

Common Law Marriage— Fact and Fiction

John D. Schuetze

[This article was published in volume 106/2 (Spring 2009)
of the *Wisconsin Lutheran Quarterly*]

What does it take to have a common law marriage? The answers to this question often vary greatly.

Some might say all it takes is "shacking up." When a guy moves in with his girlfriend, they have a common law marriage. Others will add a time factor to the definition. For some reason seven years¹ is often suggested as the necessary amount of time. If a man and woman live together seven years they have a common law marriage.

Yet both of these answers reveal much confusion. They fail to take into account that in those areas that do allow for common law marriage, the key factor is still public, present consent.²

Before we proceed it might be good to take a look at the term "common law marriage" and consider where that term came from, what it originally meant, and what it means today. Originally the term "common law marriage" or "informal marriage" came from the legal recognition that marriage is a common right of society and is not something that originated with a law of government. While the government in particular and society in general have the right to regulate marriage, neither confers the right to marry. That is a common right or law. In its *Meister v. Moore*, (96 US 76, 1877) decision, the United States Supreme Court ruled, "As before remarked, the statutes are held merely directory; because marriage is a thing of common right."³

As time went on, the term "common law marriage" or "informal marriage" was used in contrast to a "ceremonial" or "formal marriage." Writing in 1922, Otto Erwin Koegel offered this definition: "Common law marriage may be defined as a marriage which does not depend on the validity of any religious or civil ceremony but is created by the consent of the parties."⁴ During the colonial period, most governments in America reflected the laws of England and did not recognize common law marriages.⁵ However, when the United States gained its independence, many of the states recognized the validity of this marital arrangement. Today it usually refers to couples who live together as husband and wife but have not had a member of the clergy or justice of the peace solemnize the marriage.

One misconception that many people have about common law marriage is that it is formed by cohabitation and not consent. But as we pointed out above, the key is still the present, public consent of the man and woman to be husband and wife. In Canada, all of the provinces allow for common law marriage in some form, though the specific regulations vary from province to province.⁶ However, most states in the United

¹ It is unclear why the number "seven" is so often associated with common law marriage in popular thought. None of the states that presently have laws allowing for common law marriage stipulate any time period for living together. The author did find "seven years" in the common law marriage regulations for the Ho-Chunk Nation, a Native American tribe in Wisconsin. But this seems to reflect a popular misconception rather than an historical or legal precedent. The Ho-Chunk Nation Code, Title 14, Section 10, Paragraph 10 reads, "Ho-Chunk Nation law recognizes marital cohabitation between a male and female who have resided together for at least seven (7) years or more and shall enjoy the same legal treatment as partners who formalized their marital relationship in Section 9." Source: http://www.narf.org/nill/Codes/hochunkcode/4HCC10_Marriage.pdf

² Over the past several centuries, the laws have distinguished between present consent (*per verba de praesenti*) and a promise to marry in the future (*per verba de futuro*). Only consent *per verba de praesenti* established a valid marriage. See Otto Erwin Koegel, *Common Law Marriage and Its Establishment in the United States*, p. 88.

³ <http://bulk.resource.org/courts.gov/c/US/96/96.US.76.html>

⁴ Koegel, *Common Law Marriage and Its Development in the United States*, p. 7.

⁵ Koegel states, "In none of the colonies was 'self-marriage' (incorrectly called common law marriage) in which the parties took each other for husband and wife without the presence of a magistrate or clergyman sanctioned by law" (p. 54, 55).

⁶ For example, in Quebec common law marriage relationships would fall under "free unions" rather than "marriage unions." One difference is that the partner in a "free union" is not treated as a spouse for inheritance purposes. See <http://www.immigration-quebec.gouv.qc.ca/en/choose-quebec/daily-life/family/marriage.html>. In Ontario, the law states, "A common-law marriage is deemed

States do not recognize common law marriage. In those states that do, there are three basic requirements: 1) Consent—the man and woman must be free from impediments to marriage (age factor, presently married to another, etc.) and must consent to be husband and wife; 2) Cohabitation—they must live together as husband and wife. Unlike some provincial laws in Canada, none of the state laws in the United States set forth a time requirement; 3) Reputation—they must hold themselves out to the public as husband and wife. Examples would be referring to each other as "husband" and "wife" in public, filing a tax return with a married and not single status, and listing each other as "husband" or "wife" on an insurance policy. It is clear that the key element here is consent. Without the consent to be husband and wife, the couple would not apply the third point (reputation), but they might apply the second (cohabitation). The fact is that millions of couples cohabit today without consent or reputation. Even if they live in a state that recognizes common law marriage, they are not married. Present, public consent, not cohabitation, is the deciding factor.

One argument that is often made in favor of cohabitation and common law marriage is that the state has no right to regulate private matters. Therefore couples will claim that they don't need a piece of paper to prove they love each other. Such statements reveal a lack of understanding about what constitutes marriage—biblically, legally, and socially. Historically marriage has been established by the public consent of the man and woman. The Lutheran church has often quoted the phrase, *Consensus tacit matrimoniam*. This phrase dates back to the Roman era and has had a strong influence on Western culture. During the last two millennia, both the church and the state have quoted this phrase as they defined the essence of marriage. Yet both the church and the state recognized that such consent needed to be established publicly. The way in which the consent was made public varied by time, country, and culture. However, since marriage was recognized as a public, social arrangement between a man and a woman, it was understood that in some way the contracting parties had to let society—family, friends, neighbors, and society in general—know that they were now husband and wife.

It was because of the confusion caused by clandestine marriages that both the church and the state sought to regulate the establishment of marriage. An example of the church seeking to regulate marriage would be the "Decree on the Reformation of Marriage" (Council of Trent, 24th Session). While the council recognized "that clandestine marriages, made with the free consent of the contracting parties, are valid and true marriages," it also stated that

for the future, before a marriage is contracted, the proper parish priest of the contracting parties shall three times announce publicly in the Church, during the solemnization of mass, on three continuous festival days, between whom marriage is to be celebrated; after which publication of banns, if there be no lawful impediment opposed, the marriage shall be proceeded with in the face of the church; where the parish priest, after having interrogated the man and the woman, and heard their mutual consent, shall either say, "I join you together in matrimony, in the name of the Father, and of the Son, and of the Holy Ghost;" or, he shall use other words, according to the received rite of each province.⁷

This matter of publishing the banns as a way to establish the public nature of the marriage consent was also encouraged and practiced in the Lutheran church well into the 20th century. John H. C. Fritz notes,

Although the publication of the banns previous to the celebration of marriage is not of divine right, it is a very commendable custom, for a twofold purpose, 1) of publicly announcing the intended consummation of marriage and giving such as may be cognizant of an impediment an opportunity of reporting it in proper time, and 2) that the congregation may unite in prayer for the betrothed.⁸

Because of the legal challenges over inheritance and child legitimacy, the government was also faced with the task of regulating marriage. A prominent example from history would be Hardwicke's Marriage Act,

to exist if the member and eligible spouse have lived together in a conjugal relationship continuously 1) for a period of not less than three years or 2) for a shorter period if the relationship is of some permanence and there are natural or legally adopted children of the common-law marriage." See http://www.omers.com/Custom/adminmanual/admin1611_definitions.htm.

⁷ Council of Trent, p. 197.

⁸ *Pastoral Theology*, St. Louis, MO: Concordia Publishing House, 1931, p. 173.

passed in England in 1753. Reacting to a specific case where a woman claimed inheritance based on a clandestine marriage, the act stipulated that

All marriage solemnized in any other place than a church or public chapel or that shall be solemnized without the publication of banns or license of marriage from a person having authority to grant the same, first had and obtained, shall be null and void to all intents and purposes whatsoever.⁹

Once again we see that the main purpose of the act was to reduce the possibility of clandestine marriages where the consent of the party was not established publicly in society.

To help regulate the public establishment of marriage, both the church and the state have enacted over time one or more of the following: a formal order or ceremony for marriage where the man and woman give consent *per verba de praesenti*, publishing the banns, a marriage license (to perform a marriage) and a marriage certificate (proof of marriage), entering the marriage in official records, requiring a proper civil or ecclesiastical authority to solemnize a marriage, and requiring witnesses at the marriage.

Public consent is still the issue that is at the heart of civil laws that allow for common law marriage. The way in which the government seeks to establish consent in cases of common law marriage will vary. According to the Canada Revenue Agency,

A common-law partner applies to a person with whom you are living in a conjugal relationship, and to whom at least *one* of the following situations applies. He or she:

- a) has been living with you in a conjugal relationship for at least 12 continuous months;
- b) is the parent of your child by birth or adoption; or
- c) has custody and control of your child (or had custody and control immediately before the child turned 19 years of age) and your child is wholly dependent on that person for support.¹⁰

In the United States there are only 15 states¹¹ plus the District of Columbia that have laws that allow for common law marriage in some way. Attorneys point out that there is more to a common law marriage than cohabitation. In order to have a legal common law marriage, a couple will have to do all of the following:

- be a resident of a state that allows common law marriage
- live together for a significant period of time (not defined in any state)
- hold themselves out as a married couple—typically this means using the same last name, referring to the other as "my husband" or "my wife," and filing a joint tax return, and
- intend to be married.¹²

As these requirements illustrate, it is actually more difficult to establish public consent through common law marriage than it is through traditional marriage. In both cases the government sees public consent as the deciding factor. Does the couple want to be married? If so, are there subsequent actions consistent with such consent (cohabitation, reputation)?

What can we learn from this brief look at common law marriage? First of all, we have to realize that common law marriage is nothing new. In the past, some have felt pressured into it by economics (prohibitive cost of a church wedding or legal wedding), circumstances (no justice of the peace or member of the clergy available), or pursued it as a matter of preference.

Secondly, the government has a God-given right to regulate marriage. God gave man and woman the "right"¹³ to marry when he ordained marriage at creation, but he also gave the government the authority to

⁹ http://www.umich.edu/~ece/student_projects/wedding_bride/act1753.html

¹⁰ <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/prsnl-nf/mrtl-eng.html>

¹¹ These include Alabama, Colorado, District of Columbia, Georgia (if created before 1/1/97), Idaho (if created before 1/1/96), Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only), Ohio (if created before 10/10/91), Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

¹² Ihara, Toni Lynne, Ralph E. Warner, and Frederick Hertz, *Living Together: A Legal Guide for Unmarried Couples*, Berkeley, CA: Nolo Publishing, 2001, p. 2/5.

regulate it. As Christians who are not only members of the church but also of the state, we will seek to obey God and man, provided civil laws do not mandate disobedience to God's laws. Civil marriage laws are designed to protect the institution of marriage as well as the citizens of a country from fraud and abuse.

Thirdly, when the government chooses to allow for common law marriage, we cannot say that such marriages are invalid. However, we do need to point out to cohabitating couples that public consent is still a key factor not only in a God-pleasing marriage but in a legal marriage as well. Unfortunately, such consent—and the lifelong commitment that goes with it—are often lacking in such relationships.¹⁴

¹³ In biblical terms we would call marriage a "blessing" or "privilege" rather than a "right." The author chose to use the term "right" since it reflects the fact that the ability and authority to marry comes from God and not the state.

¹⁴ In an article entitled, "I Do, I Do—Maybe," *Newsweek* (Nov 2, 1998) states, "According to University of Wisconsin sociologist Larry Bumpass, the average live-in relationship lasts only about 18 months."