and a stereo system. Terri and Steve think this may be the first step toward marriage but, for now, they know living together will work out because they are in love.

WHY THIS CHAPTER IS IMPORTANT TO THE PARALEGAL

Chapter 1 presented the paralegal student the big picture of how complex family law is, how working in a family law firm involves far more than handling divorces cases, and how family law is interrelated to other areas of the law.

Chapter 3 takes a step back and introduces the paralegal student to what is perhaps the most fundamental area of the study of family law—marriage. It is the cornerstone to the understanding of this area of the law. For this reason alone, this chapter is very important to the paralegal student.

Chapter 3 is also important because it demonstrates how complicated even a seemingly simple topic can be. Understanding these complexities and the major societal changes that are taking place relating to marriage and cohabitation is critical to the paralegal student's understanding of family law.

WHAT IS MARRIAGE?

Although it is difficult to identify the exact origins of marriage, it has been with us for a very long time. Marriage has changed dramatically as time has gone by and continues to evolve as society attempts to adapt to continued changes. Many of the rituals and requirements of today's marriage can trace their beginnings to England and the Anglo-Saxons. In fact, the manner in which marriage is entered into in the United States has it beginnings from those historical developments that were incorporated into the common law and ultimately into the state statutes that regulate marriage today. English common law has also had an effect on other issues, such as what factors can cause a marriage to be invalidated by the courts.

Marriage traditionally has meant the union of a man and a woman as husband and wife. The term has been used in a variety of ways over the years. There are **ceremonial marriages (also known as traditional marriages)**, **common law marriages**, **covenant marriages**, **putative marriages**, and **same-sex marriages**, to name just a few.

Marriage has evolved and changed over the centuries. It is an institution that has legal, societal, and religious implications. Many contend that its most basic function is to provide for a stable environment to have and raise children, thus perpetuating the human species. Whatever its origins, it is certainly an institution that is intertwined into many areas of the law. For example, it is a basis for determining property rights in probate and intestacy proceedings and provides tax advantages in some cases to married couples.

This evolution of marriage is ongoing. The very definition of marriage is currently under great debate, specifically whether it should include same-sex marriage, which will be dealt with later in this chapter.

marriage
A union between a man and a woman.

ceremonial marriage aka traditional marriage
A marriage between a man and a woman that was entered into by a civil or religious ceremony.

common law marriage
A form of marriage that is legally recognized in certain states, if the two people have been living together for a long period of time, have represented themselves as being married, and have the intent to be married.

covenant marriage
The couples make an affirmative undertaking to get counseling prior to the marriage and to seek counseling if contemplating divorce.

putative marriage
The couple completes the requirements in good faith, but an unknown impediment prevents the marriage from being valid.

same-sex marriage
Marriage of two people of the same sex living together as a family.

TRADITIONAL MARRIAGES

Traditional marriages are the kind of marriages that most people think of when they hear the word *marriage.* They are marriages that comply with the laws of the state in which the marriage was entered into. It is important to note that the regulation of marriage is a state function, and the validity of a marriage is determined by the laws in the state in which it was entered into. If a traditional marriage is valid in the state in which the marriage was entered into, the general rule is that the marriage will be recognized in other states. This will be discussed in more detail in the topics relating to same-sex marriages.

State laws vary on the specific requirements, but they are relatively simple to comply with. For example, in Florida a marriage must be between a man and a woman,

solemnization
A formalization of a marriage, as in for example a marriage ceremony.

premarital preparation course
Course designed to strengthen marriages and reduce divorce.

proxy marriage
An agent for the parties arranges the marriage for the couple.

both parties must be 18 years of age (with some exceptions), the couple must have a marriage license issued by a county court judge or the clerk of the circuit court, the marriage must be **solemnized** by a person authorized to do so under state law, the couple cannot be closely related as defined by statute, and there is a 3-day waiting period unless one or both of the people have taken a **premarital preparation course**. Figure 3.1 contains the state statutes on the requirements for a valid marriage. Figure 3.2 contains a sample of an application for marriage license used in Nevada.

In the vast majority of marriages the parties attend the ceremony in person. There are occasions, however, where circumstances do not allow this to occur. In situations where either or both of the parties cannot attend the ceremony, many states allow a third party, who is granted authority to act in this capacity, to stand in for the missing person. This is referred to as a **proxy marriage**.

Many states have enacted ways to encourage adults to take a premarital preparation course prior to getting married. For example, in Florida, if one or both of the parties have taken such a course, the waiting period is reduced. It is important to note that Florida, like some other states, does not require that the course be taken. Instead these states offer incentives, such as the elimination of the waiting period and reducing the amount of the marriage license. Some states, such as Oklahoma and Maryland, have statutory provisions for the reduction of the license fees if the course is taken. Other states require minors to take a premarital course in some cases.

Alabama	Ala. Code tit. 30 ch. 1	Nevada	Nev. Rev. Stat. tit. 11, ch. 122
Alaska	Alaska Stat. tit. 25 Ch. 5	New Hampshire	N.H. Rev. Stat. Ann. tit. XLIII, ch. 457
Arizona	Ariz. Rev. Stat. Ann. tit. 25 ch. 1 art. 1	New Jersey	N.J. Rev. Stat. tit. 37
Arkansas	Ark Code Ann. tit. 9, sub. 2, § 11	New Mexico	N.M. Stat. Ann. art., ch. 40
California	Cal. Family Law Code §§ 300-500	New York	N.Y. Dom. Rel.i art. 1, 2 and 3
Colorado	Colo. Rev. Stat. tit. 14 art. 2 §§ 14-2-101 et seq	North Carolina	N.C. Gen. Stat. ch. 51
		North Dakota	N.D. Cent. Code ch. 14-03
Connecticut	Conn. Gen. Stat. title 46b, § 815e	Ohio	Ohio Rev. Code Ann. tit. 31, ch. 3101
Delaware	Del. Code. Ann. tit.13, ch. 1		
Florida	Fla. Stat. ch. 741.01, et seq	Oklahoma	Okla. Stat.tit. 43
Georgia	Ga. Code Ann. §§ 19-3-1–19-3-68	Oregon	Or. Rev. Stat. ch. 106
Hawaii	Haw. Rev. Stat. ch. 572	Pennsylvania	Pa. Code tit. 23, pt. 1
Idaho	Idaho Code tit. 32 ch. 2, 3, and 4	Rhode Island	R.I. Gen laws tit.15, ch. 15-1, et seq
Illinois	Ill Rev. Stat. ch.750 CS 5 Parts II and III	South Carolina	S.C. Code Ann. tit. 20, ch. 1
		South Dakota	D.D. Codified Laws Ann. tit. 5, ch. 1
Indiana	Ind. Code tit. 31 art. 11		
Iowa	Iowa Code ch. 595	Tennessee	Tenn. Code Ann. tit. 36, Ch. 3
Kansas	Kan. Stat. Ann. ch. 23, art.1	Texas	Tex. Family Code Ann. tit. 1, ch. 1 and 2
Kentucky	Ky. Stat. Ann. ch. 402		
Louisiana	La. Rev. Stat. tit. IV, ch. 1	Utah	Utah Code Ann. tit.30, ch. 1
Maine	Me. Rev. Stat. Ann. tit. 9, ch. 23	Vermont	Vt. Stat. Ann, tit. 15, ch. 1
Maryland	Md. Family Law Code Ann. §§ 2-201 et seq	Virginia	Va. Code Ann. tit. 20, ch. 2
		Washington	Wash. Rev. Code ch. 26.04
Massachusetts	Mass. Gen. L. tit. III ch. 207	West Virginia	W. Va. Code ch. 48, art. 2
Michigan	Mich. Comp. Laws ch. 551	Wisconsin	Wis. Stat. ch. 765
Minnesota	Minn.Stat. ch. 517	Wyoming	Wyo. Stat. tit. 20, ch. 1
Mississippi	Miss.Code tit. 93, ch. 1	District of Columbia	D.C. Code div. VIII, tit. 46, sub. 1, ch. 4
Missouri	Mo. Rev. Stat. ch. 451		
Montana	Mont. Code ann. tit. 40, ch. 1		
Nebraska	Neb. Rev. Stat.ch. 42		

FIGURE 3.1 **State Statutes Specifying Marriage Requirements**

CLARK COUNTY CLERK'S OFFICE
201 Clark Avenue, P.O. Box 551603
Las Vegas, NV 89155-1603

Please Print Clearly
INFORMATION FOR MARRIAGE LICENSE

(Groom and Bride - Please complete your own individual form.)

Male__ Female __ Today's Date_____ Office Use Only ID_____

NAME (A)
First_____ Middle _____ Last_____

Resident City (B) _____ Resident State _____ Resident Country _____

Date of Birth _____ (C) Month/Day/Year Age_____ Birth State_____ (D) Birth Country_____

Social Security # (E) _____ Marital Status (Check One) (F) Never Married___ Divorced___ Widowed___ Annulled___ Number of this Marriage (G) _____

Date Divorce or Annulment Final (Month/Day/Year)_____ (H) If Widowed, when? _____ (I)
Where divorced, annulled or widowed? (J)

City_____ State_____ Country_____

PARENTS' NAME(S)

Mother's First_____ Middle_____ Maiden_____ (K)

Mother's Birth State_____ Mother's Birth Country_____ (L)

Father's First_____ Middle _____ Last_____ (M)

Father's Birth State_____ Father's Birth Country_____ (N)

Mailing Address:_____ (O)
_____

FIGURE 3.2
Nevada Application for Marriage License
Source: Retrieved from www.co.clark.nv.us/clerk/pdf/Marriage_Application_Info/Marriage%20License%20Information.pdf.

CYBER TRIP

Visit www.flgov.com/pdfs/q_and_a.pdf to read the answers to a number of interesting questions relating to the requirements of getting married in the state of Florida. The site also includes interesting information on matters associated with marriages.

CAPACITY TO ENTER INTO MARRIAGE

As has previously been mentioned, state law regulates how a valid marriage must be entered into. The laws of the states do vary but some requirements relating to capacity include the following:

1. Age. Historically the age to marry was very young, 12 years old for women and 14 years old for men. Today states have generally increased the age requirement, often to 18 years of age, for the issuance of a marriage license. Many states provide lower ages in some situations, such as pregnancy or with the consent of the minor's parents.
2. Mental capacity. The individuals consenting to marriage need to be of sound mind, which generally means they understand the consequences of entering into marriage, such as the nature of the relationship being entered into and the responsibilities that are associated with marriage.

CYBER TRIP

To learn more about the legal requirements in the state of Florida, visit http://orangeclerk.onetgov.net/service/marriage.shtml, then search for similar sites in your state.

3. Physical capacity. The ability to consummate the marriage.
4. Relationship. State law requires that the parties not be too closely related, as set out in the state statute. Common exclusions include: parent/child, uncle/niece, aunt/nephew, and first cousins.

WHO CAN SOLEMNIZE A MARRIAGE

State statutes specify who can solemnize a marriage. These statutes commonly include: members of the clergy, notary publics, magistrates, justices of the peace, and judges.

COVENANT MARRIAGES

no fault divorce
A divorce in which one spouse does not need to allege wrongdoing by the other spouse as grounds for the divorce.

As is evident from the preceding discussion of premarital preparation courses, there has been a growing concern over the increase of divorces in the United States. Many feel that the reason for this is that people enter into marriage too lightly, knowing how easy it is to get a divorce in **no fault divorce** states if things do not go as they planned in their marriage. An example of a no fault statute is included in Figure 3.3.

Some states are now allowing couples to elect to enter into a marriage that will be terminated under the no fault laws or one in which it is more difficult to terminate the marriage. The latter form of marriage is referred to as a covenant marriage. Married couples are required to undergo premarital education before marriage and go through counseling before they are granted a divorce. There may also be a separation period, such as 18 months. Arkansas, Arizona, and Louisiana have passed some version of a covenant marriage statute and others are considering covenant marriages. Figure 3.4 sets out the Louisiana Covenant Marriage Statute.

CYBER TRIP

To learn more about covenant marriages, visit www.supreme.state.az.us/dr/pdf/covenant.pdf.

COMMON LAW MARRIAGES

Common law marriages, also referred to as *consensual marriages* and *informal marriages,* have been the subject of much discussion and misunderstanding over the years. Put simply, a man and a woman create a common law marriage by living together and holding themselves out as husband and wife to the community. In states that recognize them, this type of marriage is as valid as ones that are formally solemnized. In states where they are not recognized, they are considered void, although they are recognized if validly entered into in another state. The following *Mott v. Duncan Petroleum Trans.* case is an example of how a court of one state may be called upon to determine the validity of a common law marriage entered into in another state.

One long-standing myth associated with common law marriages is that the couple must live together for a specific period of time, usually 7 years. This is not true. The key is that the couple hold themselves out as husband and wife and that they have

FIGURE 3.3
California Statute on No Fault Divorces

Source: Retrieved from: www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=3723037800+0+0+0&WAISaction=retrieve.

CALIFORNIA CODES
FAMILY.CODE
SECTION 2310-2313

2310. Dissolution of the marriage or legal separation of the parties may be based on either of the following grounds, which shall be pleaded generally:
(a) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.
(b) Incurable insanity.

2311. Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.

RS 9:272
PART VII. COVENANT MARRIAGE

§27§272. Covenant marriage; intent; conditions to create

A. A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.

B. A man and woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license, as provided in R.S. 9:224(C), and executing a declaration of intent to contract a covenant marriage, as provided in R.S. 9:273. The application for a marriage license and the declaration of intent shall be filed with the official who issues the marriage license.

C. A covenant marriage terminates only for one of the causes enumerated in Civil Code Article 101. A covenant marriage may be terminated by divorce only upon one of the exclusive grounds enumerated in R.S. 9:307. A covenant marriage agreement may not be dissolved, rescinded, or otherwise terminated by the mutual consent of the spouses.

Acts 1997, No. 1380, §3; Acts 2006, No. 249, §1.

FIGURE 3.4
Louisiana Covenant Marriage Statute

agreed to live as husband and wife. This agreement can be established either expressly by the parties or implied by the facts surrounding their particular situation. Living together by itself is not enough to show such an agreement. In addition, unlike traditional marriages, there is no need for a marriage license to enter into a common law marriage and there is generally no public record of the marriage.

Common law marriages are currently recognized by 13 jurisdictions. Figure 3.5 contains a list of those states. In addition, some states have grandfathered in common law marriages entered into prior to a certain date. However, even states that do not allow common law marriages recognize valid common law marriage entered into in states that allow them.

Common criteria for the creation of a common law marriage often include that the parties:

1. Are a man and a woman.
2. Are of legal age and capable of giving consent and entering into a marriage.
3. Are legally capable of entering a solemnized marriage under the provisions of the laws of the state.

CYBER TRIP

Visit these sites to learn more about common law marriages: www.unmarried.org/common.html and www.ncsl.org/programs/cyf/commonlaw.htm.

The following states currently recognize common law marriages:

- Alabama
- Colorado
- Iowa
- Kansas
- Montana
- New Hampshire (for purposes of inheritance)
- Oklahoma
- Pennsylvania
- Rhode Island
- South Carolina
- Texas
- Utah
- Washington, D.C.

FIGURE 3.5
Common Law Marriage States

Mott v. Duncan Petroleum Trans.
51 N.Y.2d 289, 414 N.E.2d 657(1980)

JASEN, Judge.

On this appeal claimant-appellant Mary Mott asserts that she is the widow of John Mott by virtue of a common-law marriage allegedly contracted in the State of Georgia and seeks to recover death benefits pursuant to the Workers' Compensation Law. (Workers' Compensation Law, s 16.) The Workers' Compensation Board, however, denied the benefits sought upon the ground that John and Mary Mott were never legally married. The issue on this appeal is whether the Workers' Compensation Board erred in failing to properly apply the law of the State of Georgia in determining the Motts' marital status.

In 1964, Mary and John Mott took up residence together in Islip, New York. From that time until the time of John's death in a work-related accident in 1973, the Motts constantly lived together, in claimant's words "as husband and wife." During the course of this relationship, the Motts conducted much of their legal and financial business as if they were in fact married. Bank loans were apparently applied for together, certain tax records adjusted, and the like. Indeed, upon John's death, Mary Mott was awarded limited letters of administration as John Mott's "widow." However, notwithstanding the above incidents of "marriage," it is undisputed that John and Mary Mott were never ceremonially married in New York or elsewhere. Claimant concedes as much.

Claimant instead predicates her claim for death benefits upon the existence of an alleged common-law marriage, contracted in the State of Georgia. She testified at the hearing of this matter that she and Mr. Mott traveled to Georgia on several occasions, staying there for weeks at a time with her daughter. She claims that the couple intended to take up permanent residence in Georgia, to start a business there, and to make Georgia their home, although it is undisputed that none of these intentions were ever fulfilled. Claimant also asserts that while in Georgia she and decedent lived together as husband and wife and represented themselves to the local community as such. On the basis of this evidence, claimant concludes that a valid common-law marriage was effected in Georgia.

The Workers' Compensation Board, however, concluded that John and Mary Mott were not legally married and, as a result, denied Mary's claim for death benefits. The board found that "the decedent and Mary Mott were residents of New York State" and held that "the parties marital status must be determined under New York State Law which does not recognize common law marriages, with the exception of a common law marriage previously declared valid in another State." The board then concluded that "(t)he parties' trip to the State of Georgia was merely a visit and the parties returned to New York State's jurisdiction without having effected a common law marriage in Georgia." The Appellate Division, finding that the board's determination was supported by substantial evidence, affirmed, one Justice dissenting. There should be a reversal.

While it is clearly within the province of the Workers' Compensation Board to decide, as a factual matter, whether claimant and John Mott were ever legally married, the board must weigh such facts as it finds against a proper legal standard. Thus, before the court can undertake a review of the administrative fact-finding process which resulted in a finding that the Motts were not married, we must first determine if a proper legal standard was used in arriving at this conclusion. If an improper legal standard was used, review of the fact-finding process is impossible.

It has long been settled law that although New York does not itself recognize common-law marriages (L.1933, ch. 606; Domestic Relations Law, s 11; *see, e.g., Matter of Benjamin,* 34 N.Y.2d 27, 30, 355 N.Y.S.2d 356, 311 N.E.2d 495), a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted (*see e.g., Matter of Watts,* 31 N.Y.2d 491, 495, 341 N.Y.S.2d 609, 294 N.E.2d 195; *Shea v. Shea,* 294 N.Y. 909, 63 N.E.2d 113; *Matter of Pecorino,* 64 A.D.2d 711, 407 N.Y.S.2d 550). The law to be applied in determining the validity of such an out-of-State marriage is the law of the State in which the marriage occurred. (*Matter of Watts,* 31 N.Y.2d 491, 341 N.Y.S.2d 609, 294 N.E.2d 195, *supra; Matter of Farber v. U. S. Trucking Corp.,* 26 N.Y.2d 44, 47, 308 N.Y.S.2d 358, 256 N.E.2d 521.) Moreover, this rule has been specifically applied to cases involving entitlement to workers' compensation death benefits. (*Matter of Lieblein v. Charles Chips, Inc.,* 32 A.D.2d 1016, 301 N.Y.S.2d 743, decision on remand affd. 28 N.Y.2d 869, 322 N.Y.S.2d 258, 271 N.E.2d 234.) Thus, in determining whether claimant is entitled to death benefits as the widow of John Mott, the Workers' Compensation Board must first determine whether the Motts were married under the law of the State of Georgia.

Common-law marriages are legal in Georgia and have been recognized in that State since at least 1860. (*Brown v. Brown,* 234 Ga. 300, 215 S.E.2d 671.) While the burden of proving the existence of such a marriage is on the party asserting its validity (*id.; see also, Drawdy v. Hesters,* 130 Ga. 161, 60 S.E. 451), all that need to be shown to establish a marriage is that the parties are able to contract, that a contract of marriage was made and that the marriage was consummated according to the law. (Ga.Code Ann., s 53-101.)

Proof of the existence of a contract of marriage must include proof of a "present intent to marry" in the State of Georgia. (*Peacock v. Peacock,* 196 Ga. 441, 26 S.E.2d 608.) However, such proof can consist of circumstantial evidence including "the act of living together as man and wife, holding themselves out to the world as such, and repute in the vicinity and among neighbors and visitors that they are such, and indeed all such facts as usually accompany the marriage relation and indicate the factum of the marriage." (*Murray v. Clayton,* 151 Ga.App. 720, 721, 261 S.E.2d 455, quoting *Clark v. Cassidy,* 62 Ga. 407, 411.) No public or private de facto ceremony is required (*Alberson v. Alberson,* 237 Ga. 622, 229 S.E.2d 409) and for all that appears, no minimum stay in Georgia is required (Ga.Code Ann., s 53-101). In sum, Georgia law appears to be quite liberal in allowing such unions, subject only to the difficulty which a litigant may have in convincing a fact finder of the existence of an actual contract.

Based upon the foregoing review of the law of Georgia and of this State, it appears that the determination of the Workers' Compensation Board was premised upon an erroneous view of applicable law. First, the board appeared to assume that New York recognizes only out-of-State marriages "previously declared valid in another state." As noted earlier, this view is too limited. (*See, e.g., Matter of Watts,* 31 N.Y.2d 491, 495, 341 N.Y.S.2d 609, 294 N.E.2d 195, *supra.*) Second, the board also assumed that a mere "visit" to Georgia could not result in a valid Georgia marriage. Given the apparent liberality of the Georgia rule with respect to common-law marriages, this too was error. Finally, the board failed even to consider the behavior of the parties in New York as evidence of their intent to marry. While such evidence is not alone determinative, and is of course secondary to evidence of the parties' conduct in Georgia, it is at the very least relevant to show whether the parties viewed themselves as man and wife upon their trip to Georgia. (*Cf. Matter of Farber v. U. S. Trucking Corp.,* 26 N.Y.2d 44, 308 N.Y.S.2d 358, 256 N.E.2d 521, *supra.*)

Having concluded that the board applied an improper standard of law on the issue of marital status, we deem it inappropriate to express our view as to whether the evidence in this case would support a finding of a common-law marriage had the proper legal standard been applied. This question must be decided by the administrative agency. The case must, therefore, be remanded to the Workers' Compensation Board for a redetermination of the factual question of whether claimant and John Mott effected a common-law marriage in the State of Georgia, based upon the legal standards enunciated herein. (*See Matter of Lieblein v. Charles Chips, Inc.,* 32 A.D.2d 1016, 301 N.Y.S.2d 743, decision on remand affd. 28 N.Y.2d 869, 322 N.Y.S.2d 258, 271 N.E.2d 234, supra.)

Accordingly, the order of the Appellate Division, 72 A.D.2d 654, 421 N.Y.S.2d 416, should be reversed, with costs, and the matter remitted to the Appellate Division, Third Department, with directions to remand for further proceedings in accordance with this opinion.

Retrieved from Westlaw on 7/24/07.

Source: From Westlaw. Reprinted with permission from Thomson West.

4. Have cohabited.
5. Have mutually assumed marital rights, duties, and obligations.
6. Have held themselves out as and are recognized as husband and wife.

RESEARCH THIS

As demonstrated by Figure 3.5, a number of states still recognize common law marriages. Others have recognized them in the past.

Research the statutory and case law of your state relating to common law marriages and answer the following questions:

1. Does your state recognize common law marriages? If so, what is required to create a common law marriage? Does your state recognize it for all purposes or is it limited to specific legal matters, such as inheritance?
2. Has your state ever recognized common law marriages? If so, when did it stop? How does it deal with common law marriages from before that date?
3. Does your state recognize common law marriages from other states that allow for them?

CASE BRIEF ASSIGNMENT

Read and brief the *Mott v. Duncan Petroleum Trans.* case. (See Appendix A for information on how to brief cases.)

SAME-SEX MARRIAGES

Perhaps one of the most controversial issues in Family Law since the 1990s is that of same-sex marriage. It was brought to national attention when the Hawaii Supreme Court ruled that the state needed to demonstrate a compelling reason to prohibit same-sex marriages. Although the court did not rule that people of the same sex could marry, it did raise constitutional issues that drew the public's attention.

The issue took on even greater attention when the Massachusetts Supreme Court ruled the statute limiting marriage to a man and a woman was "incompatible with the constitutional principles of respect for individual autonomy and equality under law." See *Goodridge v. Mass. Department of Public Health,* 440 Mass. 309, 798 NE2d 941 (2003). More recently, the New Jersey Supreme Court ruled in *Lewis v. Harris,* 188 N.J. 415, 908 A.2d 196 (2006) that its state's statute limiting marriage to a man and a woman was unconstitutional under the state's constitution.

These cases both held that the state statutes limiting who can marry were unconstitutional under the *state's constitution* because they did not identify a constitutionally

adequate reason for the limitation. That does not mean that statutes limiting marriage to a man and a woman are not subject to challenges under the U.S. Constitution. In fact, in a case allowing a referendum to amend the Massachusetts Constitution to specify a marriage can only be between one man and one woman, Justice Greaney stated the amendment would be subject to such a challenge. See *Schulman v. Attorney General,* 447 Mass. 189, 850 NE2d 505 (July 10, 2006).

It is important to note that courts in other states have upheld their statutes that limit marriage to a man and a woman. Two noteworthy cases occurred in Washington and New York. In both cases the highest court in both states upheld the marriage statutes.

In *Hernandez v. Robles,* 7 N.Y.3d 338, 855 N.E.2d 1 (2006), the New York Court of Appeals rejected contentions that the Domestic Relations Law violated due process and equal protection clauses of the New York State Constitution. While the court recognized that there are many benefits of marriage, including tax advantages, rights in probate and intestacy proceedings, rights of support, and insurance coverage, it found that the legislature had a rational basis to limit marriage to heterosexual couples. Specifically the court stated that the limitation was rationally related to the legitimate government interest in protecting the welfare of children. The court did stress, however, that it was not ruling on whether the legislature should or should not allow for same-sex marriages. Instead it noted that it was a matter to be left to the state legislature to determine.

In a similar case, the Washington Supreme Court upheld the state's Defense of Marriage Act, which is discussed in more detail later, as it related to prohibit same-sex marriages. The court ruled that the act did not violate the state's constitution or the state's Equal Protection Amendment because the legislature had a relational basis to limit marriage to heterosexual couples to promote procreation and the well-being of children. See *Andersen v. King County,* 158 Wash.2d 1, 138 P.3d 963 (2006).

Ultimately it may not be a question of how state courts rule on the validity of state statutes that limits marriage to a man and a woman. The question will instead be whether states will be required to recognize same-sex marriages that were validly entered into in another state. Many legal scholars argue that all states must recognize these marriages under the rules applied to resolve conflict of laws, which require recognition absent a violation of public policy. Others argue that such marriages will have to be recognized by all states under the full faith and credit clause of the U.S. Constitution.

In 1996, Congress attempted to address this issue with the passage of the Defense of Marriage Act, often referred to as DOMA. DOMA defines marriage as a union between a man and a woman, provides that states do not have to recognize same-sex marriages from another state and that the federal government will not recognize same-sex marriages. Most states have adopted their own DOMA statutes.

The next question that must be addressed is whether the DOMA act is itself constitutional or whether it is in conflict with the full faith and credit clause. There is no clear answer to this question. Instead, the fate of DOMA will most likely have to be answered by the U.S. Supreme Court. There is even discussion of a need to adopt an amendment to the U.S. Constitution to resolve this issue.

The language of the full faith and credit clause of the Constitution is set out in Figure 3.6.

FIGURE 3.6
Full Faith and Credit Clause of the U.S Constitution

Article. IV
Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

MARRIAGE EVASION ACTS

Some states have passed marriage evasion statutes that provide a marriage validly entered into in one state may not be recognized by the couple's home state if they left the state to avoid a prohibition that would have prevented them from marrying in their home state. This is aimed at stopping people who could not legally get married in their home state from getting married in another state where they meet the requirements of that state's marriage statute and then returning to live in their home state. These type of statutes have existed in the past, but there is a new interest in them in light of the changing legal landscape of same-sex marriages. The Uniform Marriage Evasion Act, which has been adopted in its entirety by Illinois, Louisiana, Massachusetts, Vermont, and Wisconsin, is set out in Figure 3.7; and the Massachusetts version of the act is set out in Figure 3.8.

ETHICS ALERT

Chapter 1 contained a discussion of ethics and how it relates to the family law firm, including the topic of conflict of interest. The paralegal is faced with many ethical issues in the family law firm. Two topics discussed in this chapter may create a moral dilemma for some paralegals: cohabitation and same-sex marriages. Paralegals must always put the desires and needs of the client first and take all steps possible to keep their personal beliefs from interfering with this obligation.

If a paralegal finds that his or her own personal beliefs may be creating a barrier to doing the best job possible for the client, he or she should request to work on another case. Ultimately, if these issues create too much of a problem for the paralegal, the person may need to consider working for another law firm or in a different area of the law.

POLICY—THE UNIFORM MARRIAGE EVASION ACT

The Uniform Marriage Evasion Act, which has two main provisions, has been adopted by the following States:

- Illinois
- Louisiana
- Massachusetts
- Vermont
- Wisconsin

The first provision: If a resident prohibited from marrying under the law of the State goes to another State for the purpose of avoiding this prohibition and contracts a marriage which would be void within his/her home State, that marriage will be held to be void by the home State, just as if the marriage had been entered into there. (Several States which have not adopted the Uniform Marriage Evasion Act as a whole have adopted this first provision; see summary of State laws in GN 00305.165.)

The second provision: Prohibits the marriage within the State of persons residing and intending to continue residing in another State, if the marriage would be void if contracted in the individual's home State. A marriage in violation of this prohibition is void in the State of marriage, just as it would be void in the State of divorce or in the individual's home State. It is also void in all jurisdictions by the general rule that, in determining the validity of a marriage, the courts will look to the law of the jurisdiction where the marriage occurred.

FIGURE 3.7
The Uniform Marriage Evasion Act

Source: Retrieved from https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0200305155!opendocument.

CERTAIN MARRIAGES PROHIBITED

Chapter 207: Section 11. Non-residents; marriages contrary to laws of domiciled state
Section 11. No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

FIGURE 3.8
Massachusetts Marriage Evasion Statute

Colorado Court of Appeals of Colorado
Combs v. Tibbitts
Case No. 05CA0937
October 5, 2006

Plaintiff, Michael Combs, appeals from the trial court's judgment finding that the written contract he entered into with defendant, Brenda Tibbitts, is an enforceable separation agreement. We vacate the judgment and remand for further proceedings.

The following facts were stipulated to by the parties. Plaintiff legally married a woman other than defendant in 1972, and remained married to her at all relevant times. From 1978 until 1999, he cohabited with defendant in a relationship the parties referred to as a "religious" or "celestial" marriage. Plaintiff and defendant had five children together, two of whom were still minors at the time of these proceedings.

In addition to their domestic relationship, the parties were also involved in a business that sold vitamins and herbal extracts. Plaintiff testified that he was sole proprietor of that business, and that defendant worked there as an employee.

When the parties terminated their domestic relationship, plaintiff drafted an agreement, entitled "Domestic Agreement and Writ of Divorce." It states that both parties agree to dissolve "their relationship as man and wife," and provides that plaintiff "will pay [defendant] the sum of $4,000.00 each month until [plaintiff] reaches the age of 65 years old or dies, or [until] a total of $868,000.00" has been paid, whichever occurs first. The agreement indicates that the sums to be paid "will be construed as alimony and child support." The agreement requires plaintiff to pay defendant a lump sum of $100,000, and to pay all expenses incurred for the couple's children for "emergencies and treatments encountered in accidents." Other provisions, not pertinent here, address the parties' agreement concerning plaintiff's contact with the children. The document states that it is the final agreement and that "[n]othing else is agreed to or implied."

After entering into the agreement, plaintiff paid defendant $100,000, which she applied toward the purchase of a residence for herself and the parties' children. Plaintiff also paid defendant $4,000 per month from November 1999 until February 2004, for an approximate total of $160,000.

Plaintiff commenced this action seeking a declaratory judgment regarding the rights and obligations of the parties under the agreement; return of the amounts he had paid to defendant; and partition and sale of the real property defendant purchased using the funds paid. He alleged in the complaint that he was induced to enter into the agreement based on his mistaken belief that he and defendant were married, and that defendant fraudulently concealed from him the fact that the parties were not legally married. (These allegations were directly contradicted by his trial testimony, which indicated he always knew that he was not legally married to defendant.) He further alleged that defendant induced him to enter into the agreement by fraudulently concealing from him the fact that he had no legal obligation to pay her any amount.

In her answer, defendant stated that the parties' agreement was not based upon marriage. She claimed that both parties knew plaintiff had a legal wife and asserted that the payments contemplated under the agreement were intended as child support and severance pay related to the services she had contributed to plaintiff's business. Defendant asserted counterclaims for unjust enrichment based on plaintiff's alleged failure to pay the promised sums; entry of judgment for the delinquent payments, in the event the agreement were found valid; and entry of judgment for child support, in the event the agreement were found to be invalid. Plaintiff asserted numerous defenses to the counterclaims.

***

Following a bench trial, the court ruled that the parties were putative spouses pursuant to § 14-2-111, C.R.S. 2006. It based its ruling on plaintiff's admission that he entered into the agreement because of his mistaken religious belief that he was married to defendant. The court further found that plaintiff's belief that he was married to defendant was evidenced by both the title of the agreement and his allegation in the complaint that he believed he was married to defendant. The court ordered that the agreement was enforceable as a separation agreement between the parties and concluded that plaintiff had failed to make the required payments to defendant beginning in March 2004 for a total arrearage of $48,000. The court entered judgment for defendant in that amount, and awarded prejudgment interest in the amount of $2,079.30 and costs of $620.

***

PUTATIVE MARRIAGE STATUTE

Plaintiff first contends that the trial court erred in determining that defendant was his putative spouse within the meaning of the putative marriage statute. We agree.

Section 14-2-1 10(1)(a), C.R.S. 2006, states that a marriage entered into prior to the dissolution of an earlier marriage of one of the parties is prohibited. However, § 14-2-111 provides that any person who has cohabited with another in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance, whether or not the marriage is prohibited under § 14-2-110, declared invalid, or otherwise terminated by court action. Section 14-2-111.

Here, it is undisputed that, at all times, both parties knew that plaintiff was legally married to another person throughout the period of his cohabitation with defendant. Plaintiff testified, "We've never ever . . . believed that we were legally married," and defendant testified to the same effect. Therefore, there is no record support for the trial court finding that there was a putative marriage under § 14-2-111. Neither plaintiff nor defendant had a good faith belief that the two were validly married, and neither qualifies as a putative spouse. *See People v. McGuire,* 751 P.2d 1011 (Colo. App. 1987) (knowledge that one is married to another person negates good faith belief required to obtain benefit of putative spouse statute).

We conclude that the court erred in ruling that the parties were putative spouses, and in relying on a belief held by plaintiff that he had entered into a "religious" or "celestial" marriage with defendant. As stated in *People v. McGuire, supra,* "[s]ection 14-2-111 was enacted to protect innocent participants in meretricious relationships and the children of those relationships," not for "the purpose of affording protection to the perpetrator of an invalid *marriage.*" *People v. McGuire, supra,* 751 P.2d at 1012.

***

Because the parties were not legally married and the putative spouse statute does not apply, the trial court erred when it characterized the parties' agreement as a separation agreement and awarded maintenance to defendant. *See* §§14-10-112, 14-10-114.

***

ENFORCEABILITY OF AGREEMENT UNDER BASIC CONTRACT PRINCIPLES

Plaintiff finally contends that the trial court erred in failing to consider whether the agreement is valid and enforceable on other grounds. He argues that the case must be remanded for further proceedings. We agree.

Courts will not intervene to enforce, revoke, or rescind agreements between cohabiting parties where the sole consideration is based on past, present, or future sexual relations. *Houlton v. Prosser,* 118 Colo. 304, 194 P.2d 911(1948); *Baker v. Couch,* 74 Colo. 380, 221 P. 1089 (1923). Our supreme court has held that nonmarried, cohabiting couples may legally contract with each other so long as sexual relations are merely incidental to the agreement, and enforcement of such agreements may be sought under either law or equity. *Salzman, supra.*

No appellate court of this state has construed an agreement governing the termination of a relationship such as the one presented here, and we have found no cases on point within the United States. *Cf. Whitney v. Whitney,* 194 Okla. 361, 151 P.2d 583 (1944) (unwitting party to bigamous marriage may maintain suit against other party for fraudulent inducement into marriage, notwithstanding written contract for property division previously entered into by parties, which plaintiff alleged was void).

We conclude that, aside from the sufficiency of the parties' agreement pertaining to child support, as discussed above, general contract principles govern the analysis of the remaining provisions of the agreement. *See In re Marriage of Lafaye, supra,* 89 P.3d at 459 (general contract principles apply to agreements that are not governed by the Uniform Dissolution of Marriage Act).

We have already concluded that, because the parties were not legally married, payments denominated for "alimony"(by which the parties apparently meant "maintenance") are unenforceable. Nevertheless, defendant testified at trial that, to the extent the payments made to her were for anything other than child support, they were intended as severance pay for her work in plaintiff's business. Furthermore, at oral argument, counsel for defendant suggested that the payments might be construed as compensation related to the dissolution of a business relationship.

On remand, the trial court must make findings as to whether, under general contract law principles, the parties' contract is enforceable for any lawful purpose. Included within that review, the court must determine whether the prerequisites for formation of a contract have been met, and must specifically rule on the issues of consideration and meeting of the minds, which have been raised by plaintiff.

If the trial court determines that the agreement constitutes a valid contract, it must then determine whether there has been a breach of the contract, and if so, whether such breach was material.

The judgment is vacated, and the case is remanded for further proceedings as directed.

JUDGE MÁRQUEZ and JUDGE GRAHAM concur.

Source: Retrieved fromwww.courts.state.co.us/coa/opinion/2006/2006q4/05CA0937.pdf.

CASE BRIEF ASSIGNMENT

Read and brief the *Combs v. Tibbitts,* 148 P.3d 430 (Colo. App. 2006) case. (See Appendix A for information on how to brief cases.)

PUTATIVE MARRIAGES

A putative marriage is one that appears valid, was entered into in good faith by at least one of the parties, but has a legal impediment, of which the parties were unaware, that made it invalid. Note that one of the requirements for establishing a putative marriage is that the parties were unaware of the defect that prevents the marriage from being valid. If one of the parties is aware, and the other is not, only the party who is unaware can claim to be a putative spouse. This is

important because a putative spouse may be able to make a claim to a portion of the marital property and spousal support. Some states have specific statutes dealing with putative spouses such as the one discussed in the *Combs v. Tibbitts* case.

SHAM MARRIAGE

A **sham marriage** is a marriage that is entered into for some personal reason, other than love. The key question that must be answered to determine if a marriage is a sham marriage is whether the parties intended to live as husband and wife and create a life together. Historically marriages were sometimes not based on love. For example, royal marriages were often arranged to accomplish a political advantage. Today, sham marriages are often associated with attempting to avoid immigration laws or attempts to gain social security benefits.

While sham marriages may meet all of the legal qualifications of being married, the law will usually declare them void. Ones designed to evade immigration laws may also constitute criminal acts.

sham marriage
Marriage in which the parties never intended to live as a married couple.

CIVIL UNION

A civil union is similar to a traditional marriage but is entered into by same-sex couples. Civil unions are intended to extend the same rights under state law as those allowed to traditional married couples.

Vermont has led the way in the area of civil unions. Figure 3.9 sets out the Vermont civil union statute. To date, Vermont, California, New Jersey, and Connecticut allow civil unions or similar domestic partnerships.

FIGURE 3.9
Vermont Civil Union Statutes

Source: Retrieved October 26, 2006, from www.leg.state.vt.us/statutes/sections.cfm?Title=18&Chapter=106.

Title: Health
Chapter 106: CIVIL UNION; RECORDS AND LICENSES

§ 5160. Issuance of civil union license; certification; return of civil union certificate

(a) Upon application in a form prescribed by the department, a town clerk shall issue a civil union license in the form prescribed by the department, and shall enter thereon the names of the parties to the proposed civil union, fill out the form as far as practicable and retain a copy in the clerk's office. At least one party to the proposed civil union shall sign the application attesting to the accuracy of the facts stated. The license shall be issued by the clerk of the town where either party resides or, if neither is a resident of the state, by any town clerk in the state.

(b) A civil union license shall be delivered by one of the parties to a proposed civil union, within 60 days from the date of issue, to a person authorized to certify civil unions by section 5164 of this title. If the proposed civil union is not certified within 60 days from the date of issue, the license shall become void. After a person has certified the civil union, he or she shall fill out that part of the form on the license provided for such use, sign and certify the civil union. Thereafter, the document shall be known as a civil union certificate.

(c) Within ten days of the certification, the person performing the certification shall return the civil union certificate to the office of the town clerk from which the license was issued. The town clerk shall retain and file the original according to sections 5007 and 5008 of this title.

(d) A town clerk who knowingly issues a civil union license upon application of a person residing in another town in the state, or a county clerk who knowingly issues a civil union license upon application of a person other than as provided in section 5005 of this title, or a clerk who issues such a license without first requiring the applicant to fill out, sign and make oath to the declaration contained therein as provided in section 5160 of this title, shall be fined not more than $50.00 nor less than $20.00.
(e) A person making application to a clerk for a civil union license who makes a material misrepresentation in the declaration of intention shall be deemed guilty of perjury.
(f) A town clerk shall provide a person who applies for a civil union license with information prepared by the secretary of state that advises such person of the benefits, protections and responsibilities of a civil union and that Vermont residency may be required for dissolution of a civil union in Vermont. (Added 1999, No. 91 (Adj. Sess.), § 5.)

§ 5161. Issuance of license

(a) A town clerk shall issue a civil union license to all applicants who have complied with the provisions of section 5160 of this title, and who are otherwise qualified under the laws of the state to apply for a civil union license.
(b) An assistant town clerk may perform the duties of a town clerk under this chapter. (Added 1999, No. 91 (Adj. Sess.), § 5.)

§ 5162. Proof of legal qualifications of parties to a civil union; penalty

(a) Before issuing a civil union license to an applicant, the town clerk shall be confident, through presentation of affidavits or other proof, that each party to the intended civil union meets the criteria set forth to enter into a civil union.
(b) Affidavits shall be in a form prescribed by the board, and shall be attached to and filed with the civil union certificate in the office of the clerk of the town wherein the license was issued.
(c) A clerk who fails to comply with the provisions of this section, or who issues a civil union license with knowledge that either or both of the parties to a civil union have failed to comply with the requirements of the laws of this state, or a person who, having authority and having such knowledge, certifies such a civil union, shall be fined not more than $100.00. (Added 1999, No. 91 (Adj. Sess.), § 5.)

§ 5163. Restrictions as to minors and incompetent persons

(a) A clerk shall not issue a civil union license when either party to the intended civil union is:
1. under 18 years of age;
2. non compos mentis;
3. under guardianship, without the written consent of such guardian.
(b) A clerk who knowingly violates subsection (a) of this section shall be fined not more than $20.00. A person who aids in procuring a civil union license by falsely pretending to be the guardian having authority to give consent to the civil union shall be fined not more than $500.00. (Added 1999, No. 91 (Adj. Sess.), § 5.)

§ 5164. Persons authorized to certify civil unions

Civil unions may be certified by a supreme court justice, a superior court judge, a district judge, a judge of probate, an assistant judge, a justice of the peace or by a member of the clergy residing in this state and ordained or licensed, or otherwise regularly authorized by the published laws or discipline of the general conference, convention or other authority of his or her faith or denomination or by such a clergy person residing in an adjoining state or country, whose parish, church, temple, mosque or other religious organization lies wholly or in part in

(cont.)

FIGURE 3.9
(continued)

CYBER TRIP

To learn more about Vermont's civil unions, visit www.sec.state.vt.us/otherprg/civilunions/civilunions.html#What%20are%20the%20legal%20consequences%20of%20a%20civil%20union.

FIGURE 3.9
(concluded)

this state, or by a member of the clergy residing in some other state of the United States or in the Dominion of Canada, provided he or she has first secured from the probate court of the district within which the civil union is to be certified, a special authorization, authorizing him or her to certify the civil union if such probate judge determines that the circumstances make the special authorization desirable. Civil unions among the Friends or Quakers, the Christadelphian Ecclesia and the Baha'i Faith may be certified in the manner used in such societies. (Added 1999, No. 91 (Adj. Sess.), § 5.)

CYBER TRIP

To learn more about domestic partnerships in California, visit www.sos.ca.gov/dpregistry/dp_faqs.htm.

DOMESTIC PARTNERSHIPS

A domestic partnership is a means for same-sex couples, and heterosexual couples in some states, to live together without entering into marriage or a civil union. Some states have passed laws that grant domestic partners certain rights normally associated with married couples, including inheritance rights to the partner's estate, rights to file jointly on insurance forms, hospital visitation rights, and rights relating to the deceased partner if there is no will. California, Hawaii, Maine, Oregon, Washington, and the District of Columbia have passed legislation relating to domestic partnerships, although the statutes vary as to what rights are granted and who can enter into domestic partnerships. States allow for the couples to file a declaration of domestic partnership and are provided a copy of a certificate of registration. For example, in California the parties may file the Declaration of Domestic Partnership with the secretary of state. As is the case with other areas of family law, the specifics of what rights are granted vary by jurisdiction. Figure 3.10 contains California's Declaration of Domestic Partnership form.

COHABITATION

The word *cohabitation* in its most literal meaning is the act of living together, but here it will be used specifically to describe couples living together instead of getting married. Cohabitation is now a commonly used alternative to traditional marriage that many people are considering. In fact, its popularity is one of the reasons that, for the first time in history, married couples are now a minority of households in the United States according to census figures. Published reports indicate that 4.9 million unmarried men and women cohabitate, as compared to 500,000 in 1970. This change reflects not only a shift in the makeup of households; it also puts pressure on the legal system to adjust to these changes.

Traditionally the law has addressed issues relating to married couples. Statutes set out the legal requirements to create and dissolve a marriage. Statutes set out rights and liabilities of each spouse when the couple divorced, such as property distribution and payment of alimony. They also set out procedures to decide child custody and child support issues.

cohabitation agreements
A contract setting forth the rights of two people who live together without the benefit of marriage.

prenuptial agreement
An agreement made by parties before marriage that controls certain aspects of the relationship, such as management and ownership of property.

Initially these statutes did not apply to unmarried couples. The law has been changing to reflect the increased number of unmarried couples, especially as they relate to child custody and child support. Often this is accomplished by applying things like contract law to determine the rights of nonmarried parties when they decide to separate.

Cohabitation agreements are one way that couples can resolve separation issues ahead of time. Much like a **prenuptial agreement**, a cohabitation agreement is a contract entered into by the couple that sets out the specifics of their living arrangement and what will happen in the event they separate. Cohabitation and prenuptial agreements are discussed in detail in Chapter 2.

State of California
Secretary of State

FILE NO: _____

This Space For Filing Use Only

DECLARATION OF DOMESTIC PARTNERSHIP
(Please read instructions on reverse side before completing form.)

We the undersigned, do declare that we meet the requirements of Family Code section 297, as follows:

- Both persons have a common residence.
- Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
- Both persons are not related by blood in a way that would prevent them from being married to each other in this state.
- Both persons are at least 18 years of age.
- Both persons are members of the same sex, **OR**
  One or both of the persons of opposite sex are over the age of 62 and meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. section 1381 for aged individuals.
- Both persons are capable of consenting to the domestic partnership.
- Both persons consent to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, this state.

The representations are true and correct, and contain no material omissions of fact to the best of our knowledge and belief.

Signature	(Last)	(First)	(Middle)
Signature	(Last)	(First)	(Middle)
Mailing Address	City	State	Zip Code
E-Mail Address(es) (optional)			

NOTARIZATION IS REQUIRED
State of California
County of _____

On _____, before me, _____ Notary Public, personally appeared _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

_____
Signature of Notary Public

[PLACE NOTARY PUBLIC SEAL HERE]

SEC/STATE NP/SF DP-1 (REV 01/2007)

FIGURE 3.10 California Declaration of Domestic Partnership

Source: Retrieved from www.sos.ca.gov/dpregistry/forms/sf-dp1.pdf.

Summary

The word marriage is one that laypeople often think they understand. However, a review of the material covered in this chapter makes it clear that legal professionals, including paralegals, must be aware of the many different ways that this term is used in the law.

Even more important, the whole concept of marriage is under extreme political and social examination. State governments have been divided on their approach to these changes, especially the issues relating to same-sex couples. Some states have provided for civil unions and domestic partnerships as an alternative to marriage for same-sex couples. In two states, Massachusetts and New Jersey, state courts have held that the state statutes limiting marriage to a man and a woman violate the state constitution.

To further complicate this area of family law, some marriages have defects that may impact their validity. Examples include putative marriage and sham marriages.

Key Terms

Ceremonial marriage aka traditional marriage
Cohabitation agreement
Common law marriage
Covenant marriage
Marriage
No fault divorce
Premarital preparation course
Prenuptial agreement
Proxy marriage
Putative marriage
Same-sex marriage
Sham marriage
Solemnization

Review Questions

1. Discuss how marriage has evolved over the centuries?
2. What is the key difference between a prenuptial agreement and a cohabitation agreement?
3. What steps have states taken to try to reduce the number of divorces?
4. What is a covenant marriage and what makes it distinctive?
5. List the people who are commonly allowed to solemnize a marriage.
6. Why is the Full Faith and Credit Clause of the U.S Constitution important in the study of family law?
7. What societal changes have caused the legal system to make changes in the laws relating to marriage and cohabitation?
8. How do traditional/ceremonial marriages and common law marriages differ?
9. List some of the more common requirements relating to the capacity to marry.
10. What are marriage evasion statutes and why are they used?

Exercises

1. Review the facts set out in the Client Interview. What steps should Terri and Steve take to protect their rights? What problems might they face if their cohabitation is not, as they now think, a step toward marriage, but instead ends with them moving out and going their own ways? Would they need to be concerned about their living arrangement being considered a common law marriage? How would your answer differ if they were married and got divorced?
2. Sam and Donna wanted to get married. Sam was 18 but Donna is only 17. Could they get married under the laws of your state? Would your answer be different if: Donna was pregnant? Her parents gave their consent?

3. Catherine and Don, realizing they could not get married in their home state because they were both too young, decided to go to a nearby state that allowed people their age to marry. Would Catherine and Don's home state have to recognize their marriage?
4. Jack and Steven live in Missouri, a state that does not allow same-sex marriage. They decide to go to Massachusetts to get married. Research the laws of your state and of Massachusetts. Based on your findings, would Jack and Steven be able to get legally married in Massachusetts? Assuming that they were able to do so, would Missouri be required to recognize the marriage?
5. Wendy and Larry lived together for many years. They opened a joint checking account and owned their home in both their names. While many people assumed they were married, neither Wendy nor Larry thought of themselves as being married. They viewed themselves as just two people in love who lived together. If you live in a state that recognizes common law marriage, research your state's statutory and case law to determine if they would meet the requirements for creating a common law marriage. If your state does not recognize common law marriages, select a state that does, research the statutory and case law of that state and determine if Wendy and Larry's relationship would meet the requirements to create a common law marriage.

REAL WORLD DISCUSSION TOPICS

Owen and Peggy were first cousins and were married on August 30 in Colorado, in accordance with the laws of that state. At the time of the marriage, Owen was a resident of Kansas and Peggy was a resident of Oklahoma. They lived as a couple in Kansas after the marriage. They later experienced marital difficulties and in contemplation of divorce, they entered into a separation and property settlement agreement. Owen subsequently executed a will that omitted any mention of Peggy, and in April 1979, he filed a petition for divorce from her. Owen died before the completion of the divorce process. Peggy filled a petition to take one-half of his estate as his surviving spouse.

Would the marriage entered into in Colorado be valid in Kansas, even though a marriage between first cousins would be invalid if entered into in Kansas? Would your answer change if Kansas had a marriage evasion statute and it could be shown that Owen and Peggy went to Colorado to avoid the limitation to their marriage imposed by the laws of Kansas? How would the courts of your state deal with a situation like that of Owen and Peggy?

PORTFOLIO ASSIGNMENT

Locate the statute of your state that sets out the requirements to enter into a valid marriage and make a list of them. Write a summary of how they compare to the requirements of a valid marriage in the state of Florida as set out in this chapter.