

# Common Law Marriage

There is much confusion about common law marriage. Some believe it to be the manner in which God intended a man and woman to be married; others believe it to be nothing more than “shacking up” covered by dubious veneer of respectability. So what is the truth?

In order to find the truth, we must look at the origins of common law marriage as well as the manner of its use over the past few centuries. It should be remembered that men and women have been getting married for at least 5,000 years, and that government laws concerning marriage are a relatively new event.

Most people today see “common law marriage” as a noun. In other words, it is a singular thing. That perception is inaccurate. It is only “marriage” that is the noun. “Common law” is merely a system of law that certain marriages utilize. Today’s commonly accepted method of marriage is to acquire a government marriage license. Such marriages may rightly be called a “statutory marriage” because it is the system of “statutory law” that this type of marriage utilizes.

As we stated earlier, marriages have been taking place since the beginning of time, and historical records show that they were already in existence at the beginning of written history. As society progressed, and its legal systems matured, questions arose as to what really constituted a marriage. These questions originally revolved around issues such as inheritance and the status of children as bastards. Over time, the “common law of England” (from which America derived its common law) began to develop legal boundaries that expressed society’s view of what constituted a marriage. The common law does not so much “control” the act of getting married, or “establish” a marriage, as it sets out the markers that can be used to determine whether a man and woman are in fact married, or whether they are simply using the word “married” without the existence of any of the fundamental elements being present that society understands to accompany a true marriage. In short, common law does not operate upon a marriage unless or until the validity of a marriage is challenged in court. At that time, the court will use the common law standards that have evolved to decide if the alleged marriage was truly established as such.

## What’s Legally Valid and What’s Not?

When examining a legal question, it is customary to lay foundation and then come to the final conclusive point. However, we believe that in this instance it is best to state the conclusive legal reality of common law marriage first and then investigate the particulars.

Here is the holding from the decision of the United States Supreme Court in *Meister v. Moore*, 96 US 76 (1877):

“As before remarked, the statutes are held **merely directory**, because **marriage is a thing of common right...**” [emphasis added]

**Directory** – A provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. *Black’s Law Dictionary, 6<sup>th</sup> Ed.*

The statutes to which the Court was referring were statutes in Massachusetts and Michigan that purported to render invalid marriages not entered into under the term of written [statutory] state law.

While the various state courts have prattled on for almost 200 years about what the laws of their states do and do not allow concerning marriage, the US Supreme Court cut straight to the heart of the issue in declaring that statutes controlling marriage can only be directory because marriage is a common right, which is not subject to interference or regulation by government. Or phrased another way, the God-given right to marry existed prior to the creation of the states or the national government, and therefore it is beyond their purview to alter, modify, abolish, or interfere with, such a right.

In its decision in *Meister*, the Court refused to even examine the numerous state court decisions prior to making its own decision. While this was assailed by legal commentators of the day as an egregious choice, we can only agree with the Court in its choice because a state court opinion has no authority to affect a fundamental right that existed antecedent to the formation of the state.

It should be noted that *Meister* has never been reversed and is still controlling case law concerning the fundamental right to marry without state interference.

### “Recognized” versus “Unlawful ””

A lot of Americans hold the incorrect perception that common law marriage is unlawful. Nothing could be further from the truth. There is no state law anywhere that claims to make common law marriage “unlawful”. Given the decision in *Meister*, such a law could not withstand the scrutiny of the US Supreme Court. And of course the exercise of a fundamental right is always lawful!

It is true that in many states common law marriage is not “recognized”. Given the fact that common law marriage is lawful, one might reasonably ask what it meant by “not recognized”. Without getting into a lot of legal mumbo-jumbo “not recognized” means that in the eyes of the State “the marriage is not

known/understood/perceived to exist”. We agree with that legal concept and we can see nothing in that matter to concern us.

A “statutory marriage” is registered with the State as a result of the man and woman applying for a State marriage license and thus entering into a three-party contract with the State. Obviously the State keeps records of all contracts to which it is a party and therefore such a marriage is “known to exist” to State authorities. It is equally obvious that a private common law marriage would not be “known to exist” to State authorities. The problem arises from the erroneous view that “not recognized” is synonymous with “invalid”. Because of *Meister*, no state can arbitrarily declare common law marriage invalid by legislation, and none have done so! To state the point most clearly – “not recognized” does ***not*** mean, “invalid”.

### Validity of Marriage

Now that we have established that “recognition” and “validity” are two separate issues, one might then reasonably inquire as to what constitutes a “valid” marriage at common law?

It should be pointed out that under the common law, unless there is a controversy that arrives before a court of law, which calls into question the validity of a marriage, a marriage thought proper by the consenting parties is a valid marriage. It is bringing the marriage within the scope of judicial review that raises the specter of the marriage being invalidated.

The issues that a court may review in determining the validity of a marriage are:

- ~~✍~~ Consent of both parties.
- ~~✍~~ The existence of a marriage contract – oral or written.
- ~~✍~~ The existence of a marriage contract – present or future tense
- ~~✍~~ Prior marriages still in effect.
- ~~✍~~ Whether or not there is/was cohabitation.
- ~~✍~~ Solemnization or ceremony.
- ~~✍~~ Marriage Certificate providing evidence of a ceremony.
- ~~✍~~ A secret or deceptive marriage.
- ~~✍~~ A marriage based on false representations.
- ~~✍~~ Whether the scope and effect of an impediment produces an invalid marriage.
- ~~✍~~ Whether there are children that will be rendered bastards.
- ~~✍~~ Whether a religious figure performed the marriage ceremony.

This treatise would be prohibitively long (and likely pretty boring) if we explored each of these issues in depth. Instead we think it is in the best interest of the reader to discuss the elements that create a common law marriage that can never be invalidated by a court.

- **Consent** – It is critical to be able to provide evidence of consent. Although verbal consent is sufficient for validity, there are times (such as after one party has died) that a showing of verbal consent by **both** parties may be difficult to achieve. For this reason, it is highly recommended that consent be demonstrated through the existence of a written marriage contract, signed by both husband and wife. Cohabitation is also generally viewed as evidence of consent.
- **Contract** – A written marriage contract should establish the marriage in the present tense, as opposed to constituting a promise of marriage at some designated time in the future. Although courts have supported future tense marriage agreements, such an agreement is by means as secure as a present tense contract. The contract should specify the basic rights and duties of each party.
- **Prior Marriages** – Although courts have upheld the validity of some marriages in which one or both parties were still married (at common law) to other people, one should not count on such leniency. One should be able to prove (through evidence) that any prior marriages have been properly dissolved.
- **Secret Marriages** – Although the courts have generally accepted the view that a husband and wife may choose to keep a marriage secret without affecting its validity, again, one should steer clear of arrangements that leave room for today's court to render unfavorable decisions concerning validity.
- **Solemnization or ceremony** – Although the accepted doctrine is that a ceremony of solemnization is not a required element for validity, such a ceremony demonstrates consent as well as dispelling any speculation of secrecy or deception.
- **Certificate of Marriage** – While marriage certificates are most common these days in statutory marriages, one can create a marriage certificate easily enough on a personal computer, or one can have a graphic artist create one for you. The certificate should be signed by three witnesses. A properly executed marriage certificate lends to the evidentiary weight of consent.
- **Photographic Evidence** – In addition to a certificate of marriage, today one can memorialize the event in photographs or on video.
- **Religious Ceremony** – The requirement to have a religious figure perform the service is essentially dead. Such a requirement would bar atheists from marriage. Additionally, and more importantly, the common law is based on the Bible and there is no scriptural command, or even permission, for a religious leader to perform a wedding ceremony. This reality has been given recognition by the courts.

In summary, validity (or lack thereof) is often determined based a composite picture drawn from the totality of the circumstances. The person who wishes to establish an incontrovertible record of a valid common law marriage should make sure to

steer clear of areas that leave room for ambiguity. One who wishes to make an incontrovertible record should:

- 1) Have both parties sign a marriage contract and have the document notarized.
- 2) Have a ceremony with witnesses present.
- 3) Have three witnesses sign a marriage certificate.
- 4) Memorialize the ceremony in photographs or on video.
- 5) Cohabitate after the contract has been signed or the ceremony performed.
- 6) Let friends, co-workers, and people in the community know you and your spouse are married.

By applying each of these elements, there is no court in America that can declare your common law marriage invalid.

### **Why has Common Law Marriage acquired a dubious reputation?**

Many people shy away from common law marriage today because they feel it is nothing more than “shacking-up”, covered by a very thin veneer of respectability, as well as affording no legal protection concerning property rights and child custody issues if the marriage fails. Since those are really two separate issues, let's look at the “shacking-up” perception first.

#### **Pretending To Be Married**

People who look at common law marriage as merely shacking-up are not necessarily wrong in their view. Whenever **The People** have a right secured to them that the government cannot control or interfere with, there will always be people who will misuse that right. That's just human nature. Common law marriage is not immune to that human foible and may very well, by its nature, be more prone to misuse than some other rights.

It is sad but true that many people simply use the principle of common law marriage as a convenient cover for cohabitating without any intention of establishing a true marriage. It is also true that historically the state courts have been filled with people alleging to be the spouse of a deceased person only for the purpose of getting at the decedent's property. These circumstances (as well as others) have led the courts to establish criteria for the validity of common law marriages.

We encourage people to use their right of common law marriage only in circumstances where a truly committed marriage is desired. In our opinion, marriage should be approached with reverence; its dignity promoted and preserved.

## Property and Custody Right

There is a perception that there are no protections for property rights and/or child custody concerns in a common law marriage. That is one of the many inaccurate perceptions of common law marriage.

All marriages, statutory and common law, are based on a contract. In the case of a statutory marriage, the contract is between three parties – the husband, the wife, and the State – the State being the superior party of interest. In such marriages, if the husband and wife wish to dissolve the marriage they **must** do so through a court that is enforcing that State's Family Law Code. We say "must" because once the State was involved in the contract as the superior party of interest, the husband and wife are legally bound to obey the State in matters that are controlled by the State's Family Code.

In the case of common law marriage, there are two ways that property rights and child custody issues can be addressed. The first and most desirable method is to structure the contract to include the mechanism by which a termination of the contract shall occur. The parties to the contract (husband and wife to be) can sit down and agree on how they would want to dissolve the marriage if that circumstance were to occur. In a section of the contract concerning the dissolving of the contract, the parties can specify how property is to be divided and how child custody issues will be addressed. Often times constructing a framework for such matters when you're happy and in love will help provide a smoother road if the unfortunate occurs. We suggest structuring methods that involve submitting your possible disputes to your church elders or to a small panel of trusted friends. In this way the decisions that you're seeking will be rendered by people who know you and love you, rather than by some government bureaucrat in a black robe.

If pre-structuring a mechanism for divorce within the contract doesn't appeal to you, you always have the option of submitting your marriage to the jurisdiction of your State's family law court. And have no doubt, if you submit your marriage contract to the Family Law Court, it will assume jurisdiction. You should understand that if you take this route, you are surrendering your independence to the State. You cannot back out if you don't like what the court decides. You will be bound by the decisions of the court just as if you'd entered into a statutory marriage.

## Proving Your Marriage

You will only be called upon to "prove" your marriage if you are seeking some right or benefit (either private or public) that is available only to a person who is married. Examples of such matters are; death benefits to spouse on a life insurance policy; company provided medical benefits to spouse, etc.

If the right or benefit is coming from a private firm, usually a properly executed Marriage Certificate will do the trick. If that is deemed insufficient, one may need to provide a sworn affidavit. Generally, a sworn affidavit is considered conclusive on a matter unless the opposing party can rebut the affidavit.

If the right or benefit is coming from a government agency, one should start by submitting the properly executed Marriage Certificate. If the agency says that the certificate is unsatisfactory, one should immediately ask for an administrative hearing. At the hearing, one should do the following:

- 1) Submit into evidence items 1, 3, & 4 (above), plus any other items of evidentiary value that proves the marriage.
- 2) Ask to be sworn in and then give direct testimony that you and your spouse are married; give the details of your marriage (i.e. contract, dates, ceremony, etc.). In your testimony, include the Court's holding from *Meister*, that all State marriage statutes are merely directory in nature and that there can be no adverse consequence or invalidity for not following a statute that is only directory.
- 3) Ask the agency representative (who should not be the hearing officer) to be sworn in and then ask him/her to enter into the official record any evidence the agency possesses that **your** common law marriage is not lawfully valid.
- 4) Ask the agency representative to enter into the official record any evidence that the agency is precluded from recognizing any lawfully valid marriage.

If you are prepared, and you're astute during the hearing, odds are good the agency will recognize your marriage as valid and binding upon them. If they don't, then their own official record can now be used against them in a court action to force them to recognize the marriage. Remember, when a court reviews an agency's decision, it is nothing more than an "administrative appeal" handled by a guy in a black robe. The only evidence that the court can consider about your marriage is that which was entered into the official record during the administrative hearing and any agency regulations on the subject.

### **More on Common Law Marriage**

It is interesting to note the current definition of "marriage license" in Black's Law Dictionary, 6<sup>th</sup> Ed [1991] (which is the one used in a Family Law court):

**Marriage license** – *A license or permission granted by public authority to persons who intend to intermarry... By statute in most jurisdictions, it is made an essential prerequisite to lawful solemnization of the marriage.*

So far, so good; a license is required for persons who desire to “intermarry”. Fine; but what exactly does “intermarry” mean?

Black’s Law Dictionary (6<sup>th</sup> Ed):

**Intermarry** – *See Miscegenation.*

Black’s Law Dictionary (6<sup>th</sup> Ed):

**Miscegenation** – *Mixture of races. Term formerly applied to marriage between persons of a different race. [Now called “intermarry”.] Statutes prohibiting marriage between persons of different races have been held to be invalid as contrary to equal protection clause of the Constitution.*

[Editor’s Note: *Please note that the courts have held it to be unconstitutional to altogether “prohibit” such marriages, but the courts do not say that it is unconstitutional to require such marriages to be licensed.*]

Keeping the foregoing facts in mind, let’s look at a typical State marriage statute. Since we are most familiar with California statutes, we’ll examine the section from the California Family Code:

**Section 300** - Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division... [Underlines added for emphasis]

As you likely know, statutory law that lays a duty upon a person must be specific in the particulars that give rise to the duty. You will note that the section 300 does **not require** anyone to apply for a license; it merely says that consent “must” be followed by the issuance of a license. How then shall we interpret “must” in this context?

**Must** – This word, like the word “shall”, is primarily of mandatory effect... But this meaning of the word is not the only one, and it is often used in a **merely directory** sense, and consequently is a synonym for the word “may”...  
*Black’s Law Dictionary, 6<sup>th</sup> Ed.*

Given the US Supreme Court’s holding in *Meister* [that all State marriage laws are **merely directory** in nature] which of the two definitions of “must” are applicable? Clearly the definition that gives the statute a directory character must be applied if

the statute is to comport itself with the *Meister* decision, and thus remain within the bounds of Constitutionality.

If the legislative draftsmen who wrote these laws were not attempting to deceive you, section 300 would not depend on the subterfuge of veiled definitions, and it would read as follows:

**Section 300** (*our revised version*) - Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent **may** be followed by the issuance of a license if a license is applied for. If a license is issued, the marriage must then be followed by solemnization as authorized by this division...

### **Reference Material**

If you would like to learn more about common law marriage, an excellent legal analysis of the subject can be found in the book, "Common Law Marriage and its Development in the United States", written by Otto E. Koegel, D.C.L. This book was published by John Byrne & Company in 1922 and can generally only be found in a well-stocked law library.