

DIVORCE DESTROYS THE COMMUNITY: AN EXAMINATION OF THE “TEXAS METHOD” COMMUNITY PROPERTY PRINCIPLES UPON DIVORCE AND ITS EFFECTS ON INFORMAL MARRIAGE

by Avery Rios*

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* J.D. Candidate, Texas Tech University School of Law, 2021.

I. INTRODUCTION

The Fifth Amendment Due Process Clause of the United States Constitution reflects the fundamental nature of property rights.¹ The rights surrounding property—to acquire, manage, use, own, and dispose of it—may be one of the most original of rights in democratic societies today.² The Constitutional protections of property, applicable to the states through the Fourteenth Amendment, portray the notion that “property is what grounds other rights and enables the individual to act as a free agent.”³ The late Justice Scalia also characterized economic rights as liberties, and “entitlements of individuals against the majority. When they are eliminated, no matter how desirable that elimination may be, liberty has been reduced.”⁴

John Locke, a historically influential scholar known by most and ranked by Thomas Jefferson as the most important philosopher on liberty, inscribed the bedrock principles of liberty in his late 1600 treatises.⁵ Locke declared that liberty and private property are essentially mutually inclusive, believing that securing “the right to life, liberty and property” is the *purpose* of government.⁶ “[E]very Man has a Property in his own Person. This no Body has any Right to but himself. The Labour [*sic.*] of his Body, and the Work of his Hands, we may say, are properly his.”⁷

Needless to say, property rights have been long instilled in the threads of our system of federalism.⁸ Infused alongside these property principles, however, are marital interests.⁹ As issues concerning the two legal topics often coincide, community property rights of common law spouses is an area of law that is unique to Texas.¹⁰

1. U.S. CONST. amend. V.

2. See Karen S. Gerstner, *The Killing of Community Property*, 11 EST. PLAN. & COMMUNITY PROP. L.J. 1, 7–8 (2018).

3. See Rhonda A. Howard-Hassmann, *Reconsidering the Right to Own Property*, 12 J. HUM. RTS. 180, 183 (2013).

4. Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* 167 (Christopher J. Scalia et al. eds., 2017).

5. Jim Powell, *John Locke: Natural Rights to Life, Liberty, and Property*, FOUND. FOR ECON. EDUC. (Aug. 1, 1996), https://www.fee.org/the_freeman/detail/john-locke-natural-rights-to-life-liberty-and-property [perma.cc/73HB-XEWN].

6. See *id.*; Gerstner, *supra* note 2, at 3.

7. See Powell, *supra* note 5.

8. U.S. CONST. amend. V; HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 122 (2d ed. 1987) [hereinafter CLARK].

9. See Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C.D.L.R. 1999, 2012 (2017) (discussing, *inter alia*, the history and importance of matrimony).

10. The nine community property states include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See William Perez, *Community Property Laws by States*, THE BALANCE (June 12, 2018), <https://www.thebalance.com/community-property-states-3193432> [perma.cc/8B9V-G9QT]; *Id.* (Alaska is an opt-in jurisdiction. States recognizing common law marriage include Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, New Hampshire (inheritance purposes only), Oklahoma, Pennsylvania (if entered into before Jan. 1, 2005), Rhode Island, and South Carolina); see *Common-Law Marriage*, National Conference of State Legislatures (Apr. 19, 2011),

With great pressure to follow suit, Texas has nonetheless remained the only community property state that still recognizes common law marriage.¹¹ Family law scholar, Homer H. Clark, Jr., once warned,

Without [common law marriage] there would be more injustice and suffering in the world than there is with it. This is particularly true among those social and economic classes who have not accepted middle class standards of marriage. Certainly, American marriage law should tolerate this much cultural diversity.¹²

One commonly cited burden of states' reluctance to recognize common law marriage is the failure to protect vulnerable groups of the population.¹³ Göran Lind, author of *Common Law Marriage* and general manager of JURA Law Institute, explains that "[o]ne of the strongest arguments for common law marriage is that it gives the more vulnerable party in the relationship a protection during the cohabitation as well as upon its dissolution by separation or death."¹⁴ Additionally, Lind notes that the "vulnerable groups" are not necessarily limited to minority classes, but that "[c]ommon law marriage offers, regardless of ethnic association, an essential protection for economically, educationally, and socially vulnerable groups who may not formalize their relationships in a wedding ceremony."¹⁵ Thus, the policies underlying common law marriage protect a vast portion of the population.¹⁶ Notably, as is discussed in Part IV, the millennial generation has transformed many of the traditionally labeled "groups," expanding the historical definitions past their seemingly fixed boundaries.¹⁷

II. OVERVIEW

Part I examines the history of property systems in the United States, targeting the two property jurisdictions in modern law: community property and common law.¹⁸ Moreover, it considers the purposes and policies behind

<http://www.ncsl.org/issues-research/human-services/common-law-marriage.aspx> [perma.cc/C8VN-HJWG]; see also Anita Bernstein, *Subverting the Marriage Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J.L. & POL'Y 79, 109–11 (2007) (providing an overview of states that still recognize the doctrine and the application of the doctrine in such states).

11. See *supra* text accompanying note 10.

12. CLARK, *supra* note 8, at 122.

13. See Sarah Primrose, *The Decline of Common Law Marriage & the Unrecognized Cultural Effect*, 34 WHITTIER L. REV. 187, 207 (2013).

14. See GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 961, 1060 (2008).

15. See *id.* at 961.

16. See Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555 (2007).

17. See *infra* Part IV.

18. See *infra* Part I.

the systems, noting the distinctive—facially distinctive, in certain contexts—characteristics of the community property system.¹⁹

Part II focuses on community property in Texas.²⁰ By describing the specific operation of the system in the state, Part II explores the “Texas method” of property division in divorce court; specifically, the “just and right” standard, and the arguments regarding this method.²¹

Part III analyzes the history common issues arising in the courts in regard to the status of a couple’s relationship.²² By focusing on common law marriage, Part III discusses the difficulties in establishing such a relationship and the specific characterizations attributable to Texas marital law.²³

Part IV navigates the trends of the millennial generation, in comparison to historical trends, by examining their perspectives on marriage, societal norms, and evolvement towards pre-marital cohabitation.²⁴

Part V assesses the common arguments surrounding the recognition of common law marriage, both arguments for and against the doctrine.²⁵ Moreover, Part V discusses implications placed on common law spouses that reside in Texas, and opens the question as to its effect on millennials, who cohabit prior to marriage much more frequently than prior generations.²⁶

Finally, the conclusion in Part VI highlights the key points of the overall discussion.²⁷ Refraining from posing a bright-line, general solution, Part VI concedes that the legislative body has incrementally acknowledged and respected societal changes one step at a time.²⁸

III. PROPERTY SYSTEMS IN THE UNITED STATES

Governed by state legislatures, property systems are categorized as common law or community property jurisdictions.²⁹ With only nine states following some form of community property system, the majority and remaining forty-one states follow a common law—or “separate property”—system.³⁰

19. See *infra* Sections I.B; II.C.

20. See *infra* Part II (The “Texas method” is a term created for purposes of this comment, referring to Texas, as a community property state, using different standards of property division in marital property upon divorce versus in probate or estate proceedings).

21. See *infra* Section II.C.

22. See *infra* Part III.

23. See *infra* Sections III.B, C.

24. See *infra* Part IV.

25. See *infra* Part V.

26. See *infra* Part V.

27. See *infra* Part VI.

28. See *infra* Part VI.

29. See JANET L. RICHARDS, *MASTERING FAMILY LAW*, Carolina Academic Press 63 (2009).

30. See Stefania Boscarolli, *Characterization of Separate Property Within the Community Property Systems of the United States and Italy: An Ideal Approach?*, 19 GONZ. J. INT’L L. 1, 1 (2015).

Although the adoption of certain doctrines has generated more similarities between the common law and community property states, they still differ in other particular aspects.³¹ Among many, one of the core differences between the systems is the extent of their application.³² Property principles in common law jurisdictions apply only at divorce; they do not offer any ownership interests to the untitled spouse in the other spouse's property during the marriage nor upon death.³³ Community property, in contrast, controls property interest and ownership during the marriage, at divorce, and upon death.³⁴ The following sections explore the history, operation, and major differences and similarities between the systems.³⁵

A. Common Law Property System

Historically, wives and children were understood as dependents to the provider husband; so much so that common law states enacted laws requiring sufficient assets be shared by the husband with the wife and children.³⁶ At common law, households were run primarily by the husband, who owned nearly all assets collected during a marital relationship.³⁷ In large part, this was because husbands performed most of the labor outside of the home that generated those assets.³⁸ Accordingly, the wives did not collect any assets from the marriage.³⁹ However, common law states adopted the doctrine of equitable distribution, giving courts the discretion and authority to divide marital assets equitably unequal; a divorced woman could now own property that she previously did not have any legal right to.⁴⁰

1. Equitable Distribution

Equitable distribution is a term of art for a means of marital property division and is employed in many jurisdictions today.⁴¹ As a general approach, equitable distribution “tends to compensate the economic hardship of one spouse after divorce that the recognition of half of the ownership of the other spouse’s assets would not protect.”⁴²

31. RICHARDS, *supra* note 29, at 64.

32. Brett R. Turner, Equitable Distribution of Property, 4th § 1:1 (Dec. 2019 Update) [hereinafter Turner].

33. *Id.*; see RICHARDS, *supra* note 29, at 64.

34. Turner, *supra* note 32, § 1:1.

35. See *infra* Sections I.A, B.

36. Gerstner, *supra* note 2, at 3–4.

37. See *id.* at 3.

38. See *id.*

39. See *id.*

40. See *id.*

41. Turner, *supra* note 32, § 1:1.

42. Boscarolli, *supra* note 30, at 1.

Prior to adopting equitable distribution, many common law states characterized property on the basis of title ownership.⁴³ The title doctrine provided that the breadwinner of the family—the spouse that brought in all the income, acquired all the assets, and whose name was written on the title—was the spouse entitled to all of those assets in property distribution upon divorce.⁴⁴ The implications of the title doctrine lead to great inequities, often leaving many spouses (primarily women) with slim to nothing after a divorce.⁴⁵ Thus, all common law states eventually adopted the doctrine of equitable distribution, which is currently the majority method of marital property distribution.⁴⁶

A creature of statute, equitable distribution assumes that each partner contributes to the marital estate to the extent that they choose; it symbolizes the idea that marriage is a voluntary partnership.⁴⁷ It gives courts the authority to divide marital property to what the court deems equitable, considering several statutory factors, and without regard to title.⁴⁸ Factors commonly considered encompass each spouse's contribution to decide their deserved rights in acquiring the marital estate.⁴⁹ Common ownership of property, however, is not a consequence of a marriage in common law jurisdictions.⁵⁰ Accordingly, courts have authority to award property to one partner that is legally owned by the other partner.⁵¹ In fact, the abundance of property to apportion in larger estates typically leads courts to arrive at a split closer to fifty-fifty, and to an uneven divide when dealing with a smaller property estate.⁵² Notedly, then, a court is not required to order a literal, equal split of marital property between spouses.⁵³

While the implications of property division under equitable distribution can be imbalanced, these consequences are not confined to common law states; certain community property jurisdictions employ seemingly the same standard when dividing the community estate upon divorce.⁵⁴

43. RICHARDS, *supra* note 29, at 63–64.

44. *Id.* at 63.

45. *Id.*

46. *Id.*

47. 41 A.L.R. 4th 481; *see also* In Re Marriage of Komnick, 417 N.E.2d 1305 (Ill. 1981) (stating marriage as a shared enterprise); In Re Marriage of Smith, 427 N.E.2d 1239 (Ill. 1981) (held the theory of marriage was an equal partnership); Gibbons v Gibbons, 415 A.2d 1174 (N.J. Super Ct. App. Div. 1980) *rev'd on other grounds*.

48. RICHARDS, *supra* note 29, at 64.

49. 41 A.L.R. 4th 481 § 2(a).

50. “Comparing Pennsylvania and Texas Law on Ownership and Marital Rights”, 18 Tex. W. L. R. 113, 115.

51. 41 A.L.R. 4th 481 § 1(a).

52. *See* Kelly McClure, *Top 10 Things Every Woman (and Her Husband) Should Know Before Filing for Divorce*, 49 ADVOTX 55, 56 (2009).

53. Darling v. Darling, 869 N.Y.S.2d 307 (Sup. Ct. 2008) (“neither spouse obtains an equitable interest in property held by the other merely because the property falls within the definition of marital property.”); 41 A.L.R. 4th 481 § 2(a).

54. *See infra* Section II.C.

B. Community Property System

The presence of the community property system in the United States is not without credit to many different ancient civilizations in various regions of the world.⁵⁵ Developed in continental Europe and incorporated to the new world by Spanish and French settlers, community property derives from the view that the wife's numerous rights and privileges were underserved in the common law.⁵⁶ "State community property law is more than a property regime; it is a commitment to the equality of husband and wife and reflects the real partnership inherent in a marital relationship."⁵⁷ The community, rather than the individual parties, enjoy the labors and proprietor benefits of either and both spouses.⁵⁸ Accordingly, community property exists by virtue of marriage.⁵⁹

The jurisdictional motives behind the transition into community property are difficult to single out.⁶⁰ However, the underpinnings of the system infer that equality between all contributors to a family is a primary basis.⁶¹ While somewhat unclear, one original reason for the deviation can be attributed to England's shortage of community principles within the family.⁶² England, though holding similar characteristics that led to France's transition to the system, lacked strong family community traditions beyond the conjugal family.⁶³ Charles Donahue, Harvard Law School Professor and scholar of common, canon, and Roman law traditions in medieval Europe, gives an insightful perspective on this plausible reason for the divergence of the systems: the "anthropological explanation."⁶⁴ In his article covering thirteenth century marital property in England and France, Professor Donahue expounds on the struggles of English lawyers in their attempt to "group these same French elements together and call it community."⁶⁵ Despite the elements shared between the countries, Donahue argues that "[the English] lacked at an early stage the social practice around which the legal concept could crystallize and at a slightly later stage the legal concept around

55. William Q. de Funiak & Michael J. Vaughn, *PRINCIPLES OF COMMUNITY PROPERTY* 15–16 (2d ed. 1971).

56. 39 TEX. JUR. 3d *Family Law* § 96; *Marks v. State*, 164 S.W.2d 690 (Tex. Crim. App. 1942). At common law, all earnings of the husband during marriage were his separate property and the wife had no interest in them.

57. AM. JUR. 2d *Community Property* § 2; *Boggs v. Boggs*, 520 U.S. 833 (1997). Income derived from a husband or wife's "efforts, labor, and industry" during a marriage is community property. *Wood v. Wood*, 124 Idaho 12, 855 P.2d 473 (Ct. App. 1993).

58. AM. JUR. 2d *Community Property* § 2.

59. Boscarolli, *supra* note 30.

60. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994).

61. *Id.* at 24.

62. *Id.*

63. *Id.*

64. Charles A. Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 86–87 (1979).

65. *Id.*

which the social practice could crystallize.”⁶⁶ Ultimately, Donahue avoids reading too far into the policies behind the rationales, but concludes that the community concept reigned for “the idea of partnership, . . . at least in the marital context.”⁶⁷

Notwithstanding the variety of proposed reasons for its adoption, community property nonetheless “reinforces a married spouse’s sense of participation in the marriage and ownership of the marital estate.”⁶⁸ It reflects the perception that “a ‘homemaker’ contributes as much to marriage as a ‘breadwinner. . . .’”⁶⁹ The concept of sharing is an appropriate label of community property principles; shared earnings, shared management, shared control, shared tax burdens and benefits, and even shared debt.⁷⁰ Moreover, a long line of history supports the notion of equality that underlies the community property system.⁷¹ “Equality:” in the sense that the system was created to rid the contention that women are mere secondary contributors to a family’s financial assets.⁷² Community property now protects both spouses despite the original purpose confined to protecting women.⁷³ By compensating for the labors in and outside the home and placing each spouse on a level playing field regarding property rights, community property acknowledges the offerings to the marital union by both spouses.⁷⁴

1. Characterization of Property

Despite some variation, several recurring themes appear in community property states.⁷⁵ At the least, all community jurisdictions designate property as either “community property” or “separate property.”⁷⁶ Community property is subject to distribution between the parties while separate property is not.⁷⁷ Separate property is generally classified as property owned or earned by a spouse prior to their marriage, received as a gift or inheritance, or as a beneficiary recipient of a will.⁷⁸ In contrast, property which is acquired or earned throughout the duration of a marriage is declared community property.⁷⁹ Property acquired through personal efforts of either spouse, such

66. *Id.*

67. *Id.* at 88.

68. Waggoner, *supra* note 60, at 25.

69. 41 A.L.R. 4th 481 § 2(a)

70. See Coggin v. Coggin, 738 S.W.2d 375, 377–78 (Tex. App.—Corpus Christi 1987, no writ).

71. *Id.*

72. See Harmon v. Dept. of Social and Health Services, 134 Wash. 2d 523, (1998).

73. 15B AM. JUR. 2d *Community Property* § 1.

74. *Id.* § 6.

75. Gerald B. Treacy, *Planning to Preserve the Advantages of Community Property*, 23 EST. PLAN. 24 (1996).

76. See *id.*

77. RICHARDS, *supra* note 29, at 64.

78. See TEX. FAM. CODE ANN. § 3.001 (Supp.).

79. *Id.*

as income or proceeds from the sale of community property, is also community property.⁸⁰ Whether the property in question is community, is at the mercy of both the source of the property and the marriage timeline.⁸¹ The following is a non-exclusive list of assets that, if acquired during the marriage, may constitute property of the community and be subject to division:

Pension Plans, 401(k)s, IRAs and other Retirement Plans; Deferred Compensation; Stock Options; Restricted Stocks and other equity; Bonuses; Commissions; Country Club memberships; Annuities; Life Insurance . . . ; Brokerage accounts . . . ; Bank Accounts . . . ; Professional Practices and licenses; Real Estate; Limited Partnerships; Cars, boats, etc.; Art, antiques; Tax refunds.⁸²

IV. THE “TEXAS METHOD”

Texas is one of nine community property states.⁸³ When the Germanic Gothic tribe conquered and inhabited Spain, they carried with them the community concept, codifying community of matrimonial gains as the general law governing Spain.⁸⁴ Spain then introduced community property into the New World, resulting in Texas’ adoption of the system.⁸⁵ With minor modifications, property law in Texas remains essentially the same as it did at its inception.⁸⁶ The Supreme Court of Texas has gone as far as stating that the Texas Legislature is prohibited from altering property classifications already outlined and set forth in the Texas Constitution.⁸⁷

Similarly the general concepts discussed above, Texas divides property of married persons into separate property and community property.⁸⁸ The Texas Family Code defines separate property in three ways.⁸⁹ First, it is any property “owned or claimed by the spouse before marriage[.]”⁹⁰ Thus, any property owned, income acquired, or revenue earned, that the spouse owned or claimed *prior* to marriage is considered the separate property of that spouse and is not subject to division upon divorce or death.⁹¹ Second, any property accumulated by a spouse, before, during, or after their marriage,

80. *See id.*

81. Boscarolli, *supra* note 30.

82. Jeff Landers, *Understanding How Assets Get Divided in Divorce*, FORBES (Apr. 12, 2011 10:53 a.m.).

83. TEX. CONST. art. XVI, § 15 interp. Commentary (West 2018).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Arnold v. Leonard*, 283 S.W. 799, 801–02 (Tex. 1925).

88. TEX. FAM. CODE ANN. §§ 3.001, 3.002 (Supp.).

89. *Id.* § 3.001(1) (Supp.).

90. *Id.*

91. *Id.*

which was obtained through gift, devise, or descent is separate property.⁹² For example, an inheritance, trust fund, or diamond ring passed down or gifted to a spouse is considered separate property.⁹³ Finally, Texas considers as separate property any judicial recovery or award for personal injuries that a spouse may suffer during marriage, with the exception of a loss of earning capacity.⁹⁴

Community property—as opposed to property separately owned by one spouse—is defined in the Texas Family Code as property “other than separate property, acquired by either spouse during marriage.”⁹⁵ As with most statutory definitions, community property in Texas is essentially that which does not fall into any category deeming it separate.⁹⁶ In addition to its legislative definition, the Texas Supreme Court has affirmatively defined community property as that “which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community.”⁹⁷

A. Presumption of Community

There is a rebuttable presumption that all property acquired during a marriage is community property.⁹⁸ Despite the many changes made in Texas marital law, this presumption has essentially remained the same since its establishment and is codified in section 3.001 of the Family Code.⁹⁹ By application, the presumption is that property owned by a spouse during marriage and upon its dissolution is community property, rebuttable only by a showing of clear and convincing evidence proving otherwise.¹⁰⁰ Further, the presumption is enforced against claimant spouses, parties claiming through the spouse, and under *Tarver v. Tarver*, against the world.¹⁰¹ Though criticized for the burdensome effect on the petitioners, the holding in *Tarver* demonstrates the adherence and function of the presumption.¹⁰²

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* § 3.002.

96. *Id.*

97. *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972).

98. 39 Aloysius A. Leopold, *Texas Practice: Marital Property and Homesteads* § 18.1 (1993 & Gerry W. Beyer, Supp. 2013) [hereinafter Leopold].

99. TEX. FAM. CODE ANN. § 3.001; see Featherston and Springer, *Marital Property Law in Texas: The Past, Present and Future*, 39 BAYLOR L. R. 861 (1987); see also Leopold, *supra* note 98, § 18.1.

100. TEX. FAM. CODE ANN. § 3.003; *Granger v. Granger*, 236 S.W.3d 852, 856 (Tex. App.—Tyler 2007, pet. denied); *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.—Corpus Christi 1999, no pet.) (evidence that large quantity monetary deposits to mistress’ bank by husband was sufficient to show that money constituted community property of the husband and wife. Further, that gifts from husband to mistress were not property of mistress but were instead gifts made in fraud of wife’s community interest, thus subject to distribution upon divorce.).

101. *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965); see also Leopold, *supra* note 98, § 18.1.

102. See *Tarver*, 394 S.W.2d at 786.

After nearly forty years of marriage, Arline partitioned for administration of the community estate she shared with her late ex-husband.¹⁰³ The descendants from the decedent's first marriage to Minnie Peeler intervened as petitioners.¹⁰⁴ They argued on the theory that the decedent held half of the property from his marriage to Arline as a trustee for the petitioners, as heirs of Peeler.¹⁰⁵ Nonetheless, the Court held that the petitioners had the burden to trace community funds, income, or assets, from the decedent's first marriage to Peeler, to his second marriage to Arline.¹⁰⁶ In effect, the *Tarver* case indicated that the presumption is enforceable against the world.¹⁰⁷

B. Caveats

Though labeled as one of two types, the characterization of property in community jurisdictions does not come without caveats.¹⁰⁸ The mischaracterization of separate property as community property is an error which will result in a reversal on appeal.¹⁰⁹ The nature and ownership of a given asset, however, may change throughout a marriage, calling for its re-characterization.¹¹⁰ Most obvious, spouses can agree to define certain assets in the way they choose, commonly through a prenuptial agreement or other legally enforceable document.¹¹¹ For instance, spouses may label property acquired before marriage as community and property acquired during a marriage as separate.¹¹² These agreements will supersede any governing laws or presumptions given they meet all formalities in a given jurisdiction.¹¹³

Another important consideration is title.¹¹⁴ Characterization of property in a community jurisdiction relies not on whose name is written on the title, but on when and how the property was received.¹¹⁵ Title merely indicates the spouse who, acting on behalf of both spouses, manages an asset.¹¹⁶ However, certain circumstances regarding title can lead to the re-characterization of a

103. *Id.* at 781.

104. *Id.* at 782.

105. *Id.* at 781.

106. *Id.* at 782.

107. *Id.* (finding that “[t]he plain wording of the statute creates a rebuttable presumption that all property possessed by a husband and wife when their marriage is dissolved is their community property and imposes the burden upon one asserting otherwise to prove the contrary by satisfactory evidence.”) “We hold that they did have the burden of tracing and that they failed to discharge it.”

108. Boscarolli, *supra* note 30.

109. See *Vallone v. Vallone*, 644 S.W.2d 455, 458–60 (Tex. 1982); *Rider v. Rider*, 887 S.W.2d 255, 261 (Tex. App.—Beaumont 1994, no writ); *Dahl v. Dahl*, 2009 WL 866199 (Tex. App.—Dallas 2009).

110. Landers, *supra* note 82.

111. Boscarolli, *supra* note 30.

112. *Id.*

113. *Id.*

114. Gerstner, *supra* note 2, at 4.

115. *Id.*; Judith E. Bryant, *Till Death Do Us Part?*, 77 TEX. B.J. 870, 871 (2014).

116. Bryant, *supra* note 115, at 871; Gerstner, *supra* note 2, at 4.

given asset.¹¹⁷ For example, property that a spouse may rightfully claim as separate can be transformed into community property if that spouse decides to modify its title, naming the other spouse as a co-owner of that property, whether an asset, inheritance, gift, devise, or the like.¹¹⁸ Similarly, a non-proprietor spouse may be entitled to an incremental increase in value of the separate property of their spouse.¹¹⁹ If that increase accrued during the marriage, that gain is treated as community property.¹²⁰

The most important caveat to community property in Texas, however, is the standard—or “Texas method”—used to divide property upon divorce.¹²¹ Married individuals in Texas enjoy virtually equal marital property rights regarding control, management, and possessory interests.¹²² Thus, it is sensible that the same would be true at divorce and gives reason for the equal division method used in other community property states.¹²³ Yet Texas does not follow this pattern¹²⁴ and is not held to quite the same obligation.¹²⁵ Despite the equality of rights inherent in the principles of community property, this equality of right does not necessarily mandate to marital property division in divorce court.¹²⁶

C. The “Just and Right” Standard

At least three community property states, California,¹²⁷ Louisiana,¹²⁸ and New Mexico,¹²⁹ more or less require community assets to literally be distributed equally, through the rule of equal division.¹³⁰ Under equal

117. Bryant, *supra* note 115, at 871; Gerstner, *supra* note 2, at 4.

118. Landers, *supra* note 82.

119. Suzanne Reynolds, *Increases in Separate Property and The Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 245 (1989).

120. *See id.*; Landers, *supra* note 82.

121. Landers, *supra* note 82.

122. *See id.*

123. Barbara Kazen, *Division of Property at the Time of Divorce*, 49 BAYLOR L. REV. 417, 417 (1997).

124. *See id.*

125. James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal*, 72 LA. L. REV. 21, 21–23 (2011); TEX. FAM. CODE ANN. § 7.001 (defining “just and right” division of community estate); *see* Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 365 (2016).

126. TEX. FAM. CODE ANN. § 7.001 (statute merely requires division to be “just and right”); *see also* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981) (upon divorce, community property need not be divided equally); Young v. Young, 609 S.W.2d 758, 760–61, 19 A.L.R.4th 232 (Tex. 1980) (division of community property need not be equal upon divorce, and court is permitted to consider fault in ordering the division); Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974) (dividing community property equitably does not necessarily mean equally.).

127. CAL. FAM. CODE ANN. § 2550. *But see* CAL. FAM. CODE ANN. § 2601 (equal distribution with the exception “[w]here economic circumstances warrant”).

128. LA. CIV. CODE ANN. art. 2336 (2011).

129. Ruggles v. Ruggles, 860 P.2d 182, 192 (N.M. 1993) (stating “the rule requiring equal division of the community property on divorce”).

130. *See* Carter, *supra* note 125, at 365.

division, courts do not have the same authority afforded in equitable division jurisdictions, and instead, are required to award each spouse their separately-owned property and one-half of the community.¹³¹ The reality in Texas, however, is that the division of the community estate in divorce court is not necessarily equal, nor is it usually equal.¹³² The catch is, courts' have the statutory authority to divide the community estate in a manner in which the courts deem "just and right."¹³³

By application, the just and right standard permits courts to refuse an equal division of the community estate.¹³⁴ The following are factors, commonly known as the *Murff* factors, which courts may consider in determining what a "just and right" division commands:

- (1) fault in the breakup of the marriage;¹³⁵
- (2) benefits that the innocent spouse would have derived had the marriage continued;¹³⁶
- (3) disparity in the spouses' income or earning capacities;¹³⁷
- (4) each spouse's business opportunities;¹³⁸
- (5) differences in the spouses' education;¹³⁹
- (6) physical health and need for future support;¹⁴⁰
- (7) the relative ages of the parties;¹⁴¹
- (8) each spouse's financial condition and obligations;¹⁴²
- (9) the size of each spouse's separate estate¹⁴³ and any expected inheritance;¹⁴⁴
- (10) the nature of the spouses' property;¹⁴⁵
- (11) the rights of the children of the marriage;¹⁴⁶

131. *See id.*

132. Boscarolli, *supra* note 30.

133. Kazen, *supra* note 123, at 417.

134. *See id.*

135. *See Murff*, 615 S.W.2d at 698; *Baccus v. Baccus*, 808 S.W.2d 694, 700 (Tex. App.—Beaumont 1991, no writ).

136. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700.

137. *See Murff*, 615 S.W.2d at 698–99; *Baccus*, 808 S.W.2d at 700.

138. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700; *Jones v. Jones*, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ).

139. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700; *Jones*, 699 S.W.2d at 585.

140. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700.

141. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700; *Jones*, 699 S.W.2d at 585.

142. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700; *Jones*, 699 S.W.2d at 585; *Dorfman v. Dorfman*, 457 S.W.2d 417, 424 (Tex. App.—Texarkana 1970, no writ).

143. *See Baccus*, 808 S.W.2d at 700.

144. *See Murff*, 615 S.W.2d at 699; *Baccus*, 808 S.W.2d at 700; *Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Jones*, 699 S.W.2d at 585.

145. *Murff*, 615 S.W.2d at 699; *Halanka v. Halanka*, 799 S.W.2d 351, 355 (Tex. App.—Texarkana 1990, no writ).

- (12) waste of community assets¹⁴⁷ or constructive fraud against the community;¹⁴⁸
- (14) gifts by one spouse to the other;¹⁴⁹ and
- (15) tax liabilities.¹⁵⁰

Disproportionate divisions occur most frequently when supported by factors of fault, disparity in income, earning capacity, business opportunities, and education.¹⁵¹ Notwithstanding Texas has been a “no-fault” state since 1970, fault may be used as a basis for a litigant to request and for courts to order a disproportionate division of a community estate.¹⁵² Fault, in this context, must not be used as a device to punish; rather it refers to adultery, mental cruelty, and abandonment—the traditional grounds for obtaining a divorce.¹⁵³

The “just and right” standard exposes a paradoxical component to community property in divorces occurring in Texas—courts’ have a tendency to apply equitable distribution principles when dividing the community estate.¹⁵⁴ Unlike spouses’ property interests during their marriage and upon death, courts are not confined to splitting the community in portions of exactly one-half.¹⁵⁵

More recently, the opinion in *Smith v. Smith* reiterated the notion that courts are not required to equally divide the community estate so long as the division is “in a manner that the court deems just and right.”¹⁵⁶ The court did, however, ensure a reasonableness standard to that division.¹⁵⁷ In *Smith*, the wife appealed the district court’s decision awarding her husband over \$15,000 in community property compared to her “no more than zero” portion.¹⁵⁸ Relying on the factors outlined above, the court noted that “[a]lthough the court need not divide the community estate equally, a disproportionate division must be supported by some reasonable basis.”¹⁵⁹ Finding none, the court reversed and remanded the case on the basis that the

147. See *Baccus*, 808 S.W.2d at 700.

148. See *id.*; *Massey v. Massey*, 807 S.W.2d 391, 403 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

149. See *Baccus*, 808 S.W.2d at 700; *Jones*, 699 S.W.2d at 585; *Dorfman*, 457 S.W.2d at 424.

150. See *Baccus*, 808 S.W.2d at 700.

151. *Smith v. Smith*, 143 S.W.3d 206, 213 (Tex. App.—Waco 2004).

152. See *Murff*, 615 S.W.2d at 697.

153. *Kazen*, *supra* note 123, at 417–18.

154. *Ratner*, *supra* note 125, 21–23 (2011).

155. TEX. FAM. CODE ANN. §§ 7.001, 7.002; see *Phillips v. Phillips*, 75 S.W.3d 564 (Tex. App. 2002) (stating that the trial court has discretion to depart from equality by substantial amounts in dividing the community, which may weigh many factors in reaching its decision, including fault, so long as fault is not used to punish).

156. *Smith v. Smith*, 143 S.W.3d 206, 213 (Tex. App.—Waco 2004); TEX. FAM. CODE ANN. § 7001

157. *Smith*, 143 S.W.3d at 213; TEX. FAM. CODE ANN. § 7001.

158. *Smith*, 143 S.W.3d at 212–13 (citing *Smallwood v. Smallwood*, 548 S.W.2d 796, 797 (Tex. App.—Waco 1977, no writ.); TEX. FAM. CODE ANN. § 7001.

159. *Smith*, 143 S.W.3d at 214; TEX. FAM. CODE ANN. § 7001 (Supp.).

division fell short of just and right.¹⁶⁰ Thus, although courts do have discretion in dividing community property, they are limited by a showing of some reasonable basis.¹⁶¹

1. Arguments

The variance then, between community and common law jurisdictions, is substantially less in the context of a Texas divorce court.¹⁶² A convincing argument is that “co-equal rights during marriage is more theory than reality.”¹⁶³ The apparently beneficial fact that community property extends not only to divorce, but death as well, is somewhat contradicting.¹⁶⁴

Critics of this inconsistency also argue that this practice operates as a version of equitable distribution used in common law, and “seemingly [discounts] the fact that what is being divided is property with present equal ownership.”¹⁶⁵ Moreover, this practice undercuts not only marital property distribution upon divorce, but even the entire purpose of the community property system.¹⁶⁶ True, Texas law protects spouses from the threat of disinheritance in estate or probate proceedings; thus, designating Texas as a community-property-at-death jurisdiction could be appropriate.¹⁶⁷ On the same token, the undermining of these principles in Texas divorce courts renders it appropriate to also designate it an equitable-distribution-at-divorce jurisdiction.¹⁶⁸

Other policies, however, make it difficult to argue that the Texas method is without laud.¹⁶⁹ In the sense that a Texas court will award over half of the community estate to a spouse who endured abuse and adultery throughout years of marriage, the just and right tactic seems to be the most equitable route.¹⁷⁰

Regardless of the arguments, another class of people are affected by the Texas “just and right” standard—informal or common law spouses.¹⁷¹ The

160. *Smith*, 143 S.W.3d at 218.

161. *Id.*

162. Ratner, *supra* note 125, at 21–23.

163. Carter, *supra* note 125, at 366.

164. *See id.*

165. Ratner, *supra* note 125, at 23.

166. *See id.*

167. Carter, *supra* note 125, at 366.

168. *See id.*

169. *See id.*

170. *See, e.g., Ohendalski v. Ohendalski*, 203 S.W.3d 910 (Tex. App.—Beaumont 2006, no pet.) (where there was sufficient evidence of abuse and adultery by the husband, appellate court found no abuse of discretion and affirmed the trial court’s unequal division that awarded the wife 81% of community estate).

171. *See* TEX. FAM. CODE ANN. § 2.401 (Supp.).

following section discusses common law marriage—codified as “informal” marriage—and its presence in Texas.¹⁷²

V. “INFORMAL” MARRIAGES AND RELATIONSHIPS

As with property, states govern the necessary requirements for a couple to be legally married.¹⁷³ Though marital requirements vary between states, a validly created marriage in one state will retain its validity in all states.¹⁷⁴ For purposes of this comment, it is necessary to first discuss the types of relationships that arise from non-legal marriages, and the judicial system’s course of action regarding the property rights derived from these relationships.¹⁷⁵

A. Putative Marriage

A void relationship is one which is invalid from the moment it is created and holds no legal enforceability.¹⁷⁶ As there are different types of void relationships, commonly disputed in court are putative marriages.¹⁷⁷ Texas courts have defined a putative marriage as “one that is invalid by reason of an existing impediment on the part of one or both spouses; but which was entered into in good faith by the parties, or one of them, good faith being essential.”¹⁷⁸

A putative marriage can be best understood as a quasi-informal marriage; it does not arise *unless* it is contracted with good faith and ignorance, by one or both of the parties involved, to any existing impediments that would deem the marriage invalid.¹⁷⁹ Most often, the impediment that exists is a previous, non-terminated marriage.¹⁸⁰ For example, one of the spouses may have not finalized a prior divorce, or may not have terminated an established common law marriage.¹⁸¹

The good faith requirement is presumed and demands one or both of the spouses acted with good faith.¹⁸² Courts judge good faith on a case-by-case

172. *Id.* § 2.401 (“Proof of Informal Marriage”). Note that the terms “informal” and “common law” will be used interchangeably, referring to both “marriages” and “spouses.”

173. 33 John F. Elder, *Texas Practice: Handbook of Texas Family Law* § 1:1 (2019) [hereinafter Elder].

174. *See* CAL. CIV. CODE ANN., § 63; KAN. GEN. STAT. ANN. § 23-115 (1964); NEB. REV. STAT. ANN. § 42-117 (1968); N.M. STAT. ANN. § 57-1-4 (1953); S.D. CODE § 14.0103; *see* Elder, *supra* note 173 § 1:1.

175. *See infra* Part IV.A, B.

176. *See* Leopold, *supra* note 98, § 21.1.

177. *See id.*

178. *Dean v. Goldwire*, 480 S.W.2d 494, 496 (Tex. App.—Waco 1972, writ ref’d n.r.e.).

179. *See* Leopold, *supra* note 98, § 21.1.

180. TEX. FAM. CODE § 6.202(a); *see* Leopold, *supra* note 98, § 21.1.

181. *See infra* Part III.B (providing discussion over common law marriage).

182. *Smith v. Smith*, 1 Tex. 621, 628 (1846).

basis, considering all relevant facts, such as efforts made to form a valid marriage, background and experiences of the alleged putative spouse, and, of course, circumstances surrounding the alleged marriage, including any objective evidence pointing to its invalidity.¹⁸³ The underlying purpose of the doctrine is to protect innocent spouses.¹⁸⁴ The doctrine allows an innocent spouse to use their jurisdiction's divorce and probate provisions to be awarded compensation upon separation.¹⁸⁵ When established, a putative relationship constitutes a legal marriage when the impediment is removed, whether or not the parties are aware of the impediment's removal.¹⁸⁶

The law terminates a putative relationship the moment the good faith spouse realizes the invalidity of their marriage—i.e. when the good faith belief is no longer present.¹⁸⁷ At this moment, the current putative marriage is deemed bigamous and void.¹⁸⁸ Thus, the amount of relief for a putative spouse is measured by the timeframe of the spouse's ignorance to the impediment.¹⁸⁹ The marriage becomes valid only when the impediment is dissolved, on the condition that the putative parties continue to cohabitate and represent themselves as a married couple.¹⁹⁰ Usually, the manner which in the impediment dissolves is when the legal spouse dies, constructing the putative marriage as a legally valid marriage.¹⁹¹

Notedly, there is a significant overlap between putative and common law spouses.¹⁹² Though, originally, a putative marriage's good faith deemed a formal ceremony necessary to prove, putative marriage has expanded to include common law marriages.¹⁹³ Because all reasons for a court to grant “relief to a party who has entered into a formal putative marriage relationship [apply] with equal force to [situations where] the putative marriage was entered into as a common law marriage[.]” the definition of putative marriage considers common law marriages as well.¹⁹⁴

183. *Family Law E&E* (6th ed.) at 36.

184. Leopold, *supra* note 98, § 21.1.

185. *See id.*

186. 39 TEX. JUR. 3d *Family Law* § 32.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. Leopold, *supra* note 98, § 21.2.

192. *Id.* § 21.1.

193. *See id.*

194. *See id.*

B. Common Law Marriage

1. History

Despite its deeply rooted traditional practice, common law marriage is on the sharp decline.¹⁹⁵ In fact, though states with variations of laws show deference to conflicts, most states have abolished the doctrine.¹⁹⁶

The origins of common law marriage date back to colonial America, when it was much more difficult to fulfill all marriage requirements of capacity, obtaining a marriage license, and a marital ceremony.¹⁹⁷ Due to the shortage of clergy members accessible to conduct ceremonies, the long travel distances to obtain a license, and the public interest to encourage marriage, reproduction, and growth of the colonies, common law marriage was a commonly used method to marriage.¹⁹⁸ Today, however, critics of the doctrine coin common law marriage as unnecessary and obsolete, and a minority of states still recognize common law marriage initiated in its own borders.¹⁹⁹

Between the late nineteenth and early twentieth centuries, jurisdictional recognition of common law marriages sharply declined.²⁰⁰ In part, this was due to legislative and judicial fears that the doctrine encouraged deception and perjury among couples, incentivizing them to bring fraudulent claims of marriage.²⁰¹ By the 1930s, the doctrine was abandoned in roughly half of the states.²⁰² Evolving societal norms reflected the notion that formal weddings were the proper method of marriage.²⁰³ States reasoned that by removing the doctrine from the system, the bounds of marital laws were more clearly defined, which promoted government involvement and efficiency in the institution of marriage.²⁰⁴

195. See Primrose, *supra* note 13, at 187; Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 483 (2007) (“Common-law marriage is about to go the way of the buggy whip.”).

196. Matsumura, *supra* note 9, at 1999.

197. Elder, *supra* note 173, § 2:1.

198. *Id.*

199. 1 TEX. PRAC., FAMILY LAW § 2:78; see *supra* note 10.

200. Primrose, *supra* note 13, at 195.

201. See Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 161 (2009). (“States became uneasy that couples would defraud and take advantage of the system because documentation was not needed to have a valid marriage. By abolishing common law marriage, states could ensure that more reliable evidence, by which the marriage could be proved, would be available to prevent fraud and litigation.”).

202. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2037 (2000).

203. See *id.*; see also Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L.J. 189 (2005).

204. See Hedgecock, *supra* note 16, at 562–63; see Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 546 (2006); but see John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461, 475–78 (2007) (arguing that a requirement of a formal

Texas is among the minority of states that continue to recognize informal or common law marriages.²⁰⁵ The following section discusses the details of common law marriage in Texas, the statutory requirements of which were codified in 1970 as “informal marriage” under the Texas Family Code, and the intricacies in the doctrine.²⁰⁶

C. “Informal” Marriage in Texas

Common law marriages are lawful and binding in Texas, encompassing the same legal consequences and effects as ceremonial marriages.²⁰⁷ Parties of a common law marriage neither obtain a marriage license nor conduct a ceremony, yet enjoy essentially identical property rights which attach to formal marriages.²⁰⁸ The doctrine “requires no solemnization, but rather a private agreement to be married, usually cohabitation, and public appearance as a married couple.”²⁰⁹ Thus, parties to a common law marriage are legal spouses, of which children born are legitimate, that “may acquire and own community property and may enjoy homestead and family exemptions.”²¹⁰ Moreover, each common law spouse has an insurable interest as the spouse of the other, in the life of that other.²¹¹ Hence, if a common law marriage is established, a surviving spouse may recover from the wrongful death of the common law spouse, and each party may qualify for personal property exemptions as a family.²¹² The “family” that generates the homestead and other exemptions includes any members that come as a result of the common-law marital relationship.²¹³

Whether a common law marriage exists between two parties is an issue of fact to be decided by the trier of fact.²¹⁴ When there is sufficient proof to

marriage ceremony and certificate does not actually increase administrative efficiency, judicial economy, or protect against fraud).

205. 1 TEX. PRAC., FAMILY LAW § 2:78; *see supra* note 10.

206. TEX. FAM. CODE § 2.401; *Russel v. Russel*, 865 S.W.2d 929, 931 (Tex. 1993); *Wilson ex rel. C.M.W. v. Estate of Williams*, 99 S.W.3d 640 (Tex. App. Waco 2003).

207. *Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App.—Houston [14th Dist.] 1993, no pet.); *McClendon v. Brown*, 63 S.W.2d 746 (Tex. Civ. App. Galveston 1933), writ dismissed. The legal consequences of a common law marriage are no different than those of a ceremonial marriage. *Whaley v. Peat*, 377 S.W.2d 855 (Tex. App.—Houston 1964), writ refused n.r.e. (July 22, 1964).

208. Note that common law spouses do have the option to register as an informally married couple, signing a declaration that indicates the identity of each party, their age, and their disclosure that they are not related to each other in any of six different ways. *See* TEX. FAM. CODE ANN. § 2.402 (Supp.). Finally, they agree to an “oath reading” that provides they “solemnly swear” to all of the elements of an informal marriage. *See id.*

209. *Primrose*, *supra* note 13, at 188.

210. *Baker v. Mays & Mays*, 199 S.W.2d 279, 284 (Tex. App.—Fort Worth 1946), dismissed.

211. *Id.*

212. *Shelton v. Belknap*, 155 Tex. 37, 282 S.W.2d 682 (1955) (a common-law wife may recover for her husband’s wrongful death). In *re Leva*, 96 B.R. 723 (Bankr. W.D. Tex. 1989) (Texas recognizes that parties in common-law marriages may qualify as family for personal property exemptions).

213. *McClendon*, 63 S.W.2d at 746.

214. *Warren v. Kyle*, 565 S.W.2d 313, 317 (Tex. App.—Austin 1978, no writ).

establish a common law marriage, Texas courts consider a common law spouse “a true de jure spouse and not a mere de facto one.”²¹⁵ Arising out of facts to prove the matrimony, once the common law status exists between spouses, the marriage follows suit as any formal marriage: it ceases to exist only by death or judicial dissolution.²¹⁶ The extent of this similarity deems a subsequent denial of the marriage by either or both spouses insufficient to negate the marriage.²¹⁷

The party arguing that an informal marriage exists bears the burden of proof by a preponderance of the evidence that the parties had the capacity to enter into the marriage and that the statutory requirements have been met.²¹⁸ Capacity to be married is measured identically for formal and informal marriages.²¹⁹ A person under eighteen-years-old may not establish an informal marriage under section 2.402 of the Texas Family Code, nor may they be involved in an informal marriage of any kind.²²⁰

The statutory requirements for a common law marriage are similar between states that recognize the relationship.²²¹ In Texas, an informal marriage exists when two people, over the age of eighteen, (1) agreed to be married; and (2) after the agreement, lived together in Texas as spouses to one another; and (3) represent to others in Texas that they are married.²²² Each of the elements must exist contemporaneously for a purported informal marriage to hold any validity.²²³ The courts will decide these issues on a case-by-case basis and determine them on their respective facts.²²⁴

I. Agreement

The parties' agreement to be married must be proven as a present agreement of permanent nature.²²⁵ The “present” agreement is qualified not

215. 39 TEX. JUR. 3d *Family Law* § 30.

216. *Id.*; Daniel v. Daniel, 676 S.W.2d 666 (Tex. App. Beaumont 1984), writ refused n.r.e. (Jan. 16, 1985). The status or relationship of parties who have in truth and in fact entered into a common-law marriage cannot be dissolved by estoppel. Williams v. Williams, 336 S.W.2d 757 (Tex. Civ. App. Eastland 1960), writ dismissed, (Oct. 5, 1960).

217. 39 TEX. JUR. 3d *Family Law* § 30.

218. The level of proof varies by jurisdiction. Compare *Alonso v. Alvarez*, 409 S.W.3d 754, 757 (Tex. App.—San Antonio 2013, pet. Denied) (preponderance of the evidence) with *Nestor v. Nestor*, 472 N.E.2d 1091 (Ohio 1984) (clear and convincing); see also *Nguyen v. Nguyen*, 355 S.W.3d 82, 88 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

219. See TEX. FAM. CODE ANN. §§ 2.001–.002, 2.101–.102, 2.401 (Supp.).

220. TEX. FAM. CODE ANN. § 2.401(c)(1)–(2); see *Kingery v. Hintz*, 124 S.W.3d 875, 977 (Tex. App.—Houston [14th Dist.] 2003, no pet) (“The Family Code plainly provides that a person under the age of 18 may not be a party to an informal marriage.”). *Id.* at 878.

221. TEX. FAM. CODE ANN. § 2.401.

222. *Id.* § 2.401(a)(2).

223. See *Farrell v. Farrell*, 459 S.W.3d 114, 117 (Tex. App.—El Paso 2015, no pet.); *Burden v. Burden*, 420 S.W.3d 305, 308 (Tex. App.—Texarkana 2013, no pet.).

224. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993).

225. See TEX. FAM. CODE ANN. §§ 2.001, 2.002, 2.101, 2.102, 2.401 (Supp.).

as simply an agreement to be married at some point in the future, but rather as a “present and immediate marital relationship.”²²⁶ Both direct and circumstantial evidence are admissible in establishing the agreement.²²⁷ Thus, direct evidence of an agreement is not required for a court to recognize a common law marriage, so long as there is strong circumstantial evidence to prove the element.²²⁸ Examples of direct evidence may include an express written agreement or testimony of one or both parties.²²⁹ Acts, statements, and conduct of the parties may serve as circumstantial evidence.²³⁰ Furthermore, occasional references to “my wife” or “my husband” can prove a tacit agreement to be married under the condition the references are paired with strong corroboration.²³¹

Mere cohabitation and representation of marriage to others will not automatically trigger the direct proof of an agreement to be married, though they may act as circumstantial evidence to support the agreement.²³² Because there is seldom an express agreement, the second and third elements of living together and holding out may, and often times do, act as circumstantial evidence sufficient to prove the agreement.²³³

2. Cohabitation

Subsequent to the agreement, the couple must cohabit in Texas.²³⁴ This element is qualified not by “frequent overnight guest[s] [who store] personal property at someone else’s home,” but rather cohabitation in a fashion indicating that the two partake in things ordinarily done by spouses, and “more than sexual relations under a common roof.”²³⁵ Although family law treats cohabitating parties as generally inferior in regard to rights of legally married couples, common law marriage can be seen as a quasi-exception—

226. See *Aguilar v. State*, 715 S.W.2d 645, 648 (Tex. Crim. App. 1986); *Flores v. Flores*, 847 S.W.2d 648, 650 (Tex. App. 1993).

227. *Russel*, 865 S.W.2d at 933; *Assoun v. Gustafson*, 493 S.W.3d 156, 160 (Tex. App.—Dallas 2016, pet. Denied); *Winfield v. Renfro*, 821 S.W.2d 640, 644 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

228. *Russel*, 865 S.W.2d at 933.

229. See *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978) (demonstrating the use of testimony used as direct evidence); *Small v. McMaster*, 352 S.W.3d 280, 283 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

230. *Hill v. Smith*, 181 S.W.2d 1015, 1016 (Tex. App.—Dallas 1994, no writ).

231. See *Flores v. Flores*, 847 S.W.2d 648, 652; see also *Garcia v. Garcia*, WL 3115763 (2012) (corroborating representations with evidence such as tax returns and co-signed lease that listed the couple as husband and wife was sufficient evidence to support holding out of marriage.).

232. See *In re C.M.W.*, 479 S.W.3d 352, 360 (Tex. App.—El Paso 2015, no pet).

233. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993); see, e.g., *Osojic v. Osojic*, No. 03-08-00688-CV, 2009 WL 2902743, at 1* (Tex. App.—Austin Aug. 27, 2009, no pet.) (mem. op.) (cohabitation and community representation were circumstantial evidence of the agreement).

234. TEX. FAM. CODE ANN. § 2.401(a)(2) (Supp.); see *Garza*, *supra* note 204, at 546.

235. *Allen v. Allen*, 966 S.W.2d 658, 661 (Tex. App.—San Antonio 1998, pet. denied); *Claveria v. Estate of Claveria*, 597 S.W.2d 434, 437 (Tex. App.—Dallas 1980), *rev’d*, 615 S.W.2d 164 (Tex. 1981); *Garza*, *supra* note 204, at 546.

“a legally sanctioned cohabitation.”²³⁶ Cohabitation must also occur in Texas, as cohabitation outside of Texas cannot serve as proof of this element.²³⁷

Additionally, there is a common misunderstanding that the element of cohabitation has a minimum threshold time limit—it does not.²³⁸ No Texas court has decided on the issue of whether a given amount of time is or is not enough time.²³⁹ Instead, the element of cohabitation is determined solely on a case-by-case basis.²⁴⁰ For instance, frequent overnight guests will not support establishment of cohabitation absent other supportive evidence.²⁴¹ Moreover, the cohabitation must occur *after* the agreement to be married is established.²⁴² If the agreement to be married occurs at a later date than the various time frames of cohabitation, a Texas court will likely conclude that no common law marriage existed.²⁴³ In *Farrell v. Farrell*, a previously divorced couple began spending entire weekends together after the first divorce was finalized.²⁴⁴ The court noted not only did the cohabitation occurring in New Mexico at the woman’s home weaken the assertion of a common law marriage, the parties did not actually agree to be married until after the cohabitation occurred.²⁴⁵ Ultimately, the court found that all of the facts supported the verdict that no Texas common law marriage ever existed.²⁴⁶

Proof of cohabitation was sufficient to establish this element in *Omodele v. Adams*.²⁴⁷ There, a woman submitted testimonial evidence showing that the parties lived together for less than two years and purchased a home and insurance together as husband and wife between these years.²⁴⁸ Absent any evidence that contradicted these assertions, the court found this evidence “legally and factually sufficient to support the element of living together as husband and wife.”²⁴⁹

236. Anna Stepién-Sporek, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 85 (2016).

237. See TEX. FAM. CODE § 2.401(a)(2); see, e.g., Texas Employers’ Ins. Ass’n v. Borum, 834 S.W.2d 395, 399–400 (Tex. App.—San Antonio 1992, writ denied) (acts occurring in Kentucky deemed no informal marriage).

238. See *Omodele v. Adams*, No. 14-01-00999-CV, 2003 WL 133602 at 1* (Tex. App.—Houston [14th Dist.] Jan. 16, 2003, no pet.) (mem. op.) (“neither the Family code nor the common law provide a bright-line test to determine the length of time a couple must cohabitate to satisfy this requirement.”).

239. See *id.*

240. See *id.*

241. See *Allen v. Allen*, 966 S.W.2d 658, 661 (Tex. App.—San Antonio 1998, pet. denied).

242. See *Farrell v. Farrell*, 459 S.W.3d 114, 117 (Tex. App.—El Paso 2015, no pet.) (“[t]he Family Code requires cohabitation in the state of Texas *after the parties agree to be married*”) (emphasis in original).

243. See *id.*

244. See *id.*

245. See *id.*

246. See *id.*

247. See *Omodele v. Adams*, No. 14-01-00999-CV, 2003 WL 133602 at 1* (Tex. App.—Houston [14th Dist.] Jan. 16, 2003, no pet.) (mem. op.).

248. See *id.*

249. See *id.*

3. “Holding Out”

Lastly, and clearly the most difficult to prove among the lot, the parties must hold themselves out to the community as a married couple.²⁵⁰ The judicial requirement of “holding out to the public” is synonymous with the statutory requirement of “presenting to others.”²⁵¹ “Community,” as outlined by the Texas Supreme Court, may be defined as friends, family, and coworkers of the couple, residing within the state of Texas, with whom the couple maintains regular contact.²⁵²

This element further requires that *both* parties contribute to presenting themselves as married to the community; the lone efforts of one party will not establish this element.²⁵³ Moreover, the couple’s behavior must have been intended to communicate to others that they are married.²⁵⁴ Unintentional conduct that enables an individual to infer that the couple is married is not sufficient, nor is intimate behavior in general.²⁵⁵

Whether the evidence presented is sufficient, as a matter of law and of fact, to establish that a couple actually held themselves as married largely depends on their reputation in the community; whether the community believed their reputation to be that they were married.²⁵⁶ In other words, there is no such thing as a secret common law marriage, and couples who hide their belief from the community—even if not the whole community—are not in a common law marriage.²⁵⁷ The Texas Supreme Court held that introduction of a partner as one’s spouse to two close friends, or telling only a few people that the individual was married to that alleged spouse, did not constitute evidence of this element.²⁵⁸ This portrays the Court’s perspective of secrecy, in this context, as “inconsistent and irreconcilable with the requirement of a public holding out that the couple are living together as” married.²⁵⁹ Spoken words specifically of marriage, such as “husband” or “wife,” however, are not necessarily required to establish a couple’s representation of marriage.²⁶⁰ Courts have found documentation evidence, including joint bank account

250. See TEX. FAM. CODE ANN. § 2.401(a)(2) (Supp.); see Garza, *supra* note 204, at 546.

251. Small v. McMaster, 352 S.W.3d 280, 284–85 (Tex. App.—Houston [14th Dist.] 2011, pet denied).

252. See Lee v. Lee, 981 S.W.2d 903, 906 (Tex. App.—Houston [1st Dist.] 1998, no pet).

253. See McMaster, 352 S.W.3d at 284–85; see also Lee, 981 S.W.2d at 907 (finding that unilateral conduct by one party is insufficient to prove the couple was holding themselves out as spouses).

254. See Mills v. Mest, 94 S.W.3d 72, 75 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

255. See *id.*

256. Eris v. Phares, 39 S.W.3d 708, 715 (Tex. App.—Houston [1st Dist.] 2001, pet denied).

257. See Ex parte Threet, 160 Tex. 482, 483, 333 S.W.2d 361, 363 (1960) (holding out as married to only a few friends and not the rest of the public within their community was insufficient evidence to support informal marriage.).

258. *Id.* at 364–65.

259. *Id.*; see Eris, 39 S.W.2d at 714–15.

260. See Lee v. Lee, 981 S.W.2d 903, 906 (Tex. App.—Houston [1st Dist.] 1998, no pet).

statements, joint tax returns, or insurance policies listing the alleged spouse as such, sufficient proof to support this element.²⁶¹

4. *Rebuttable Presumption*

Despite the challenge of proving the elements of an informal marriage, the most rigidly important condition is the timing of which a claim is brought.²⁶² Before the Texas Legislature amended the Family Code in 1989, the courts accepted nothing shy of a formal court proceeding to dissolve an informal marriage.²⁶³ Between 1989 and 1995, couples who sought to establish an informal marriage after separation faced a one-year limitation period.²⁶⁴ Thus, failure to bring a claim within that period rendered a couple's informal marriage unrecognizable under Texas law.²⁶⁵ In 1995, however, the legislature replaced the statute of limitations with a two-year rebuttable presumption.²⁶⁶ In other words, Section 2.401(b) of the Texas Family Code provides that if a party fails to bring a claim within two years from the time they cease to cohabit with their partner, there is a presumption that the parties were never under the agreement to marry in the first place.²⁶⁷ Specifically, the code states:

If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.²⁶⁸

Of the minority of states that recognize common law marriage, Texas is one of two jurisdictions that requires an additional barrier to overcome.²⁶⁹ Hence, courts must determine at what point in time the relationship "ended" in order to calculate whether the period for the presumption has run.²⁷⁰ Texas courts have struggled on framing a reliable

261. Garza, *supra* note 204, at 547.

262. *Id.*

263. Elder, *supra* note 173, § 2:3; Act of Apr. 7, 1997, 75th Leg., R.S., ch. 7, § 2, sec. 1.91, 1997 Tex. Gen. Laws 8 (codified at Tex. Fam. Code 2.401).

264. Act of Apr. 7, 1997, 75th Leg., R.S., ch. 7, § 2, sec. 1.91, 1997 Tex. Gen. Laws 8 (codified at Tex. Fam. Code 2.401) (§ 1.91(b) was amended by the 1997 Texas Legislature); *see* Elder, *supra* note 173, § 2.3.

265. Elder, *supra* note 173, § 2:3.

266. *Id.*

267. *Id.*

268. *Id.*

269. Garza, *supra* note 204, at 548; *see also* UTAH CODE ANN. § 30-1-4.5(2) ("must occur during the relationship described . . . or within one year following termination of that relationship.").

270. Garza, *supra* note 204, at 548.

method to determine the end of a relationship, especially considering the often back and forth break-up and reconciliation pattern among couples.²⁷¹

The history of this limitation reveals the Texas legislature's quasi-considerate rationale behind the rebuttable presumption.²⁷² Undeniably, the transition from the one-year statute of limitations to the two-year rebuttable presumption provides parties a significantly larger opportunity for legal recourse.²⁷³ Neither of these conditions, however, resolved the issue of marital property distribution.²⁷⁴ True, the statutory recognition of informal marriages in Texas is a method capable of providing some type of relief to common law spouses, and the rebuttable presumption, as opposed to the statute of limitations, offers more integrity to the system.²⁷⁵ However, not only does establishing such a marriage come with extreme difficulty, it fails to promote the protections of common law spouses' property interests in the community estate.²⁷⁶

The following section discusses the millennial generation and the trends of marriage and cohabitation within it.²⁷⁷ With the decrease in marital formalities and the increase in cohabitation present in the generation, millennials will face the grunt of the issues presented in this comment.²⁷⁸

VI. MARRIAGE AND COHABITATION—HISTORIC AND MILLENNIAL TRENDS

A. History and Evolvment of Marriage

Within the last thirty years, marriage rates have declined.²⁷⁹ In 2018, the marriage rate displays a sharp decrease, standing at 6.5 per 1,000 people of the population.²⁸⁰ Moreover, in 2018, 6.1 per 1,000 residents in Texas were married.²⁸¹ Just twenty years ago, however, in 1990, 91% of women at the age of 40 (early baby boomers), born in the United States had married.²⁸²

271. See Kathryn S. Vaughn, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 HOU. L. REV. 1131, 1159–60 (1991).

272. *Id.*

273. *Id.*

274. Elder, *supra* note 173, § 2:3.

275. *Id.*

276. See Tom Andrews, *Not So Common (Law) Marriage: Notes from a Blue State*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 1, 3 (2013); see also Leopold, *supra* note 98, § 21.5.

277. See *infra* Part V.

278. See *infra* Part V.

279. See *infra* Part V.

280. Statista Marriage Rate in the U.S. 1990–2018.

281. Statista Marriage Rates in the U.S. 2018, by State.

282. Steven P. Martin, Nan Marie Astone & H. Elizabeth Peters, Urban Inst., *Fewer Marriages, More Divergence: Marriage Projections for Millennials to Age 40*, at 1 (2014), <https://www.urban.org/sites/default/files/publication/22586/413110-Fewer-Marriages-More-Divergence-Marriage-Projections-for-Millennials-to-Age-.PDF> [perma.cc/XEJ8-SJFN].

Ten years later, in 2000, this decreased to 87% (late baby boomers), and further decreased to 82% by 2010 (Generation X).²⁸³

Preference to impersonal digital messaging paired with the desire to obtain self-sufficiency above all else contributes to the “GenMe” label commonly given to millennials.²⁸⁴ The incentives have changed with each generation because of the desire to pair with individuals with similar, successful characteristics, “affecting economic inequality . . . changing social norms, and increased focus on self rather than children and family.”²⁸⁵ These incentives are grounded in the importance placed on social media, where relationships built on dating apps and the internet have largely replaced conventional relationships.²⁸⁶ Because of these factors, marriage has declined among millennials, and “the percentage of millennials marrying by age 40 will still decrease below the level for any previous generation of Americans.”²⁸⁷

Undoubtedly, the marriage norms in American society have changed immensely.²⁸⁸ This is due, in large part, to the changing economic and family incentives of marriage.²⁸⁹ Dividing the rich and the poor in ways unfamiliar to history, the new generation has created its own, unique income inequality gap.²⁹⁰ “Millennial prerogative on the high end of the income inequality gap has decreased the incentives of marriage for any other function than personal happiness.”²⁹¹ Inevitably, this is displayed by the decrease in number of couples seeking the permanency of marriage, despite the easily accessible resources to do so at younger ages.²⁹² On the lower income side of the spectrum, pregnancy outside of marriage is increasingly common, in addition to men falling into unemployment.²⁹³ In summary, because of the dramatic changes in the transactional aspect of marriage over time, “greater inequality has been created between women and men, and the rich and the poor.”²⁹⁴

Societal involvement has proven a successful environment for women, producing a class of independent, highly educated, and wealthy women who rank success in their careers above the urgency for marriage and children.²⁹⁵

283. *Id.*

284. Gabriel B. Grant, *Exploring the Possibility of Peak Individualism, Humanity’s Existential Crisis, and an Emerging Age of Purpose*, 8 *Frontiers in Psychol.* 1, 1 (2017).

285. See Kathleen E. Akers, *Solving Millennial Marriage Evolution*, 48 *U. B. A.L.R.* 1, 10 (2017).

286. *Id.* at 10.

287. *Id.* at 10.

288. *Id.* at 2.

289. *Id.* at 1.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 2.

294. *Id.*

295. See Gretchen Livingston, *For Most Highly Educated Women Motherhood Doesn’t Start Until the 30s*, *Pew. Res. Ctr.* (Jan 15, 2015), <http://www.pewresearch.org/fact-tank/2015/01/15/for-most-highly-educated-women-motherhood-doesnt-start-until-the-30s/> [perma.cc/N5UF-82A9].

Moreover, these trends are largely due to factors not present in previous generations.²⁹⁶ Only 26% of millennials are married, with the median ages of marriage falling between twenty-seven and twenty-nine for women and men, respectively.²⁹⁷ As it is clear that marriage among millennials has undergone a sharp decline, scholars believe that “the percentage of millennials marrying by the age of forty will still decrease below the level for any previous generations of Americans.”²⁹⁸ It is further predicted that the portion of millennials who remain single through age forty will be unprecedented, and a sizeable 25% will remain unmarried indefinitely.²⁹⁹

Millennial women prefer spouses with a stable and secure income.³⁰⁰ Millennial men, somewhat more traditionally, prefer financial success of their own, as well as in their spouse, and eventually, seek a partner who can stay home to tend to the children and other homestead duties.³⁰¹ Accordingly, individuals in the position to marry are pickier about their partners, demanding higher qualities in the marriage market.³⁰² Exacerbating this effect is that if millennials get married at all, marriage occurs later in life, once millennials are self-sufficient.³⁰³ Upon career success, and not before, the time for personal success ranks as a priority.³⁰⁴

The loss of interest in marriage is also part of the reason why millennials are less inclined to marry.³⁰⁵ This is likely due to a variety of reasons, including the norms of premarital sex, optimism about the future, determination of early life success, and the inevitable stress and responsibility accompanying marriage, weddings, and having children.³⁰⁶ Premarital sex is often not only characterized as a norm, but even a requirement.³⁰⁷ Additionally, the ease in access of oral contraceptives and other methods of preventing pregnancies, enables young men and women “to put off marriage while not having to put off sex.”³⁰⁸ The social costs of having sexual relations outside of marriage have lessened, and millennial

296. Akers, *supra* note 286, at 10–11.

297. Akers, *supra* note 286, at 2.

298. Steven P. Martin, Nan Marie Astone & H. Elizabeth Peters, Urban Inst., *Fewer Marriages, More Divergence: Marriage Projections for Millennials to Age 40*, at 1 (2014), <https://www.urban.org/sites/default/files/publication/22586/413110-Fewer-Marriages-More-Divergence-Marriage-Projections-for-Millennials-to-Age-.PDF> [perma.cc/U7BS-ARK9] [hereinafter Martin].

299. See Meg Murphy, *NowUKnow: Why Millennials Refuse to Get Married*, BENTLEY U., <https://www.bentley.edu/impact/articles/nowuknow-why-millennials-refuse-get-married> [perma.cc/G66-YC26] (last visited Jan. 17, 2020).

300. Akers, *supra* note 285, at 20.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 11.

306. *Id.*

307. *Id.* at 11–12.

308. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 747 (2002).

perspectives on sexual behavior have also shifted in comparison to traditional views.³⁰⁹ So long as millennials are not harmed in the process, millennials consider sexual behavior an entitled benefit of gratification.³¹⁰ It is for these two key reasons, that a “massive disconnect between sex and marriage with absolutely no social, financial, or even moral constraints[,]” has transpired in the millennial generation.³¹¹

Aside from the need for intimacy and the fact that humans feed on close and personal relationships with others, non-marital cohabitation is also on the rise among millennials.³¹² Though traditional marriage can be described as an economic partnership that is treated as such by the law, some states recognize legal principles in cohabitation, such as in the form of a quasi-contractual relationship, even if there is no written or oral agreement existing.³¹³

By 1970, there were eight times as many unmarried cohabitants as in 1960.³¹⁴ For millennials, cohabitation is viewed as a predicate, if not a replacement, to marriage.³¹⁵ Scholars say this is due to, at least in part, narcissism, economic expectation, and changes in incentives.³¹⁶ Considering the element of cohabitation is embedded in the requirements of an informal marriage in Texas, the millennial generation will be, in large part, the litigants to the issue in court.³¹⁷

VII. ARGUMENTS REGARDING COMMON LAW MARRIAGE

The generational and societal changes present in today’s population, as discussed in Part V above, call for the Texas Legislature to re-evaluate the marital property laws which control Texas residents.³¹⁸ However, the current structure of the doctrine as it applies to legal disputes can have severe adverse impacts on the rising and future generations.³¹⁹

A. “Overly Burdensome”

As a majority of states have abolished the doctrine of common law marriage, finding it “no longer necessary, as facilitating hasty and ill-conceived unions, or as inconsistent with the trend to require blood test of

309. Akers, *supra* note 285, at 12.

310. *Id.* at 12–13.

311. *Id.* at 11–13.

312. *Id.*

313. *Id.* at 16.

314. Leopold, *supra* note 98, § 21.9.

315. Akers, *supra* note 285, at 17.

316. *Id.* at 10.

317. *Id.* at 10.

318. *See supra* Part II.

319. *See infra* Part VI.

marriage license applicants,” Texas has nonetheless stayed true to recognizing the doctrine.³²⁰ The major critics of recognizing common law marriage still argue its overly burdensome effects, the potential for fraudulent claims, burdens on third parties, and threats to administrative and judicial efficiency.³²¹ Among these, the following sub-section will discuss the opposing arguments, along with their counters.³²²

Critics to the doctrine fail to recognize that abolition of it will not demolish “hasty and ill-conceived unions.”³²³ With the extreme difficulty in proving the existence of common law marriages, those supporting its abolition are arguing on poor footing.³²⁴ The notion that marriage licenses are easily obtainable is supported, admittedly, but fails to account for the fact that many parties to an informal marriage do not comprehensively understand that the doctrine has been largely abandoned.³²⁵ Additionally, the argument that common law marriage is “overly burdensome” to the courts is unfounded, as there is no clear showing of the substantiality of the burdens in comparison to other marital relationships.³²⁶ Particularly, considering most jurisdictions do not deal with issues of the type.³²⁷ True, informal marriages may raise more evidentiary issues than licensed marriages do, but in determining their burdensome effects, some state bar associations have determined that they do not over burden the system, going as far as saying that even if they did, “court dockets should not be the only basis for abrogating the doctrine, given the strong potential for the doctrine to ‘avoid significant inequities.’”³²⁸

Similarly, scholars have argued that the formalities of a legal marriage become the “test of enforceability.”³²⁹ Specifically, scholars note that “[i]n contrast, informal choice requires different state actors to inspect different evidence at a different stage in the parties’ relationship.”³³⁰ Formal marriages, however, do not beneficially outweigh informal marriages in all aspects.³³¹ One key difference is where the parties’ of a formal or informal

320. Primrose, *supra* note 13, at 204; see TEX. FAM. CODE ANN. § 4.201.

321. Garza, *supra* note 204, at 552; Primrose, *supra* note 13, at 204.

322. See *infra* Part VI.A.

323. Primrose, *supra* note 13, at 204.

324. *Id.* at 205.

325. *Id.*

326. *Id.* at 204.

327. *Id.* at 205.

328. *Id.* at 205–06.

329. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941) (arguing that formalities serve “to mark or signalize the enforceable promise” to the parties who contemplate that their acts will have a legal effect); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492–98 (1975) (discussing the functions of formalities following with an argument for a substantial compliance approach); cf. Jeffrey A. Redding, *Formal Marriage*, 60 ST. LOUIS U. L.J. 671, 677–78 (2016) (noting that the marriage license itself offers access to legal benefits and analogizing it to paper currency).

330. Matsumura, *supra* note 9, at 2012.

331. *Id.* at 2012–13.

marriage reliance lies.³³² Legal spouses rely on clerks; common law spouses rely on courts.³³³ Though the process of establishing an informal marriage may be costlier, it discovers fuller assessment of the nature of an informal relationship.³³⁴ In contrast, formal marriage relies on the clerk issued marriage license, revealing nothing of the nature of the relationship than the applicants' names, ages, addresses, and the notation that they were witnessed participating in a formal ceremony.³³⁵ Formal marriages "lack the means to test commitment and mutual support, much less love or other indicia of conjugality."³³⁶ Essentially, they do not explore the subjective intent of the parties.³³⁷ In effect, clerks will inevitably issue license to married couples who will insufficiently perform the duties of marriage.³³⁸ Similarly, clerks will also miss admitting informal marriages to those that the state may have great interest in recognizing.³³⁹

1. Burdens on Third Parties

One plausible argument is that common law marriage has burdensome effects on third parties, such as credit card companies, which have interests in knowing whether someone is married.³⁴⁰ Nevertheless, the interests held by multi-million dollar corporations must be weighed with the potential inequities in refusing to recognize a common law marriage between two good faith individuals.³⁴¹ In the fair sense that some cases are meritorious and others are not, who should bear the burden of uncertainty?³⁴² Corporations with a plethora of resources to hire attorneys in their legal departments for the purpose of managing the business interests?³⁴³ Or ordinary people who are using the minimal resources they do have to pay for legal assistance to argue that their reliance on the codified law should give them what they deserve?³⁴⁴

Similar to these third-party issues, many concerns center around the susceptibility to fraud and perjury that comes alongside common law marriage claims.³⁴⁵ As fraud prevention is important in preserving the limited

332. *Id.* at 2012.

333. *See id.*

334. *See id.*

335. *See id.*

336. *Id.*

337. *See id.*

338. *See id.*

339. *Id.* at 2013.

340. *See* Primrose, *supra* note 13, at 206.

341. *See id.*

342. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711 (1996).

343. *See id.*

344. *Id.*

345. *See* Primrose, *supra* note 13, at 206.

government funding behind programs such as Social Security, the holding out requirement of the marriage surely covers the bases necessary to mitigate fraudulent claims.³⁴⁶

B. Administrative and Judicial Efficiency

Ultimately, arguments based on administrative and judicial efficiency cannot ignore the necessity of considering the values and policies behind retaining common law marriage, despite its costs.³⁴⁷ In doing so, judicial and legislative branches need to widen the scope in terms of considering issues in a different light.³⁴⁸ Consider who is benefitted and who is harmed by prohibiting common law marriage.³⁴⁹ Consider the adverse impacts of its non-recognition in terms of gender, race, generation, and age.³⁵⁰ Regarding the traditional functions of family law, do the impacts fall on “those who are most vulnerable and thus most in need of the law’s protection”?³⁵¹

While problems arising from this argument are, at least in part, due to the fact that most states do not recognize informal marriages, thus leading to confusion on both sides, some scholars pose a bright-line rule as a solution.³⁵² Problems with the status of common law marriage typically arise in two situations: death of a partner or termination of the relationship.³⁵³ This is the distinct difference between states that do not recognize common law marriage, because in those states, marital property is not an issue in any case other than a formal divorce.³⁵⁴ “[A]lthough, of course, no one is going to challenge a marriage unless there is a good financial or legal reason to do so.”³⁵⁵

When it comes to intestacy, in the case that a cohabitant dies without a will, laws will typically protect the rights of only formally married or related individuals.³⁵⁶ The common argument by individuals who support the eradication of the doctrine is that parties involved in a committed relationship can protect one another through a will.³⁵⁷ However, there are crystal clear reasons for why this contention does not rise to the importance of policies

346. Bowman, *supra* note 342, at 746 (“[w]ith the growth of new benefit programs, the courts began to add concerns about administrative convenience and fraud in relation to government benefits to their concerns about decedents’ estates.”).

347. See Bowman, *supra* note 342, at 753.

348. See *id.*

349. See *id.*

350. See *id.*

351. Bowman, *supra* note 342, at 753. *id.*

352. See Primrose, *supra* note 13, at 206.

353. See *id.* at 189.

354. See *id.* at 189.

355. 177 AM. JUR. PROOF OF FACTS 3d 111, Topic of Article (2019).

356. See Christine A. Hammerle, Note, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1764 (2006).

357. See Primrose, *supra* note 13, at 207–08.

behind the doctrine.³⁵⁸ Most obvious, the decedent's relatives will undoubtedly challenge the will, creating the risk of leaving the common law spouse empty handed.³⁵⁹ Additionally, attorney drafted wills can be expensive, and homemade wills may be not be upheld for formalities or defects.³⁶⁰ The most rational argument against this contention, however, is the fact that parties who choose not to formally marry may have similar motivations to opt out of arranging a will.³⁶¹

All of these things point to the problems that arise between common law married couples.³⁶² Moreover, the ability for Texas courts to distribute community property disproportionately is likely a harsher effect on individuals attempting to establish an informal marriage.³⁶³

C. Millennials

The traditional order of a relationship, placing marriage as a prerequisite to cohabitation and children, has rearranged throughout the last few years.³⁶⁴ In fact, "[a]n increasing number of unmarried cohabitation relationships functionally resemble a marriage."³⁶⁵ Though historically, courts have refused to give these relationships any legal support, this position has changed substantially.³⁶⁶ Recent court decisions display the courts' change in attitude by the development of new theories which appreciate certain legal rights for couples making agreements as non-marital partners.³⁶⁷ This is likely due to the trends showing millennials are waiting longer to get married, start families, and become parents.³⁶⁸ Many are staying at home with parents longer than traditional trends show, however, they also tend to cohabit with their partners prior to marriage, if they get married at all.³⁶⁹ One of the issues driving millennials away from marriage is that many of

358. *See id.* at 208.

359. *See* Hammerle, *supra* note 356, at 1770 (noting that attractiveness of lower expenses may drive testators may opt to create homemade wills, and that the reliance that the homemade will is valid and will be upheld in court will ultimately result in detriment to the parties involved).

360. *See id.* at 1764.

361. *See* Primrose, *supra* note 13, at 208.

362. *See id.*

363. *See id.*

364. *See* J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L. Q. 93, 96 (1984).

365. *Id.*

366. Landers, *supra* note 82 § 21.9.

367. *Id.*

368. Kristen Bialik & Richard Fry, *Millennial Life: How Young Adulthood Today Compares with Prior Generations*, WWW.PEWSOCIALTRENDS.ORG (Feb. 14, 2019), <https://www.pewsocialtrends.org/essay/millennial-life-how-young-adulthood-today-compares-with-prior-generations/> [perma.cc/WD3M-K37P].

369. *See id.*

them are often children of divorce and seek to avoid the same fate.³⁷⁰ Conversely, as research shows, the decline of marriages among millennials also pulls the divorce rate down because millennials are choosing to cohabitate with their partners prior to making any legal commitment.³⁷¹

All of these trends support the argument that the Texas Legislature's continued modification of community property laws account for the growing generations in society.³⁷² Moreover, make clear what rights will be deprived from Millennials if they fail to take steps adequate to retain any and all property interests they acquire in a cohabitating relationship or a common law marriage.³⁷³

VIII. CONCLUSION

The tremendous increase of unmarried millennial couples cohabitating has brought an increase of issues when these couples seek recovery in property interests through the judicial system.³⁷⁴ Courts have trouble defining a "precise method [to distribute property] accumulated during, or arising from, a relationship between a cohabitating couple."³⁷⁵ Societal changes have inevitably led to an increase in unmarried cohabitation, necessarily deserving of a legal doctrine to protect both the institution of marriage promoting judicial efficiency, while maintaining protections to the rights of unmarried couples who perceive their relationship as an informal marriage.³⁷⁶ Ultimately, if Texas continues to recognize informal marriages, the legislature needs to enact statutes that effectively protect the overwhelming portion of society that may be claimants in this area of law.³⁷⁷ Otherwise, it is unjust to allow litigants to rely on such a watered down protective statute.³⁷⁸

We—legal scholars, students, and society in general—must all concede that the legal system is not without flaws.³⁷⁹ In a general sense, it can be argued that state legislatures do often recognize—albeit, sometimes retroactively—social and economic changes with each wave of generation.³⁸⁰ Thus, the purpose of this comment is not to purport that there is a clear

370. See Hillary Hoffer, *7 Ways Millennials are Changing Marriage from Signing Prenups to Staying Together Longer Than Past Generations*, BUSINESSINSIDER.COM (May 24, 2019, 9:14 AM), <https://www.businessinsider.com/how-millennials-are-changing-marriage-divorce-weddings-prenups-2019-5> [perma.cc/7PR5-W7S2].

371. *Id.*

372. *Id.*

373. *Id.*

374. 69 A.L.R. 5th 219 (1999).

375. *Id.*

376. See *supra* Part IV; Garza, *supra* note 204, at 552.

377. See *supra* Part IV; Garza, *supra* note 204, at 552.

378. See *supra* Part III.C.

379. See *supra* Part III.C.

380. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015) (legalizing same-sex marriage).

bright-line solution to the issues discussed; rather, the purpose of this comment is to reveal issues in the law that have historically existed in the courts which will seemingly continue to arise in this lifetime.³⁸¹ By the time the law aligns with whatever condition society is in at a given time, we would not be surprised, to see the new generation advocate for rights historically dealt with in traditional ways.³⁸²

381. *See supra* Parts I–V.

382. *See supra* Parts I–V.