



The Spirit of the Law

Throughout history, public policy has looked upon marriage as a stabilizing force in society. Along with creating rights and duties, as all contracts do, the marriage contract creates a condition in which the parties' rights and duties are governed by law rather than by agreement. Marriage partners have the right to receive economic support from each other when necessary. They are responsible for each other's debts in payment for the necessities of life. They have a legal right to a portion of each other's property in the event of death and sometimes in the event of separation or divorce. Their children are entitled to their custody and support and, in some cases, a portion of their property upon death. Marriage also brings with it the duty of faithfulness.

Legal Issues:

1. Can a 15-year-old girl marry without her parents' consent?
2. Is a marriage between first cousins allowed?
3. Are first cousins related by affinity?
4. What is a common-law marriage and is it legal?
5. What is the name and legal effect of the state of having two spouses at one time?

The Marriage Contract

Marriage is a personal relationship between a man and a woman, arising out of a civil contract. The marriage contract actually comes into existence when the couple becomes engaged. At that time, a bilateral contract takes place. All the elements of a contract are present. There is an agreement containing consideration (promising to give up one's legal right to remain single) between two parties who have capacity to contract, by mutual consent and for a legal purpose. At common law, if one of the parties failed to go through with the marriage, the other party could sue for damages caused by breach of the marriage contract.

Example 1. John Olivito asked Joyce Waldie to marry him, and Waldie accepted. A few months later, before they were married, Waldie changed her mind and called off the engagement. If the parties lived in a state that still follows the common law on this point, Olivito could sue Waldie for any damages he suffered because of the breach of contract.

Most states today have passed statutes that no longer allow suit to be brought for breach of the marriage contract. In addition, according to court decisions in some states, the man is entitled to the return of the engagement ring on the theory that it was a gift, contingent (dependent) upon the marriage taking place. If the marriage does not occur, the gift is not made. In some states, courts have allowed the woman to keep the ring if the man has broken the engagement.

While the couple is engaged, the marriage contract is in its executory stage. It is executed when the wedding occurs.

agreement of the parties. Other duties, in general, flow from the rights that are discussed above. If one spouse has the right to receive support, for example, the other spouse has the duty to provide it.

All people, married or not, must refrain from causing bodily harm to those they live with. In addition, both parents, whether married or not, have the duty to support their children.

Written Agreements

Sometimes, before they marry, people enter into written agreements concerning the real and personal property they will own during their marriage. They set forth in the agreement how their property interests will be disposed of in the event the marriage comes to an end, either by death or divorce. A **premarital agreement**, also called an *antenuptial* or *prenuptial agreement*, is an agreement between prospective spouses made in contemplation of marriage, to be effective upon marriage. In making a premarital agreement, the parties must be honest in the statements they make to each other. In addition, they must fully disclose their assets to each other. In some states, each must be represented by a different attorney.

A premarital agreement must be in writing and signed by both parties. Although laws vary from state to state, in general, parties to a premarital agreement may contract with respect to:

- the rights and obligations of each of the parties in any of the property of either or both of them, wherever acquired,
- the right to buy, sell, manage, and control real and personal property;
- the disposition of real and personal property upon separation, divorce, death, or some other event;
- the change or elimination of support;
- the making of a will; and
- ownership of and benefits from life insurance policies.

YOU
And The
LAW

What are your state's laws regarding premarital agreements?

► Second or third marriages involve many decisions and responsibilities. How would a premarital agreement help a couple resolve some of these details?



People who have children from other relationships often enter into prenuptial agreements. Such agreements help to prevent their children from being disinherited and having all their property pass to their new spouse upon death. Figure 25-1 below shows a sample premarital agreement.

Written agreements concerning property are important for people who live together without being married. In such living arrangements, people do not receive the protection that is given automatically to married people. Written agreements can address such issues as financial responsibility, property ownership, and life insurance benefits, in addition to those previously mentioned.

Premarital Agreement

Agreement made this 10th day of June, 19— between Joseph Taft of 1273 Holly Lane, Amesburgh, PA, and Susan Jacobs, of 299 Oak Lane, Amesburgh, PA.

Whereas a marriage is shortly to be solemnized between the parties hereto:

Whereas Susan Jacobs now owns a large amount of property and expects to acquire from time to time additional property under a trust established by her uncle, Henry Jacobs;

Whereas Joseph Taft has agreed that all of the property now or in the future owned by Susan Jacobs, or her estate, shall be free of all rights that he might acquire by reason of his marriage to her. It is agreed as follows:

1. Susan Jacobs shall have full right and authority, in all respects the same as she would have if unmarried, to use, enjoy, manage, convey, mortgage, and dispose of all of her present and future property and estate, of every kind and character, including the right and power to dispose of same by last will and testament.

2. Joseph Taft releases to Susan Jacobs, her heirs, legal representatives, and assigns, every right, claim and estate that he might have in respect to said property by reason of his marriage to Susan Jacobs.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Joseph Taft
Susan Jacobs

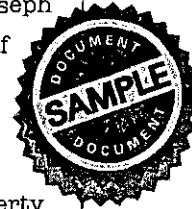


Figure 25-1 Married people have certain economic rights and duties that a premarital agreement may exclude. When does a premarital agreement become effective?

Marriage Formalities

Each state has its own laws regulating marriage. Eight states have adopted the Uniform Marriage and Divorce Act, making their laws uniform. They are Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. The rest of the states have marriage laws that differ somewhat from each other. Figure 25-2 on page 369 summarizes marriage laws in the different states.

Age Requirements

Under common law, a male had the capacity (legal ability) to marry at age 14 and a female at age 12. These ages were called the *ages of consent* to marry. The marriage of a person under age 7 was absolutely void. If such a marriage took place, it would have no legal effect whatever, and anyone could raise the issue before a court. A marriage of a person over age 7 but under the age of consent (14 for a male, 12 for a female) was voidable. The marriage was valid unless a party to the marriage took some kind of court action to **annul** the marriage, or make it void. No one else could attack the validity of the marriage.

Modern statutes in the United States have established ages at which young people can marry if one of their parents gives permission. In some states, the permission of the court as well as a parent or guardian is required if the person is below a certain age.

Example 2. Joseph Bontorno, who was 25, wanted to marry Joyce Bell, who was 13 years old. Under Massachusetts law, the couple could marry only if one of Bell's parents and the probate court judge gave permission. If her parents or the judge denied permission, the couple would have to wait to marry until Bell was 18.

Before 1971 the laws of many states provided that persons could marry without a parent's consent at the age of 18 if female and 21 if male. In 1971 the Twenty-Sixth Amendment to the U.S. Constitution allowed persons to vote at age 18. That change in the law caused most states to change their marriage laws, allowing both males and females to marry at age 18 without their parents' consent.

The custom of treating males and females differently with respect to age is coming to an end. For example, Utah had a law holding that males under 21 and females under 18 were minors so far as being entitled to receive support from their parents. In 1975 the U.S. Supreme Court declared the statute unconstitutional because it treated males and females of the same age differently.

Common-Law Marriage

In England, under the common law, no formal ceremony was necessary to bind the parties in wedlock. All that was required was that the parties agree between themselves that they were married. No witnesses were required, and the agreement could be either oral or in writing. This informal type of marriage requiring no ceremony, called a **common-law marriage**, came to America with the early pioneers. Some states, including Massachusetts, enacted strict marriage laws as early as the seventeenth century. Other states followed over the next century.

YOU
And The
LAW

Does your state
recognize common-
law marriage?

LAW & Ethics

Moon Lee agrees to marry Kien Lu so she can immigrate to the United States. What are the ethical issues?

In answer to Legal Issue 4, today all but 13 states in the United States consider the common-law marriage to be contrary to public policy and do not allow it. The states that still recognize this type of marriage are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas, as well as the District of Columbia.

With a few exceptions, the states that recognize the common-law marriage require the following elements:

- The parties must agree, by words in the present tense, that they are husband and wife.
- The parties must cohabit—that is, they must dwell together (time period varies among the states)—in the same place as husband and wife.
- The parties must hold themselves out to the world as being husband and wife so that the public recognizes their marital status. This may be done by such actions as introducing the other person as one's spouse, and by sharing a joint bank account with the other person.

A few states do not regard the last two elements as essential to a valid common-law marriage. A common-law marriage, properly entered into in a state that recognizes it, will be regarded as valid in any other state.

Example 3. George Desjardins and Jacqueline Kelly say to each other that they are married. They cohabit in the state of Rhode Island and introduce themselves as husband and wife to people they meet. They do not have a marriage ceremony. Later they move to Massachusetts, which does not recognize the common-law marriage. That state would regard them as being legally married because the Rhode Island law, which allows the common-law marriage, was properly followed.

A divorce is required to end a common-law marriage. George and Jacqueline, in Example 3, would have to go through a formal divorce procedure should they decide to end their common-law marriage.

▼To get married, a couple will have to follow certain steps. What do these usually include?



Ceremonial Marriage

From early colonial times, a ceremony, officiated by a cleric or magistrate, was required to become married. Today, a majority of the states require a ceremony to **solemnize** marriage. No particular form of marriage ceremony is required, as long as the parties declare in the presence of a person who has authority by state law to solemnize marriages that they take each other as husband and wife. Some courts have held that a marriage that is properly solemnized is valid even though a marriage license was not obtained before the ceremony.

Marriage License

It is generally necessary to obtain a marriage license to be married in a ceremonial marriage. A **marriage license** is a certificate issued by a governmental office giving permission to two people to marry. Once issued, the license becomes effective after the waiting period required by state law and expires (if the couple does not marry) at the end of a prescribed time period.

To obtain a marriage license, the couple must fill out a marriage application. Under the Uniform Marriage and Divorce Act, the application must contain the following:

- name, sex, occupation, address, social security number, and date and place of birth of each party to the proposed marriage;
- name of former spouse, if any, and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;
- name and address of the parents or guardian of each party;
- whether the parties are related and, if so, their relationship; and
- name and date of birth of any child of which either party is a parent, born before the making of the application, unless parental rights and the parent/child relationship with respect to the child have been terminated.

A marriage license will be issued when the fee is paid and the couple furnishes satisfactory proof of age and proof that the marriage is not prohibited.

Waiting Period

Under common law, in order to give persons who might oppose a marriage the opportunity to object, notices of a forthcoming marriage were required to be published and posted. These notices were called *marriage banns*. Instead of the requirements that marriage banns be published, most states today have a waiting period before a license is issued. This period varies from 24 hours to 7 days, depending on the state. Recently, some states have done away with the waiting period altogether.

There are several reasons for the waiting-period requirement. The man and woman may need time to reconsider their decision to marry. In addition, a waiting period may allow evidence of fraud, force, or jest to be uncovered. As with marriage banns, it gives interested parties, such as the parents of the prospective marriage partners, the opportunity to object on other grounds.



Most Jewish weddings are held under a special canopy. At the end of the ceremony, a breakable object is placed on the floor. The groom breaks the object with his foot, symbolizing the destruction of the ancient Jewish Temple and reminding the couple that a marriage can also break.



▲ Some states require a blood test and a physical examination before issuing a marriage license. If a venereal disease in a communicable state is found, the license will not be issued. Do you think there are any other reasons that a marriage license should not be issued?

Blood Test/Physical Examination

Some states require a blood test or physical examination before a marriage license can be issued. These tests may screen prospective spouses for such conditions as AIDS, venereal disease, sickle cell anemia, rubella (German measles), and infectious tuberculosis. The type of test and the particular condition tested for varies. (See Figure 25-2.) Under a typical state statute, if a venereal disease, such as syphilis, is found and is in the noncommunicable stage, both parties are informed of the nature of the disease and the possibilities of transmitting such infection to the marital partner or to their children. If syphilis is found and is in the communicable stage, a marriage license is not issued.

In a state that tests for rubella, for example, the test must certify that the female (if within childbearing age) is immune to rubella infection. If the female refuses the test, the doctor must advise her of the risks of contracting rubella during childbearing years and of the immunizing vaccine available to eliminate or protect against such risks.

Example 4. William Nolan and Lynn Bryant decided to get married. They went to the town clerk's office in their town and filled out an application for a marriage license. They were told that they would have to wait at least three days before a marriage license could be issued and that they would have to have their blood tested.

Proxy Marriage

In a **proxy marriage**, one or both of the parties to the marriage are absent and are represented by an agent who acts on their behalf. Such a marriage, which is allowed in some states but not others, requires a ceremony. The Uniform Marriage and Divorce Act provides that a party unable to be present at the solemnization of his or her marriage may authorize in writing a third person to act as proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, he or she may solemnize the marriage by proxy.

Use of Maiden Name

Under common law, people may use any name as long as they do not do so to commit fraud. A wife's use of her husband's surname (last name) came about through custom. It was not required by common law. Many states allow women to continue to use their maiden name or hyphenate it with their husband's surname even after they are married. Some states, however, take the position that a married woman takes her husband's surname as a matter of law.

Prohibited Marriages

Certain types of marriages are illegal from the start because they are opposed to public policy. Among these are marriages between certain relatives, marriages by one party to two or more other people, and, in most states, marriages between persons of the same sex.

Marriage Between Relatives

Statutes in many states prohibit marriage between certain persons who are related by **consanguinity** (blood) or **affinity** (marriage). In these states, such marriages are void. Some states base their law on the common law, which made it illegal to marry certain relatives. Figure 25-3 below shows which relatives it was illegal to marry under the common law.

Consanguinity	Affinity
Mother or Father	Stepmother or Stepfather
Grandmother or Grandfather	Step-grandmother or Step-grandfather
Daughter or Son	Stepdaughter or Stepson
Granddaughter or Grandson	Step-granddaughter or Step-grandson
Aunt or Uncle	Mother-in-law or Father-in-law
Sister or Brother	Grandmother-in-law or Grandfather-in-law
Niece or Nephew	Daughter-in-law or Son-in-law
	Granddaughter-in-law or Grandson-in-law

Figure 25-3 Marriage to these relatives was prohibited by common law. Many states have changed this law. How is being related by consanguinity different from being related by affinity?

Under the Uniform Marriage and Divorce Act, the following marriages are prohibited:

- Marriage between an ancestor (parent or grandparent) and a descendant (child or grandchild), or between a brother and sister, whether the relationship is by the half or the whole blood, or by adoption; and
- Marriage between an uncle and a niece or between an aunt and nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures.

Reducing Legal Risks

Verify that the person performing your marriage ceremony is authorized to do so. Keep current addresses and telephone numbers of witnesses to the ceremony. Record your marriage license in the county where the ceremony is performed. Where applicable, change identification and accounts.

If a person did marry any of these relatives in violation of the law, the marriage would be void and any children born of the union would be illegitimate. Under the common law, it would be illegal to marry a person related by affinity even after the relationship ends, as by death or divorce.

Example 5. Frank and Susan Sargent, whose marriage lasted for six months, were divorced. Susan later fell in love with Frank's father, a widower. In a state that follows the common-law rule, they could not marry.

The marriage of first cousins is allowed under common law. Many states, however, prohibit marriages between first cousins. Almost half the states have no prohibition against marriage of persons related by affinity.

Bigamy and Polygamy

A marriage that is contracted while either party is already married is void in all states unless the prior marriage is ended by annulment. **Bigamy** is the act of having two spouses at the same time. **Polygamy** is the act of having more than two spouses at the same time. Any children born of a man and woman whose marriage is void are illegitimate. In answer to Legal Issue 5, both bigamy and polygamy are crimes under the laws of every state in this country.

In some states, if one of the parties entered into the marriage in good faith without knowing that the other party was already married, the second marriage may become valid on the death or divorce of the partner to the first marriage.

Chapter

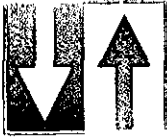
25 Review



Summary

Carefully read the summary below before completing the chapter review.

1. All the elements of a contract are present when a couple becomes engaged to marry.
2. A premarital agreement must be in writing and signed by both parties. Generally, parties to a premarital agreement may contract with respect to real and personal property, support, wills, and life insurance.
3. State statutes establish the age at which people may marry with or without consent. In some states, the permission of the court as well as that of a parent is required if the person is below a certain age.
4. Only 13 states and the District of Columbia recognize common-law marriage. In those jurisdictions, a common-law marriage occurs when the parties: (a) agree, by words in the present tense, that they are husband and wife; (b) cohabit; and (c) hold themselves out as being husband and wife.
5. Most states require a marriage to be solemnized. No particular form of ceremony is required.



Cases in Point

For each of the following cases, give your decision and state a legal principle that applies:

1. Paul Sessions asks Ellen Throckmorton to marry him and places a diamond ring on her finger. Throckmorton accepts. Three months later, Throckmorton cancels the engagement. Sessions threatens to sue for breach of contract. May he do so?
2. James and Mary lived together in Vermont as husband and wife for 20 years. They agreed with each other that they were husband and wife and presented themselves to others as being married. They had no marriage ceremony. When James died without leaving a will, Mary claimed that she should inherit because she was his common-law wife. Do you agree?
3. Shirlee Spencer wants to marry her uncle, Henry. Will their marriage be valid? What will be the legal status of any children of the marriage?
4. William Lyons, 22, wants to marry Alice Galo, 14. They both live in Massachusetts. Galo's parents refuse to give permission for the marriage. Can Lyons and Galo legally marry? (See Figure 25-2.)
5. Five years after James and Josephine marry, Josephine discovers that James never divorced his first wife, Wanda, who is still living. Is the marriage between James and Josephine valid?



Cases to Judge

In each case that follows, you be the judge.

1. Charles Gill gave Dianne Shively an engagement ring, worth approximately \$3,600, when they became engaged. Less than a month later, Shively told Gill that she was not ready for marriage. Is Gill entitled to the return of the ring? Why or why not? *Gill v. Shively*, 330 So.2d 415 (Florida)
2. Two months after divorcing Bobby Gunter, Gloria Gunter married Edward Peters, whom she thought was divorced. She later learned that Peters was still married and had deceived her into thinking he was divorced. What legal wrong did Peters commit? What is the legal effect of Gunter's marriage to Peters? *Gunter v. Gunter*, 418 N.E.2d 149 (Illinois)