Common-law marriage

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(Redirected from Common law marriage)

Family law
Entering into marriage
Prenuptial agreement · Marriage
Common-law marriage
Same-sex marriage
Legal states similar to marriage
Cohabitation · Civil union
Domestic partnership
Registered partnership
Dissolution of marriage
Annulment · Divorce · Alimony
Issues affecting children
Paternity · Legitimacy · Adoption
Legal guardian · Ward
Emancipation of minors
Parental responsibility
Contact (including Visitation)
Residence in English law
Custody · Child support
Areas of possible legal concern
Spousal abuse · Child abuse
Child abduction
Adultery · Bigamy · Incest
Conflict of Laws Issues
Marriage · Nullity · Divorce

Common-law marriage (or **common law marriage**), sometimes called **informal marriage** or **marriage by habit and repute** is, historically, a form of interpersonal status in which a man and a woman are legally married. The term is often mistakenly understood to indicate an interpersonal relationship that is not recognized in law. In fact, a common law marriage is just as legally binding as a statutory or ceremonial marriage in most jurisdictions — it is just formed differently.

Contents

Essential distinctions

The essential distinctions of a common law marriage are:

1. Common law marriages are not licensed by government authorities.
2. Common law marriages are not necessarily solemnized.
3. There is no public record of a common law marriage (i.e., no marriage certificate).
4. Cohabitation alone does not amount to common law marriage; the couple in question must hold themselves out to the world to be husband and wife.
5. In some jurisdictions, a couple must have cohabited and held themselves out to the world as husband and wife for a minimum length of time for the marriage to be recognised as valid.

Otherwise, the requirements are the same for common law marriage as they are for statutory marriage, i.e., the parties must mutually consent to be married, be of legal age or have their parents' permission, and so on.

There is no such thing as "common law divorce." Once a marriage is validly contracted, whether according to statute or according to common law, the marriage can only be dissolved by a legal proceeding in the pertinent trial court (usually family court or probate court).

Since the mid-1990s, the term "common-law marriage" has been used in parts of Europe and Canada to describe various types of domestic partnership between persons of the same sex as well as persons of the opposite sex. Although these interpersonal statuses are often, as in Hungary, called "common-law marriage" they differ from

true common-law marriage in that they are not legally recognized as "marriages" but are a parallel interpersonal status, known in most jurisdictions as "domestic partnership" or "registered partnership."

History

Most marriages in Europe were common law marriages until the Council of Trent convened 1545–1563. Thereafter, a marriage was only legal in Roman Catholic countries if it were witnessed by a priest of the Roman Catholic Church. This was not accepted in the newly Protestant nations of Europe, of course; nor by Protestants who lived in Roman Catholic countries or their colonies in the Americas or elsewhere; nor by Eastern Orthodox Christians.

Nevertheless, all Protestant and Eastern Orthodox countries in Europe eventually abolished "marriage by habit and repute", with Scotland being the last to do so, in 2006. Scotland had long been the sole exception in Europe.

The practice persevered in Scotland because the Acts of Union 1707 provided it retained its own legal system separately from the rest of the Kingdom of Great Britain. Thus, Lord Hardwicke's Act, passed by the British Parliament in 1753, did not apply to Scotland. It *did* apply to England and Wales, however (and apparently to Ireland, after the Act of Union 1800), where marriages were only valid in law if they were performed by a priest of the Church of England—unless the participants in the marriage were Jews or Quakers, both of whom were exempt from that provision.

Lord Hardwicke's Act did not apply to Britain's overseas colonies at that time, so the practice continued in the future United States and Canada. Common law marriages may still be contracted in eleven US states and the District of Columbia, and in several Canadian provinces.

Australia

See also: Australian family law

In Australia the term *de facto marriage* is often used to refer to relationships between men and women who are not married but are effectively living as husband and wife for a period of time, however *common-law marriage* is sometimes heard. The Federal parliament has power to legislate for marriages, which it first did in 1959 with the Matrimonial Causes Act (covering divorces, etc.) and in 1961 with the Marriage Act, both of which are now replaced by the 1975 Family Law Act. The Federal parliament has no power over de-facto marriages, and thus all Australian states and territories have legislation covering aspects of de-facto marriages, such as property distribution, custody of children, etc. if a relationship ends. Most laws dealing with taxation, social welfare, pensions, etc. treat de-facto marriages in the same manner as solemnized marriages.

Canada

Under Canadian law, the legal definition and regulation of common law marriage fall under provincial jurisdiction. A couple must meet the requirements of their province's Marriage Act for their common law marriage to be legally recognized.

However, in many cases common law couples have the same rights as married couples under federal law. Various federal laws include "common law status," which automatically takes effect once two people (of any gender) have lived together in a conjugal relationship for one full year. Common law partners may be eligible for various federal government spousal benefits. As family law varies between provinces, there are differences between the provinces regarding the recognition of common law marriage.

In 1999, after the court case *M. v. H.*, the Supreme Court of Canada decided that same-sex partners would also be included in common law relationships.

Ontario

In Ontario, the Ontario Family Law Act specifically recognizes common law spouses in sec. 29 dealing with spousal support issues; the requirements are living together for three years or having a child in common and having "cohabitated in a relationship of some permanence." The one-year must be continuous; however a breakup of a few days during the one-year period will not affect a person's status as common law [1]. However, the part that deals with marital property excludes common law spouses as sec. 2 defines spouses as those who are married together or who entered into a void or voidable marriage in good faith. Thus common law partners do not always evenly divide property in a breakup, and the courts have to look to concepts such as the constructive or resulting trust to divide property in an equitable manner between partners. Another difference that distinguishes common law spouses from married partners is that a common law partner can be compelled to testify against his or her partner in a court of law.

Québec

Québec, which unlike the other provinces has a Civil Code, has never recognized common-law partnership as a kind of marriage. See about De Facto Marriage in Québec. However, many laws in Québec explicitly apply to common-law partners (called "de facto unions" or *conjoints de fait*) as they do to spouses. See a List of These Rights and Freedoms. Same-sex partners can also have recognized "de facto unions" in Québec.

A recent amendment to the Civil Code of Québec recognizes a type of domestic partnership called civil union that is similar to common-law marriage and is likewise available to same-sex partners.

Other Provinces

The requirements in some other provinces are as follows:
In British Columbia and Nova Scotia you must cohabit for two years in a marriage-like relationship [2].
In New Brunswick, you must live together continuously in a family relationship for three years.

United Kingdom

The term "common law marriage" is frequently used in England and Wales, however such a "marriage" is not recognised in law, and it does not confer any rights or obligations on the parties. See also English law. Genuine (that is, legal) common-law marriage was for practical purposes abolished under the Marriage Act, 1753. Prior to that point, marriage was by consent under Roman Law, and by consummation under canon law. [3] "Common law marriage" survives in England and Wales only in a few highly exceptional circumstances, where people who want to marry but are unable to do so any other way can simply declare that they are taking each other as husband and wife in front of witnesses. British civilians interned by the Japanese during World War II who did so were held to be legally married.

Unmarried partners are recognised for certain purposes in legislation, e.g., for means-tested benefits. For example, in the Jobseekers Act 1995, '"unmarried couple" means a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances. [4]

Scotland

Under Scots law, there have been several forms of "irregular marriage". These were:

1. Irregular Marriage by declaration de presenti - Declaring in the presence of two witnesses that you take someone as your wife or husband. 2. Irregular Marriage conditional on consummation. 3. Irregular Marriage with co-habitation and repute.

The Marriage (Scotland) Act 1939 provided that the 1st and 2nd forms of Irregular marriage could not be formed on or after 1st January 1940. However, any Irregular Marriages contracted prior to 1940 can still be upheld. This act also allowed the creation of Regular Civil Marriages in Scotland for the first time. (The civil registration system started in Scotland on 1st January 1855.) Until this act the only Regular Marriage available in Scotland was a religious marriage. Irregular Marriages were not socially accepted and many people who decided to contract them did so where they were relatively unknown. In some years up to 60% of the marriages in the Blythswood Registration District of Glasgow were "Irregular".

In 2006 "marriage by cohabitation with habit and repute" was also abolished in the Family Law (Scotland) Act 2006. Until that act had come into force, Scotland remained the only European jurisdiction never to have totally abolished the old style common-law marriage. For this law to apply the minimum time the couple have lived together continuously had to have exceeded 20 days.

As in the American jurisdictions that have preserved it, this type of marriage can be difficult to prove. It is not enough for the couple to have lived together for several years, but they must have been generally regarded as husband and wife, e.g., their friends and neighbours must have known them as "Mr. and Mrs. So-and-so" (or at least they must have held themselves out to their neighbours and friends as Mr. and Mrs. So-and-so). And, as with American common-law marriages, it is a form of lawful marriage, so that nobody can say they are common-law spouses, or husband and wife by cohabitation with habit and repute, if one of them was legally married to somebody else when the relationship began.

It is a testament to the influence of English and American legal thought that, for a study conducted by the Scottish Executive in 2000, 57% of Scots surveyed believed that couples who merely live together have a "common-law marriage." In fact, that term is unknown in Scots Law, which uses "marriage by cohabitation with habit and repute." "Common-law marriage" is an Anglo-American term. Otherwise, men and women who otherwise behave as husband and wife do NOT have a common-law marriage or a marriage by habit and repute merely because they set up housekeeping together, but they MUST hold themselves out to the world as husband and wife. (In many jurisdictions, they must do so for a certain length of time for the marriage to be valid.) The Scottish Survey is not clear on these points. It notes that "common law marriage" is not part of Scots Law, but fails to note that "marriage by cohabitation with habit and repute" - which is the same thing - *is* part of Scots Law.

Upon entering into or establishing an irregular marriage a Declarator's Warrant is obtained from the Sheriff Court. This is then taken to the Registry Office and the marriage is entered into the Register of Marriages. This step does not create the marriage, but merely enables the existence of the marriage to be authenticated in written form.

Israel

Israeli law recognizes common-law marriage (ידוע בציבור) particularly since an apparatus for civil marriage is absent, and many couples choose to avoid a religious marriage or are barred from it. Israeli law makes provisions for common-law spouses, but is murky as to the period of time that needs to pass before a relationship can be recognized as common-law marriage. Unlike marriage, the spouses need to provide proof of their relationship in order to gain access to the various benefits and rights which accompany a common-law marriage.

United States

In *Meister v. Moore*, 96 U.S. 76 (1877), the United States Supreme Court, relying on *Hutchins v. Kimmell*, 31 Mich. 126 (1875) ruled that Michigan had not abolished common law marriage merely by producing a statute

which established rules for the solemnization of marriages, because it did not require marriages to be solemnized — it only required that, if a marriage were solemnized, it could only be solemnized as provided by law. Otherwise, the court found that, as the right to marry existed at common law, the right to marriage according to the tradition of that common law remained valid until such time as state law affirmatively changed it. The Court did not find it necessary to pass special legislation specifically outlawing the common law contract of a marriage, but it was sufficient for a state's general marriage statutes to clearly indicate no marriage would be valid unless the statutory requirements enumerated were followed.

Common-law marriage can still be contracted in the following jurisdictions: Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, New Hampshire (posthumously), Oklahoma, Rhode Island, South Carolina, Texas, and Utah. Note there is no such thing as "common-law divorce" — that is, you can't get out of a common-law marriage as easily as you can get into one. Only the contract of the marriage is irregular; everything else about the marriage is perfectly regular. People who marry per the old common law tradition must petition the appropriate court in their state for a dissolution of marriage.

The situation in Pennsylvania became unclear in 2003 when an intermediate appellate court purported to abolish common-law marriage (*PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos)*, 831 A.2d 1269 (Pa. Cmwlth. 2003)) even though the state Supreme Court had recognized (albeit somewhat reluctantly) the validity of common-law marriages only five years before. (*Staudenmayer v. Staudenmayer*, 552 Pa. 253, 714 A.2d 1016 (1998).) The Pennsylvania legislature resolved most of the uncertainty by abolishing common-law marriages entered into after January 1, 2005. (Act 144 of 2004, amending 23 Pa.C.S. Section 1103.) However, it is still not certain whether Pennsylvania courts will recognize common-law marriages entered into after the date of the Stamos decision and before the effective date of the statute (i.e., after September 17, 2003, and on or before January 1, 2005), because the other intermediate appellate court has suggested that it might not follow the Stamos decision. (Compare *Bell v. Ferraro*, 2004 PA Super 144, 849 A.2d 1233 (4/28/2004), with *Stackhouse v. Stackhouse*, 2004 PA Super 427, 862 A.2d 102 (11/10/2004).)

Common-law marriage can no longer be contracted in the following states, as of the dates given: Alaska (1917), Arizona (1913), California (1895), Florida (1968), Georgia (1997), Hawaii (1920), Idaho (1996), Illinois (1905), Indiana (1958), Kentucky (1852), Maine (1652, when it became part of Massachusetts; then a state, 1820), Massachusetts (1646), Michigan (1957), Minnesota (1941), Mississippi (1956), Missouri (1921), Nebraska (1923), Nevada (1943), New Mexico (1860), New York (1933, also 1902-1908), New Jersey (1939), North Dakota (1890), Ohio (1991), Pennsylvania (2005), South Dakota (1959), and Wisconsin (1917).

The following states never permitted common-law marriage: Arkansas, Connecticut, Delaware, Louisiana, Maryland, North Carolina, Oregon, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. Note that Louisiana is a French civil or code law jurisdiction, not an English common law jurisdiction. As such, it is a former Council of Trent jurisdiction and common-law marriage was never known there.

Nevertheless, all states — including those that have abolished common-law marriage — continue to recognise common-law marriages lawfully contracted in those U.S. jurisdictions that still permit this irregular contract of a marriage. Contrary to popular belief, this is not the result of the Full Faith and Credit Clause of the U.S. Constitution — which has never been held to require one state to recognize marriages created under the law of another, and is completely irrelevant to common-law marriages to start with because there is no sister-state public act, public record or judicial proceeding to recognise pursuant to the clause. Rather, states recognise each other's marriages, and those from foreign countries, under their own conflict and choice-of-law rules. In general, a marriage that is validly contracted in the foreign state will be recognized as valid in the forum state, unless the marriage is odious to the public policy of the forum state.

This *may* have changed in California, however, as an unintended consequence of Proposition 22. This was a voter initiative statute intended to deny California recognition to sister-state same-sex marriages (which already could not be performed in California), but the language of the initiative was sufficiently broad that it could be construed

to outlaw recognition of sister-state common law marriages between men and women, as well as sister-state same-sex marriages. The question has not yet been litigated.

The requirements for a common-law marriage to be valid differ from state to state:

Alabama

The requirements for a common-law marriage are: "(1) capacity; (2) present agreement or mutual consent to enter into the marriage relationship ...; (3) public recognition of the existence of the marriage; and (4) cohabitation or mutual assumption openly of marital duties and obligations." See *Creel v. Creel*, 763 So. 2d 943 (Ala. 2000), quoting *Adams v. Boan*, 559 So. 2d 1084, 1086 (Ala. 1990).

Colorado

The elements of a common-law marriage are, if both spouses: (1) are legally free to contract a valid ceremonial marriage, (2) hold themselves out as husband and wife; (3) consent to the marriage; (4) cohabitate; and (5) have the reputation in the community as being married (*Colorado Attorney General - FAQ: Common-Law Marriage*). See also: Colorado Common Law Marriage Article

Effective September 1, 2006, Colorado no longer recognizes common law marriages, regardless of where the marriage was entered into, where the parties are not both eighteen years of age or older. Colorado Revised Statutes, Sections 14-2-104 and 14-2-109.5.

District of Columbia

The elements of a common-law marriage are: (1) "an express, mutual, present intent and agreement to be husband and wife"; "followed by" (2) "cohabitation in good faith." See *Jackson v. Young*, 546 A.2d 1009 (D.C. App. 1988), quoting *Johnson v. Young*, 372 A.2d 992, 994 (D.C. App. 1977). See good overview at *Dickey v. Office of Personnel Management,* 419 F.3d 1336 (Fed.Cir., 2005).

Iowa

"The three elements of a common-law marriage are: (1) the present intent and agreement to be married; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife. *Martin*, 681 N.W.2d at 617. The public declaration or holding out to the public is considered to be the acid test of a common-law marriage. In re Marriage of Winegard, 257 N.W.2d 609, 616 (Iowa 1977)." See *Snyder-Murphy v. City of Cedar Rapids* (Iowa 2004)

Kansas

Under Kansas Statute 23-101 (2002), both parties to a common-law marriage must be 18 years old. The three requirements that must coexist to establish a common-law marriage in Kansas are: (1) capacity to marry; (2) a present marriage agreement; and (3) a holding out of each other as husband and wife to the public. See *In the Matter of the Petition of Lola Pace* (Kan. 1999)

Montana

A common-law marriage is established when a couple: "(1) is competent to enter into a marriage, (2) mutually consents and agrees to a common law marriage, and (3) cohabits and is reputed in the community to be husband and wife." See *Snetsinger v. Montana University System*, 325 Mont. 148, 104 P.3d 445, quoting *In re Ober*, 314 Mont. 20, 62 P.3d 1114.

New Hampshire

"Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years," are recognized by the state as being legally married after one spouse dies. Thus, the state posthumously recognises common-law marriages ensuring that a surviving spouse inherits without any difficulty. See: NH RSA 457:39 Cohabitation, etc.

Oklahoma

The criteria for a common-law marriage are: (1) "an actual and mutual agreement between the spouses to be husband and wife;" (2) "a permanent relationship;" (3) "an exclusive relationship, proved by cohabitation as man and wife;" and (4) "the parties to the marriage must hold themselves out publicly as husband and wife." See *Estate of Stinchcomb v. Stinchcomb*, 674 P.2d 26, 28-29 (Okla. 1983).

Rhode Island

The criteria for a common-law marriage are: (1) the parties seriously intended to enter into the husband-wife relationship; (2) the parties' conduct is of such a character as to lead to a belief in the community that they were married. See *DeMelo v. Zompa*, 844 A.2d 174, 177 (R.I. 2004) (pdf).

South Carolina

The criteria for a common law marriage are: (1) when two parties have a present intent (usually, but not necessarily, evidenced by a public and unequivocal declaration) to enter into a marriage contract; and (2) "a mutual agreement between the parties to assume toward each other the relation of husband and wife." See *Tarnowski v. Lieberman* (S.C. Ct. App. 2002). The minimum age for such a marriage is fourteen years old as established by South Carolina Code of Laws 20-1-100 (2004). For this law to apply the minimum time the couple have lived together continuously had to have exceeded 30 days.

Texas

Common-law marriage is known as an "informal marriage," which can be established either by declaration (registering at the county courthouse without having a ceremony), or by meeting a 3-prong test showing evidence of (1) an agreement to be married; (2) cohabitation in Texas; and (3) representation to others that the parties are married. While in the actual wording of the law there is no specification on the length of time that a couple must cohabitate to meet the second requirement of the 3-prong test, it is understood within Texas law that cohabitation must occur for an extended period of time, usually two years, but in certain cases where the situation is more complicated and other factors are involved, three years can be the requisite time period. However, if a couple does not commence a proceeding to prove their relationship was a marriage within two years of the end of their cohabitation and relationship, by law the marriage never existed in the first place, and no agreement to be married was ever present. (Obviously the wording can cause complications because cessation of relationship and cessation of cohabitation are not mutually inclusive — thus, the law is vague and interpretable.) See Texas Family Code Sec. 2.401.

Utah

For a common-law marriage to be legal and valid, "a court or administrative order must establish that it arises out of a contract between a man and a woman" who: (1) "are of legal age and capable of giving consent"; (2) "are legally capable of entering a solemnized marriage under the provisions of Title 30, Chap. 1 of the Utah Code; (3) "have cohabited"; (4) "mutually assume marital rights, duties, and obligations"; and (5) "who hold themselves out

as and have acquired a uniform and general reputation as husband and wife" (See Utah Code Ann. 30-1-4.5 (2004)).

Putative spouses

Many U.S. states that do not have common law marriage, and some that do, have a concept of a "putative spouse". Unlike someone in a common law marriage, a putative spouse is not actually married. Instead a putative spouse believes himself or herself to be married in good faith and is given legal rights as a result of this person's reliance upon this good faith belief.

A number of states followed the example of the Uniform Marriage and Divorce Act (also sometimes called the Model Marriage and Divorce Act) to establish the concept of a "Putative Spouse" by statute. The concept has been codified in California, Colorado, Illinois, Louisiana, Minnesota and Montana. [5] Case law provides for putative spouse rights in Nebraska, Washington state and Nevada. [6] Colorado and Montana are the only U.S. states to have both common law marriage and to formally recognize putative spouse status. Putative spouse concepts, called "deemed marriages" are also recognized under the Social Security program in the United States. [7]

The putative spouse concept is likewise recognized in Australia. [8]

In Colorado, which is typical, "Any person who has cohabited with another person to whom he is not legally marriaged 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." Section 14-2-111, Colorado Revised Statutes.

Putative spouse status is a remedial doctrine designed to protect the reasonable expectations of someone who acts on the belief that they are married, and generally entitled a putative spouse to the rights a legal spouse would have for the period from the putative marriage until discovery that the marriage was not legal. It is possible that a person could have both a legal spouse and someone is a putative spouse, in which case, courts are directed to do what seems appropriate in the circumstances.

Unlike a common law marriage, which is possible only when both spouses are legally eligible to marry, putative spouse status can be unilateral. For example, if a husband is married, but goes through a marriage ceremony without informing the woman with whom he goes through with the ceremony of that fact, the husband is not a putative spouse, because he knows that he has no right to marry. The wife however is a putative spouse because she in good faith believes that she is married, and has no knowledge that she is not legally married. *See, e.g. Carndell v. Resley*, 804 P.2d 272 (Colo. App. 1990) and *Williams v. Fireman's Fund Ins. Co.*, 670 P.2d 453 (Colo. App. 1983).

In the example above, the putative wife who believed she was married could seek the property division and alimony awards that a legal spouse could have, when the putative spouse discovers that she is not legally married, but the man she believed she was married to could not seek a property division of property in the putative wife's name or alimony from her, because he knew that they weren't married.

See also

- Family
  - Family law
- Child
  - Illegitimacy
- Interpersonal relationship and Intimate relationship
  - Cohabitation

    - Divorce
    - Domestic partnership
    - Marriage
- POSSLQ

External links

- The Alternatives to Marriage Project is a national US organization for unmarried people
    - Dorian Solot and Marshall Miller, *Common Law Marriage Fact Sheet*
- Demystifying Common Law Marriage
- The National Marriage Project at Rutgers University
- Treatise on Common Law Marriage

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