FIRST COMES LOVE, THEN COMES MARRIAGE: COHABITATION AS A FRAMEWORK FOR CONFLICTS BETWEEN COMMUNITY PROPERTY AND COMMON LAW MARRIAGE

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I. INTRODUCTION

In 2015, the Supreme Court of the United States legalized same-sex marriage.[1] This occasion was momentous, but the decision also led to numerous other issues related to marriage and property.[2] A big question was whether *Obergefell* would apply retroactively or prospectively because both options would have significantly different impacts on property distribution.[3] In the intervening time, precedent has indicated that *Obergefell* is applied retroactively, but this precedent does not resolve all issues related to the interplay between marriage and property.[4] Texas happens to be the only state in the entire United States that possesses both community property and common law marriage systems, which can complicate property distribution.[5] *Obergefell*'s impact raises even more thorny issues to consider.[6]

A. Overview

The remainder of this introduction will begin to address key concepts in Texas law, including separate property, community property, the homestead, and how marriage is organized.[7] Part II will present a hypothetical fact situation that incorporates these concepts and produces problems related to community property, common law marriage, and property distribution.[8] Part II also discusses consequences that may arise from these problems and the lack of a clear solution for them.[9] Part III takes a deeper dive into community property as a system of property organization, its history, how it works in Texas, and how it impacts property distribution upon death in Texas.[10] Part IV similarly addresses common law marriage in more depth, its history, theories for its adoption, and efforts to abolish it.[11] Part V summarizes the sociopolitical and legal context surrounding how people choose to live together as well as the negative sentiment towards and negative treatment of

1. *See* Obergefell v. Hodges, 576 U.S. 644, 713 (2015).
2. *See* Gerry W. Beyer, *Estate Planning Ramifications of* Obergefell v. Hodges, EST. PLAN. DEVS. FOR TEX. PROFS. (July 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807101 [https://perma.cc/A2PT-5VYN].
3. *See* Kaitlin E.L. Gates, *Catching the Gold at the End of the Rainbow: The Impacts of Retroactive Recognition of Same-Sex Marriage on Community Property Division*, 9 EST. PLAN. & CMTY. PROP. L.J. 263, 267 (2017).
4. *See infra* Section II.A.
5. *See* Gates, *supra* note 3, at 267; *Common Law Marriage by State*, NAT'L CONF. ST. LEGISLATURES (Mar. 11, 2020), https://www.ncsl.org/research/human-services/common-law-marriage.aspx [https://perma.cc/9PB7-899R].
6. *See* Gates, *supra* note 3, at 267.
7. *See infra* Sections I.B–D.
8. *See infra* Section II.A.
9. *See infra* Section II.B.
10. *See infra* Part III.
11. *See infra* Part IV.

same-sex couples in Texas.[12] Part VI presents cohabitation in its broader sense as a framework through which to examine formal marriage, common law marriage, and other ways people organize their relationships.[13] Additionally, Part VI analyzes different methods of recognizing relationships and how other jurisdictions grant property rights according to these methods.[14] Part VII considers all the aforementioned concepts and offers a solution to the problems created by the hypothetical, and lastly, the conclusion in Part VIII reviews main points and this Comment's goals.[15]

B. The Texas Property System

Every state has its own system for organization and distribution of property.[16] Generally, states will either have a community property system or common-law-driven separate property system for property distribution, but even within these methods of property organization, there may be significant differences in property rules from state to state.[17] The type of property system a state has—community property or separate property—dictates the way property is distributed upon termination of a marriage.[18]

In a community property system, marriage is treated as a partnership from which both spouses share equally in the property they acquire.[19] Community property recognizes that both spouses' contributions to the marriage relationship are equally important.[20] In Texas, any property that is not separate property is community property.[21] This rule of exclusion works hand in hand with the presumption of community property.[22] All the property a married couple possesses and acquires during their marriage is presumed to be community property and comprises their community estate.[23] Both

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12. *See infra* Part V.

13. *See infra* Part VI

14. *See infra* Part VI.

15. *See infra* Part VII.

16. Kandice Bridges, *Community Property States vs. Separate Property – Definitions & Laws*, MONEY CRASHERS (June 27, 2012), https://www.moneycrashers.com/community-property-states-separate-property/ [https://perma.cc/RTY6-688Z]; *see* Gates, *supra* note 3, at 277.

17. *See* Bridges, *supra* note 16; *see* Gates, *supra* note 3, at 277.

18. *See* Gates, *supra* note 3, at 280–83. Texas is one of nine states that have community property systems. The other eight are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Washington, and Wisconsin. Puerto Rico and Guam are also community property jurisdictions. *See Basic Principles of Community Property Law*, IRS, https://www.irs.gov/irm/part25/irm_25-018-001#idm140332592923296 (Sept. 10, 2017) [https://perma.cc/ATN2-QDME].

19. *See* Gates, *supra* note 3, at 277.

20. *See* 15B AM. JUR. 2D *Community Property* § 2 (2020).

21. TEX. CONST. art. XVI, § 15; *see* Arnold v. Leonard, 273 S.W. 799, 802 (Tex. 1925) (discussing the doctrine of implied exclusion, which provides that any property included within the constitutional definition of separate property is separate property and whatever is excluded is community property).

22. TEX. FAM. CODE ANN. § 3.003(a).

23. *See id.*; Chris Thompson, *Inheritance Laws in Texas*, SMARTASSET (Mar. 12, 2021), https://smartasset.com/estate-planning/texas-inheritance-laws [https://perma.cc/7ES3-C5JP].

spouses own their community property in equal, undivided one-half interests.[24] When one spouse dies, only their one-half interest in the community estate passes through will or intestacy; the surviving spouse will retain the second one-half interest that they originally owned.[25] In a common law, non-community property system, property acquired by the spouses during the marriage is owned individually and remains separate.[26] In separate property jurisdictions, separate property will be relevant only at divorce; community property principles have a broader scope and apply at marriage, at divorce, and upon death.[27]

This distinction between the characterization of property as community or separate can make a world of difference as far as who inherits property after death.[28] As a simple example, if two spouses buy a house in Texarkana, Texas, they will both own one-half of the interest in the property—assuming no legal agreement changed the characterization of it.[29] If one spouse dies intestate, the surviving spouse will retain their one-half interest because of Texas's community property rules.[30] If instead, the spouses decide on a house that is located a few streets over on the Arkansas side of the city, Arkansas's separate property rules and dower and curtesy law will control in determining what the surviving spouse inherits.[31] Thus, a community property system will result in a clearly different outcome for property distribution, and whether or not it applies depends on a person's state of residence.[32]

In Texas, the marital property system is driven by the Texas Constitution.[33] "All marital property is . . . either separate or community."[34] The Constitution provides a controlling definition for separate property:

> All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the

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24. FAM. § 3.003(a); *see* Thompson, *supra* note 23.

25. *See* TEX. EST. CODE ANN. § 101.001 (meaning, you can only give away what you own, and a spouse only owns a one-half interest in the community estate).

26. *See* Bridges, *supra* note 16.

27. Avery Rios, *Divorce Destroys the Community: An Examination of the "Texas Method" Community Property Principles Upon Divorce and Its Effects on Informal Marriage*, 12 EST. PLAN. & CMTY. PROP. L.J. 437, 441 (2020).

28. *See* Gates, *supra* note 3, at 267.

29. Author's hypothetical; FAM. § 3.003(a).

30. Author's hypothetical; EST. § 201.003.

31. Author's hypothetical; *see* Sarah Fisher, *Arkansas Inheritance Laws: What You Should Know*, SMARTASSET (Feb. 25, 2020), https://smartasset.com/financial-advisor/arkansas-inheritance-laws [https://perma.cc/7S2V-6WMR] (Dower and curtesy will not leave the surviving spouse without any inheritance, but if the surviving spouse was not a title owner of the property, he or she will not already own an interest in it prior to probate as would be the case in Texas); *see also* Parson v. United States, 460 F.2d 228, 234 (5th Cir. 1972) (showing how the Texarkana, AK-Texarkana, TX distinction has impacted community property distribution).

32. *See* Bridges, *supra* note 16.

33. *See* TEX. CONST. art. XVI, § 15.

34. Hilley v. Hilley, 342 S.W.2d 565, 573 (Tex. 1961), *superseded by constitutional amendment*, TEX. CONST. art. XVI, § 15, *as recognized in* Holmes v. Beatty, 290 S.W.3d 852, 854–55 (Tex. 2009).

> separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.[35]

This critical provision imposes this system of dual separate and community characterization of property in Texas because of its constitutional nature that cannot be abridged by the state legislature.[36] However, the state legislature has delineated these principles and rights more thoroughly in the Family, Estates, and Property Codes.[37]

C. The Texas Homestead

Another concept important to the discussion of marriage and property in Texas is that of the homestead.[38] The place or property used as a family home is one's homestead.[39] The Texas Constitution provides strong protections to a homestead.[40] These protections consist primarily of

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35. TEX. CONST. art. XVI, § 15.

36. Arnold v. Leonard, 273 S.W. 799, 802 (Tex. 1925). The Texas Legislature does not have the authority to change the character of property by statutorily "add[ing] or withdraw[ing] rights." This is a rule of construction. *See* GERRY W. BEYER, TEXAS ESTATE PLANNING STATUTES WITH COMMENTARY 69 (2019). However, note that the clause permitting spouses to agree on converting the character of their property is a 1999 addition to Section 15. Any agreements must abide by the constitutional definition of separate property. *See* PAMELA E. GEORGE, GEORGE ON TEXAS MARITAL PROPERTY RIGHTS: CASES AND MATERIALS 39–43 (2017–2018 ed. 2017).

37. *See* BEYER, *supra* note 36, at 69.

38. *See* GEORGE, *supra* note 36, at 511, 514.

39. *See* TEX. PROP. CODE ANN. § 41.002; *id.* at 511 (Notably, the Texas Constitution does not define "homestead," but the legislature has codified a definition in Property Code Section 41.002.).

40. *See* TEX. CONST. art. XVI, §§ 50–52.

protections against seizure by creditors, but they also encompass protection for surviving spouses during their lifetimes and minor children from having to leave the homestead in situations in which other potentially unscrupulous parties acquire an interest in the homestead property and would like to force a partition.[41] However, the homestead property is treated like other real property upon the death of an owner, meaning that it can be community property.[42]

D. The Texas Marriage System

1. General Provisions

Other general Texas marriage provisions and principles are worth reviewing.[43] There is a presumption that marriages are valid unless a strong reason exists for invalidating them.[44] In particular, when one person has been married more than once to "different spouses," the most recent marriage is the one presumed valid against previous marriages unless a previous marriage is proven valid.[45] A marriage is void if either of its participants "has an existing marriage to another person" that has not been terminated by legal action or death.[46] In other words, a still-valid earlier marriage voids a later marriage.[47] But, the invalidity of the later marriage can be cured if the earlier valid marriage is dissolved, and after that date of dissolution, the parties to the later marriage live together and represent themselves to others as spouses.[48]

2. Formal Marriage and Common Law Marriage

For many couples, marriage is a step in their relationship that not only signifies love and commitment but also provides several legal benefits, including tax and other financial benefits, healthcare benefits, and benefits related to property and inheritance.[49] As mentioned above, marriage can drastically impact how a couple's property is distributed—it could mean the difference between a surviving spouse receiving all of a deceased spouse's property; receiving only part of it, while children receive the remainder; or in

41. *Id.* §§ 50, 52.
42. *Id.* § 52.
43. *See infra* Section I.D.1.
44. TEX. FAM. CODE ANN. § 1.101.
45. *Id.* § 1.102.
46. *Id.* § 6.202(a).
47. *Id.*
48. *Id.* § 6.202(b).
49. *See* Beyer, *supra* note 2.

some cases, receiving none of it.[50] But what counts as being married?[51] For many people, getting married probably means obtaining a formal paper license at a government office and having a wedding in front of family and friends.[52] However, in some states, this procedure is not the only way to become married.[53]

In several states, including Texas, informal or common law marriage provides another avenue toward obtaining this status.[54] In Texas, a couple can prove the existence of a common law marriage if they show that they agreed to be married, they live together as spouses, and they represent themselves as a married couple to other people.[55] Proof can also consist of evidence of a signed declaration of informal marriage.[56] Ultimately, whether a common law marriage exists is an issue of fact.[57]

As a lawful marriage status, common law marriage provides the same legal benefits as formally-licensed marriage and results in similar outcomes, including how property is disposed of after death and who is a beneficiary or inherits such property.[58] Common law marriage can be terminated only by death or court decree, as is the case with formal licensed marriage.[59] Common law divorce does not exist.[60] Subchapter A of Chapter 2 of the Family Code addresses how a couple may enter into a formal licensed marriage.[61] Subchapter E addresses informal or common law marriages.[62]

The informal marriage statute also contains an interesting provision when considered alongside the general marriage provisions discussed above: "A person may not be a party to an informal marriage or execute a declaration of an informal marriage if the person is presently married to a person who is not the other party to the informal marriage or declaration of an informal marriage, as applicable."[63] This language makes one wonder what happens if

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50. *See supra* Section I.B.

51. *See* Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2012 (2017); Gates, *supra* note 3, at 267 (presenting the question of whether a same-sex couple's date of marriage is the date they would have been married had it been legal or the date of the *Obergefell* decision when same-sex marriage was legalized).

52. *See* Matsumura, *supra* note 51, at 2002.

53. *See id.* at 2009–10.

54. *See* TEX. FAM. CODE ANN. § 2.401 (authorizing common law marriage in Texas). Note that the gender-specific "husband and wife" language is unconstitutional after *Obergefell*. *Obergefell v. Hodges*, 576 U.S. 655 (2015). The provision now presumably includes same-sex partners. *See id.*

55. FAM. § 2.401(a)(2).

56. *Id.* § 2.401(a)(1).

57. Warren v. Kyle, 565 S.W.2d 313, 317 (Tex. App.—Austin 1978, no writ) (citing Walton v. Walton, 228 S.W. 921 (Tex. Comm'n App. 1921, judgm't adopted)).

58. *See* FAM. § 2.401(a); 1 KATHRYN J. MURPHY & IKE VANDEN EYKEL, TEXAS PRACTICE: FAMILY LAW § 2:84 (2020).

59. Est. of Claveria v. Claveria, 615 S.W.2d 164, 167 (Tex. 1981).

60. *Id.*

61. *See* FAM. §§ 2.001–.009.

62. *See id.* §§ 2.401–.405.

63. *Id.* § 2.401(d).

both parties are presently married, but to each other instead of to other people.[64]

The problem is that common law marriage, although providing the same ends as a formal licensed marriage, is not entered into in the same way, and in particular, the method of acquiring common law marriage status has subjective elements that depend on how common law married spouses view themselves and how third parties view the spouses.[65] The elements for showing a common law marriage are the antithesis of the clear, procedural steps required for a formal marriage license in Texas, which involves appearing before the county clerk, proving one's identity, submitting an application, taking an oath, and making a convenient record of the occurrence.[66] Professor Kaiponanea Matsumura considers this distinction:

> The formalities [the license and the ceremony] become the "test of enforceability." Proof of the formalities becomes proof of the [choice to marry] itself. . . . In contrast, informal choice requires different state actors to inspect different evidence at a different stage in the parties' relationship. Courts are typically called upon to determine the existence of a common law marriage upon dissolution or death. . . . Without legal formalities to rely upon, parties attempting to prove this intent must litigate the issue after the fact, meaning that courts, rather than clerks, must resolve the disputes. . . . Formal choice depends on a minimal amount of information: the applicants' names, addresses, ages, and the representation that they participated in an official ceremony witnessed by a few people. Clerks do not determine whether the couple is well-suited to performing the functions of marriage. They lack the means to test commitment and mutual support, much less love or other indicia of conjugality—in other words, the subjective intentions of the parties.[67]

There may be a belief that common law marriage is inferior to formal marriage, but arguably the burden is considerably higher.[68] As Professor Matsumura noted, common law marriage is proven in court with evidence while formal marriage is easily obtained at the county clerk's office.[69]

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64. *See id.*

65. *Compare* FAM. § 2.401 (spouses "agreed to be married and after the agreement lived together" as spouses and "represented to others that they were married"), *with* FAM. § 2.002 ((1) appear, (2) submit proof, (3)–(4) fill out the application, and (5) take the oath); *see also* Matsumura, *supra* note 51, at 2006, 2008 (describing common law marriage as "created through the exchange of promises" and noting the "uncertainty about the relationship between conduct and subjective mental state").

66. FAM. § 2.002(1)–(5); *see* Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 99 (1960); *Marriage and Divorce Records*, TEX. DEP'T OF ST. HEALTH SERVS., https://dshs.texas.gov/vs/marr-div/ (July 19, 2021) [https://perma.cc/2MK K-8ZPG]; Matsumura, *supra* note 51, at 2013 (Note, however, that formal marriages are not immune to challenges that implicate the subjective intent to marry.).

67. Matsumura, *supra* note 51, at 2012.

68. *See id.*

69. *Id.*

Unsurprisingly, confusion and misunderstanding exist about common law marriage and how it works.[70] In addition to these broader ideas about what it means to be married and to prove marriage, sometimes people think that to be common law married, a couple has to live together for only a certain amount of time, or that common law marriage can be dissolved without formal procedures.[71] This confusion could also complicate the perception of a common law marriage.[72] On one hand, the element of a couple holding themselves out as married depends directly on other people perceiving that intention.[73] On the other hand, other people in a community may perceive a marriage-like relationship that a couple has not consciously intended to present as an actual marriage.[74]

If the acquisition of community property depends on the boundaries of marriage, common law marriage's potentially fuzzy boundaries will complicate the determination of whether a couple's property is characterized as community or separate, which in turn will impact post-death property distribution.[75] This qualitative distinction between formal licensed marriage and informal common law marriage, which both result in the same marriage benefits, goes to the main question of this Comment: what happens in Texas to property distribution, and in particular community property, when a couple is common law married and then for any reason decides to get formally married with a license?[76]

II. HYPOTHETICAL

A. The Facts

Jane and Susan are two older, married women in Texas.[77] Both have been in prior marriages to different people, and Susan has two children from her prior marriage who are now adults.[78] They have been a couple for well over a decade, and in that time they have managed their affairs as any other couple would.[79] Apartments they have rented have been in both their names.[80]

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70. *See* Rebecca Rowan, *Common-Law Marriage in Texas Debunking Two Typical Myths*, ST. BAR TEX., https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=46987 (last visited Feb. 2, 2021) [https://perma.cc/G26H-9JX4].

71. *Id.*

72. *See id.*

73. *See* Matsumura, *supra* note 51, at 2009.

74. *See* Rowan, *supra* note 70.

75. *See* Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395, 397–99 (2017).

76. Author's original question; *see also id.* at 400–03 (providing hypothetical and discussion that consider the importance and impact of the length of a marriage).

77. Author's hypothetical (Names have been changed to protect the identity of the real people.).

78. Author's hypothetical.

79. Author's hypothetical.

80. Author's hypothetical.

They have had utilities in both their names.[81] Their legal documents reflect this comingling of their lives going back years.[82] Eventually, they purchased a house together that they maintain as their homestead, even though it happens to be titled only in Susan's name.[83] All these events happened prior to the 2015 decision in *Obergefell v. Hodges* while same-sex marriage was illegal in Texas.[84] Promptly after *Obergefell* was decided, Jane and Susan made arrangements to be formally married.[85] Common law marriages can be backdated post-*Obergefell*.[86] So, for purposes of this Comment, Jane and Susan were common law married and then successfully completed the process to become formally married with a license.[87]

After being formally married for a handful of years, Susan becomes ill and dies without a will.[88] Dying without a will means that her property must pass to any heirs in accordance with the rules of intestacy in the Texas Estates Code (discussed below).[89] Susan's children from her prior marriage disapprove of Jane and Susan's marriage and are not cooperative in the probate process.[90] Jane and Susan's main asset is their house they purchased while common law married but prior to becoming formally married.[91] Although this homestead property passes in the same manner as other real property, whether the property is characterized as community property or separate property depends on whether Jane and Susan were legally married at the time they purchased the property.[92] Both formal licensed marriages and informal common law marriages count as lawful marriages.[93]

If the house is characterized as community property, then Jane, as Susan's spouse, retains the one-half interest she owned when both spouses acquired the property, and Susan's children inherit Susan's one-half interest.[94] If the character of the house is separate, then Jane is entitled to a life interest in one-third with the remaining two-thirds interest passing

81. Author's hypothetical.

82. Author's hypothetical.

83. Author's hypothetical; TEX. PROP. CODE ANN. § 41.002 (detailing what a homestead is).

84. Author's hypothetical; Obergefell v. Hodges, 576 U.S. 644, 644 (2015); *see also* De Leon v. Abbott, 791 F.3d 619, 625 (5th Cir. 2015) (holding that Texas's prohibition of same-sex marriage was unconstitutional. The case was pending when *Obergefell* was decided, but the Fifth Circuit made their decision just five days later, following *Obergefell* and expressing no view on the case's merits).

85. Author's hypothetical.

86. *See* Nicolas, *supra* note 75, at 414–18; G.M. Filisko, *After* Obergefell*: How the Supreme Court Ruling on Same-Sex Marriage has Affected Other Areas of Law*, ABA J. (June 1, 2016, 4:00 AM), https://www.abajournal.com/magazine/article/after_obergefell_how_the_supreme_court_ruling_on_same_sex_marriage_has_affe [https://perma.cc/EM6R-VP6P]; Beyer, *supra* note 2.

87. Author's hypothetical.

88. Author's hypothetical (Ultimately, the major takeaway of this discussion is to write a will and make sure to appoint executors who will carry out the probate.).

89. *See infra* Section III.C.

90. Author's hypothetical.

91. Author's hypothetical.

92. *See* TEX. EST. CODE ANN. § 102.003.

93. *See* TEX. FAM. CODE ANN. §§ 2.202, 2.401; Nicolas, *supra* note 75, at 415.

94. *See* EST. § 201.003(c).

outright to Susan's children.[95] Regardless of whether the house is community or separate property, Jane by right also can remain on the property because it is her homestead, and Susan's children cannot kick her off the property even though they own an interest in it.[96]

B. Statutory Confusion, Logic, Intent, and Weddings

Does either marriage cancel out or invalidate the other?[97] The preference in Texas is for marriages to be presumed valid, but Section 1.102 of the Family Code seems to indicate that Jane and Susan's second formal marriage, as the most recent marriage, would be the one presumed valid against the prior informal marriage.[98] But, the statute's language specifies "different spouses," and Jane and Susan are the same two participants in both marriages.[99]

Section 6.202 seems to require that Jane and Susan's prior informal marriage be dissolved or terminated for the subsequent formal marriage to be valid, but Jane and Susan were not divorced prior to becoming formally married, and Susan died much later in the timeline.[100] This lack of termination would mean that the earlier informal marriage should be the one proven valid against the subsequent invalid formal marriage.[101] Because death and divorce are the only two ways to terminate a marriage, it seems that becoming formally married would not terminate a prior common law marriage between the same two people.[102]

Section 2.401(d), the provision specifically addressing informal marriage, says that a person cannot be a party if he or she is presently married to a person who is not the other party.[103] This language would seem to indicate that because Jane and Susan, as parties to the "presently married" union, are the same two people seeking the informal marriage, the statute would not bar the informal marriage.[104]

Additionally, meeting the requirements of common law marriage in Texas requires satisfying an intent aspect—a couple consciously intends to hold themselves out as married.[105] But if two people intend to represent

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95. *See id.* § 201.002(b).

96. *See id.* § 102.002; TEX. CONST. art XVI, § 52.

97. *See* FAM. §§ 6.202(a)–(b), 1.102, 2.401(d) (As the next few paragraphs discuss, these provisions seem to conflict with each other logically.).

98. *Id.* § 1.102.

99. *Id.*

100. *See id.* § 6.202(b) (Recall that there is no such thing as common law divorce.); Est. of Claveria v. Claveria, 615 S.W.2d 164, 167 (Tex. 1981).

101. *See* FAM. § 6.202(a).

102. *Claveria*, 615 S.W.2d at 167.

103. FAM. § 2.401(d).

104. *Id.*

105. *See* Matsumura, *supra* note 51, at 2008, 2019 (displaying marriage as something that must reflect an "act of will" because of how significantly it transforms legal status).

themselves as married and be common law married, it seems that they cannot also intend to become married through the formal licensing process.[106] Although an average person without legal background likely does not have a thorough understanding of the differences between formal and informal marriage and the effects of both, it also does not make logical sense to get formally married after being common law married because both provide the same benefits.[107] Two people need to get married only once to obtain that vast array of marriage benefits.[108]

However, it is not unreasonable that two people could lawfully be common law married and then decide to get formally married; people undergo major life changes, like having children, that can motivate a desire to "formalize" a relationship.[109] Even if the same legal outcome is achieved by obtaining an ornate piece of paper bestowing the status of marriage from the county clerk and having a big wedding, or by two partners simply agreeing that they consider their relationship to be a committed marriage relationship and presenting it in that way to others and a court—both situations are socially and legally not the same.[110] Also, considering this social motivation for couples to express their love and commitment to each other in a public wedding ceremony, it is not surprising that people who have been systemically prevented from getting married, like same-sex couples, would immediately want to have their own memorable weddings the moment they legally could.[111]

C. Real Consequences

The above hypothetical presented a simpler picture of how an interest in property, like a house, can be divided and inherited in considerably different ways.[112] This prospect may not pose a problem for some people, but what if a person for any reason does not want their children to inherit, or they are childless but do have abusive parents, or they have conniving family members who would stop at nothing to interrupt the normal statutory chain of intestate succession?[113] The obvious solution to avoid these intestacy situations is to write a will and appoint an executor who will probate the will,

106. FAM. § 2.401. *See* Nicolas, *supra* note 75, at 431.

107. MURPHY & EYKEL, *supra* note 58, § 2:84; *see* Matsumura, *supra* note 51, at 2008, 2031.

108. MURPHY & EYKEL, *supra* note 58, § 2:84; *see* Beyer, *supra* note 2, at 3–4 (providing a list of benefits along with rights and obligations of marriage).

109. *See* Matsumura, *supra* note 51, at 2008, 2009 (stating how relationships change over time: "It is possible for the parties not to know their own intentions regarding marriage, much less their partners' intentions").

110. *Id.* at 2011–12 (explaining differences between a formal court marriage process and determining a common law marriage).

111. *Id.* at 2016–17.

112. *See supra* Section II.A.

113. *See* TEX. EST. CODE ANN. § 201.001.

but not everyone has the knowledge, access, time, or financial resources to accomplish this.[114]

If a couple's relationship is not a formal licensed marriage or there are issues that make a common law marriage difficult to prove or alternatively, issues that make it easy to challenge what a couple believed was a common law marriage or otherwise committed marriage, the disintegration of the relationship can leave ex-partners in vulnerable financial and personal situations.[115] Imagine the situation of a woman who finally manages to leave a 10-year-or-longer abusive relationship in which she bore children, maintained a household, and essentially functioned as a wife.[116] She has minimal, if any, financial resources and no significant property of her own because major assets were titled in the name of the abusive ex-partner.[117] Some kind of defect exists in the legal status of her former relationship, or she lives in a state with no recognition of common law marriage.[118] Consequently, she has no remedies and no way to recover from what otherwise would have been a lawful marriage in the way afforded to similarly-situated people who are legally married.[119]

Property and assets are resources that can make or break someone's life and are at the mercy of intestacy law when there is no will.[120] Property distribution can become more complicated when the time boundaries of a committed relationship are legally ambiguous and not clearly defined as is the case with a formal marriage.[121] Any solution to the hypothetical situation presented above (and any similar situations in which people's relationships end and they find themselves in distressing positions) should take into account these vulnerabilities and should seek to strengthen the property rights of those affected.[122]

Before exploring solutions that are tailored to Texas, this Comment will further address some of the historical background, legal development, and sociopolitical context under which these issues of marriage and property arise.[123]

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114. *See* Charles Moster, *The Importance of Having a Will in Texas*, MOSTER L. FIRM (Mar. 24, 2015), https://www.themosterlawfirm.com/2015/03/the-importance-of-having-a-will-in-texas/ [https://perma.cc/LC5F-HZV8] (explaining consequences of not having a will).

115. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 709–10 (1996) (illustrating a hypothetical couple separating and the resulting consequences in a state that does not recognize common law marriage).

116. *See id.* at 709.

117. *See id.* at 710.

118. *See id.*

119. *See id.*

120. *See* Nicolas, *supra* note 75, at 402–03.

121. *See id.*

122. *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 4, 221 (2010).

123. *See infra* Parts III–V.

III. COMMUNITY PROPERTY

Before addressing common law marriage, this section will discuss the legal system of community property and its historical and legal development in more depth.[124] It will also review intestate property distribution in Texas.[125] Texas is currently the only state in the United States that utilizes both community property and common law marriage.[126] As a result, community property is the backdrop against which we consider issues related to marriage and the interaction of these two legal systems.[127]

A. History of Community Property

The concept of community property is a remnant of the French and Spanish civil legal systems that existed at various times during Mexico's and Spain's control and colonization of the southwest United States.[128] This history is why the community property states are concentrated in the southwest area of the country.[129] Its spread within the United States was likely a result of economic factors.[130] Although Mexico declared independence from Spain, it was still following Spanish civil law, and its government authorized colonization and designation of Texas land to immigrating families.[131]

Prior to the formation of the Republic of Texas in the 1830s, Texas followed Spanish and Mexican community property law.[132] This iteration of community property law reflected the idea of spouses as partners who share equally in the community to which they both contribute.[133] When the community was dissolved, both spouses' property was presumed to be community property unless proven to be separate.[134] After Texas gained independence, it was not until the third Congress that community property rights were addressed.[135] Upon the death of their husbands, wives were given some rights in the marital property, and widows with children were entitled to life estates in one-third of the property as well as a portion of the deceased husband's personal property.[136] The fourth Congress in 1840 formally

124. *See infra* Sections III.A–B.
125. *See infra* Section III.C.
126. Gates, *supra* note 3, at 267; *Common Law Marriage by State*, *supra* note 5.
127. Gates, *supra* note 3, at 267.
128. 38 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 2.2 (1993 & Gerry W. Beyer, Supp. 2020).
129. *Id.*
130. *Id.* § 1.1.
131. *Id.* § 1.18.
132. *Id.* § 1.20.
133. *Id.*
134. *Id.*
135. *Id.* § 1.21.
136. *Id.*

adopted English common law but also further defined separate property relative to community property.[137] The first Texas Constitution in 1845 expanded the definition of separate property.[138] Since then, several iterations of the constitution have maintained the provision for separate property, authorized the legislature to pass further laws defining separate and community property, and permitted spouses to make agreements concerning the character of their property.[139]

B. General Community Property Provisions

Texas utilizes a system of community property and separate property, as opposed to only the latter.[140] "Community property" entails a presumption that any property possessed by spouses during their marriage is community property owned equally by both, instead of held separately, subject to any written agreement classifying the property or providing for its management in another way.[141] A premarital agreement may contract with respect to the rights and obligations of the parties regarding the property, estate and trust planning, the disposition of the property, and other related matters.[142] A marital agreement may address partition or exchange of community property into separate property, as well as income and property arising from separate property.[143] Partition or exchange means that Spouse A is transferring their interest in property that would otherwise be community property to Spouse B, who then holds that transferred interest as their own separate property.[144] Premarital and marital property agreements have the effect of waiving, releasing, assigning, or partitioning claims for economic contribution and/or reimbursement.[145] Spouses may also agree to convert all or part of their separately-owned property into community property.[146] This provision is significant because of the primacy of the Texas Constitution and its relation to what the legislature can and cannot do.[147] These agreements must be signed and in writing, but no consideration is required.[148] To overcome the presumption of community property, a person needs to prove by clear and

137. *Id.* § 1.22.
138. *Id.* § 1.23.
139. *See supra* Section I.B.
140. *See* Gates, *supra* note 3, at 267.
141. TEX. FAM. CODE ANN. §§ 3.003, 3.102.
142. *See id.* § 4.003.
143. *See id.* §§ 4.102–.103.
144. *Partition Agreements in Texas*, L. OFF. BEN CARRASCO PLLC (Mar. 28, 2019), https://bencarrascolaw.com/information/property-division/partition-agreements-in-texas/ [https://perma.cc/U2D3-E879].
145. FAM. § 3.410.
146. *Id.* § 4.202.
147. *See supra* Section I.B.
148. *Partition and Exchange Agreements*, ONDA FAM. L., https://www.ondafamilylaw.com/marital-agreements-texas/partition-exchange/ (last visited Sept. 21, 2021) [https://perma.cc/2L2D-3JKN].

convincing evidence that property acquired during a marriage is separate property.[149]

As mentioned above, the Texas Constitution defines separate property, but the legislature has also developed a definition.[150] Separate property consists of "(1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage."[151] Community property consists of property that does not fall into these separate property categories.[152]

C. Inheritance in Texas

The probate property of a person that passes by intestacy vests immediately in their heirs.[153] Chapter 201 of the Estates Code addresses the distribution of a person's estate.[154] In terms of the validity or invalidity of marriage, a void marriage will be treated in the same way for distribution purposes as a valid marriage.[155]

1. Disposition of Community Estate of an Intestate Leaving a Surviving Spouse

The undivided one-half interest of the community estate owned by a person who dies intestate and leaves a surviving spouse passes to the surviving spouse if the deceased spouse has no surviving descendants or if all surviving descendants are only of the intestate's and surviving spouse's marriage.[156] If there are surviving descendants from outside the marriage, the deceased spouse's undivided one-half interest passes to all of those descendants and the surviving spouse retains their own one-half interest of the community estate.[157] Surviving descendants from outside the marriage will inherit per capita with representation.[158]

The debts and responsibilities of the intestate decedent spouse do not necessarily go away upon their death.[159] The community estate is still subject to any liabilities or debts of the deceased spouse after death, which is an

149. FAM. § 3.003.
150. *See supra* Section I.B.; TEX. CONST. art XVI, § 15.
151. FAM. § 3.001.
152. *Id.* § 3.002.
153. TEX. EST. CODE ANN. § 101.001(b).
154. *See id.* §§ 201.001–.152.
155. *Id.* § 201.055.
156. *Id.* § 201.003(b)(1)–(2).
157. *Id.* § 201.003.
158. *Id.* § 201.101(a).
159. *See id.* § 101.052.

important consideration if a couple were to strategically recategorize their property via agreement or partition and exchange.[160]

2. Disposition of Separate Property of an Intestate Leaving a Surviving Spouse

The separate property of a person who dies intestate and leaves a surviving spouse is distributed differently for separate personal property and separate real property.[161]

a. Separate Personal Property with a Surviving Descendant

When the intestate has at least one surviving descendant, one-third of the personal property passes to the surviving spouse, and the remaining two-thirds pass to the surviving descendants.[162]

b. Separate Real Property with Surviving Child or Descendant of Child

For the separate real property of the intestate, the surviving spouse is entitled to a life estate in one-third, and the surviving descendants inherit outright the remaining two-thirds and the remainder of the life estate.[163] Additionally, if the real property was the couple's homestead, the surviving spouse who receives the life estate in one-third of the real property has the distinct constitutional right to remain on and occupy the property for the remainder of their life, along with any minor children.[164] These homestead rights of surviving spouses are the same despite the character of the property.[165]

c. Separate Property with No Surviving Child or Descendant of Child

When the intestate leaves no surviving descendants, the surviving spouse is entitled to all the intestate's personal property and one-half of the real property.[166] The second half of the real property passes to any surviving parents, siblings, or descendants according to the hierarchical rules of descent

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160. *Id.* § 101.052(a)–(c); *see* TEX. CONST. art. XVI, § 15 (providing for both of these methods as of Jan. 1, 2000).

161. *See* EST. § 201.002(a)–(d).

162. *Id.* § 201.002(b)(1)–(2).

163. *Id.* § 201.002(b)(3).

164. *See* TEX. CONST. art XVI, § 52. (clarifying that if the real property in question is the surviving spouse's homestead, the spouse is thoroughly protected from being evicted, essentially, by any of the heirs who inherited the remainder interest).

165. EST. § 102.002.

166 *Id.* § 201.002(c)(1)–(2).

and distribution in Section 201.001.[167] If the intestate has no surviving parents, siblings, or descendants of siblings, the surviving spouse will take all the personal and real property.[168]

3. Joint Ownership of Property and Spouses' Community Property Right of Survivorship Agreement

When property is held jointly by more than one person, and one of the joint tenants dies, that co-owner's interest does not pass to the surviving joint tenant(s) unless the instrument that created the joint tenancy expressly provided for survivorship rights.[169] Rather, the interest of the deceased joint tenant passes to the decedent's heirs or under the decedent's will.[170] Joint tenancy without express rights of survivorship is treated as a tenancy in common.[171]

Spouses may also now create an agreement for right of survivorship in community property.[172] In these agreements, the spouses agree that either all or part of their community estate, whether it is property they currently own or may acquire in the future, becomes the property of the surviving spouse on death of a spouse.[173] These agreements are distinct from Transfer on Death Deeds, which cover separate real property and permit a spouse to transfer their interest to the surviving spouse upon their death without the need for probate.[174]

D. Applying Inheritance Rules to the Hypothetical

Recall that in the hypothetical discussed above, Jane and Susan had previously been married to different spouses before marrying each other, first via a common law marriage and subsequently via a formal licensed marriage.[175] They do not have children together, but Susan has two adult children from her prior marriage.[176] In the time after their common law marriage and prior to their formal marriage, they purchased a house that is titled only in Susan's name, but which serves as both spouses' homestead.[177]

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167. *Id.* § 201.002(c)(1)–(3).
168. *Id.* § 201.002(d).
169. *Id.* § 101.002. (This opt-in survivorship feature differs from the automatic attachment of survivorship rights that was the case at common law.).
170. *Id.*
171. *See* BEYER, *supra* note 36, at 112–13.
172. EST. §§ 112.001, 112.051.
173. *Id.*§ 112.051.
174. *See id.* §§ 114.051, 114.053.
175. *See supra* Section II.A.
176. *See supra* Section II.A.
177. *See supra* Section II.A.

After all these events, Susan dies intestate.[178] The following scenarios detail how the distribution of Susan's estate might proceed.[179]

1. Scenario 1: Jane and Susan's House Is Community Property

Jane and Susan's house is characterized as community property because their marriage date is determined to be the beginning of their common law marriage, which occurred before they purchased the house.[180] As a result, they both own an undivided one-half interest in the house.[181] When Susan dies, Jane retains her one-half interest in the community and Susan's one-half interest passes equally to her two children.[182] Jane also gets to stay in the house because it is her homestead and Susan's children cannot force her out.[183] This outcome is ideal for Jane because she can continue to live in her home and retain an ownership interest in it, which she then can devise to whomever she desires.[184]

2. Scenario 2: Jane and Susan's House Is Separate Property

Jane and Susan's house is characterized as separate real property because their marriage date is determined to be the date of their formal licensed marriage, which occurred after purchasing the house.[185] Because the house is titled only in Susan's name, Jane is entitled only to a life estate in one-third of the property, although she still has her homestead right of occupancy.[186] Susan's two children inherit two-thirds of the interest outright as well as the remainder of Jane's life estate.[187] Although Jane can stay in her home, this situation is less than ideal because she does not have an ownership interest that she can devise or that can be inherited by any of her heirs.[188] Lack of assets to pass onto children or a future generation can stunt the development of generational wealth, which significantly impacts access and quality of life for people, especially for Black people and other people of color in the United States.[189]

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178. *See supra* Section II.A.
179. *See infra* Section III.D.
180. *See* TEX. FAM. CODE ANN. § 3.003(a).
181. *See id.*
182. *See* TEX. EST. CODE ANN. § 201.003(c).
183. *See* TEX. CONST. art XVI, § 52.
184. *See* EST. § 101.001.
185. FAM. § 3.001(1).
186. *See* EST. § 201.002(b)(3).
187. *See id.*
188. *See* Nicole Dieker, *How to Create Generational Wealth*, HAVEN LIFE (Sept. 22, 2020), https://havenlife.com/blog/how-to-create-generational-wealth/ [https://perma.cc/DY42-G9VN].
189. *See id.*; Neil Bhutta et al., *Disparities in Wealth By Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. GOVERNORS FED. RSRV. SYS. (Sept. 28, 2020), https://www.federalreserve.gov

3. Scenario 3: Jane and Susan Jointly Own the House as Separate Property

If Jane and Susan had purchased the house jointly with both their names on the title, characterization of the house as separate property would not negatively impact Jane as it would if the house were only in Susan's name.[190] Jane would still have an ownership interest of her own to pass on when she dies.[191] Both could have even taken steps to execute a Transfer On Death Deed so that Susan's interest in the house passes to Jane upon her death without the need for probate.[192]

IV. COMMON LAW MARRIAGE

As discussed above, marriage delineates how property is dealt with at death.[193] However, the ability to be common law married adds a fuzzy subjective layer to the question of when marriage starts.[194]

A. History of Common Law Marriage

1. Geographic Origins of the Doctrine

Common law marriage has an interesting, complex history in the United States.[195] There are a variety of theories for its existence and adoption across the country—from the original colonies to the western states—but these theories are not uniform across the states and are sometimes inconsistent with common theories of adoption.[196]

/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/CQR6-ZSPN]; *About the Racial Wealth Gap*, CHI. CMTY. TR., https://www.cct.org/about/about-the-racial-wealth-gap/ (last visited Sept. 29, 2021) [https://perma.cc/DAV7-PJRQ]; *Racial Economic Inequality*, INEQUALITY.ORG, https://inequality.org/facts/racial-inequality/ (last visited Sept. 29, 2021) [https://perma.cc/XTG8-LZB3] (for a discussion of the racial wealth gap in relation to the COVID-19 pandemic); *see also* Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (July 15, 2019), https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/ [https://perma.cc/7R8Q-RH2R] (for a discussion of the very real and negative consequences that result when a family does have assets but those assets are inherited over multiple generations instead of devised via will, such that unscrupulous developers and others later on force partition sales and dispossess families of generational wealth).

190. *See supra* Section III.D.2.

191. *See* EST. § 101.001 (Jane's interest would presumably be one-half but could be a different fractional amount as well.).

192. *See id.* §§ 114.051, 114.053.

193. *See supra* Sections I.B, I.D.2.

194. *See* Nicolas, *supra* note 75, at 402–03.

195. *See* Bowman, *supra* note 115, at 718.

196. *See id.*

Common law marriage was a feature in English common law and something regarded as a "private contract" based on natural law.[197] In 1563, the Council of Trent passed a decree that made the validity of marriage dependent on its being performed in front of a priest and witnesses.[198] Despite this formalization of marriage, informal marriage continued in England for some centuries until Lord Hardwicke's Act was passed.[199] This Act provided that only marriages performed by ministers of the Church of England from that time onward would be valid.[200]

The first American colonies followed two models concerning common law marriage according to how they considered the Council of Trent's decree and Lord Hardwicke's Act.[201] One model, led by the state of New York, adopted common law marriage because it was valid in English common law.[202] Importantly, Lord Hardwicke's Act had passed after the establishment of some colonies in the United States and thus did not apply to the states after all.[203] States that implemented the other model, spearheaded by Massachusetts, passed statutes and regulations that dealt with entry into marriage and the validity of marriage.[204] These statutes required formal ceremonies and registration or license with the state, which abrogated the common law marriage in those states.[205]

2. Theories of Adoption

In addition to the first colonies and their methods of adoption or abrogation of common law marriage, other theories of adoption in the rest of the United States include the frontier theory, French civil law, Spanish colonial law, Mexican law, and the culture and custom of Native Americans and other indigenous groups.[206]

a. The Frontier Theory

The characteristics of the American frontier are one of the simpler explanations for the adoption of common law marriage.[207] The theory is that sparsely populated areas, difficulty of travel, and lack of access to ministers or other state officials made common law marriage an easy way to legitimize

197. *See id.*
198. *See id.* at 718–19.
199. *See id.* at 719.
200. *See id.*
201. *See id.*
202. *See id.* at 720.
203. *See id.*
204. *See id.* at 719–20.
205. *See id.*
206. *See id.* at 723–30.
207. *See id.* at 722.

a committed relationship between people that was conducive to their situation.[208] It was essentially a matter of necessity.[209] One Texas court explained the value of common law marriage in the state:

> It took root there when the conditions in Texas justified it. The sparse settlements, the long distance to places of record, bad roads, difficulties of travel, made access to officers or ministers difficult for some of our residents, lack of general education in the English language produced unfamiliarity with the laws, and, in the small settlements it was more difficult to dignify an illicit association with the name of marriage than in one of our large cities where all of us are strangers to the private life of most of its residents.[210]

However, conditions of the frontier cannot totally explain the adoption of common law marriage because common law marriage was not adopted in all states with frontier-type conditions.[211] Other possible origins of common law marriage help fill in the picture.[212]

b. French Civil Law

French civil law prohibited common law marriage and, rather harshly, assimilated would-be common law spouses into the legal status of concubines.[213] Louisiana inherited these same traditions and prohibited common law marriage.[214]

c. Spanish Law and Legacy

The legacy of Spanish law in the Southwestern United States traces back through Mexico and its colonization, but also to marriage law in Spain itself.[215] Like French law, Spanish law imposed formal requirements to stamp out the widespread practice of common law marriage among the people in Spain.[216]

This dynamic between formal marriage requirements of the state and persistence of common law marriage among the people, especially poorer people in rural areas, continued among Spanish people in Mexico.[217] One reason for this imposition of formalized marriage in Mexico was the

208. *See id.*
209. *See id*.
210. McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. App.—Fort Worth 1934, no writ).
211. *See* Bowman, *supra* note 115, at 723–24.
212. *See id.* at 724.
213. *See id.*
214. *See id.*
215. *See id.*
216. *See id.* at 726.
217. *See id.*

motivation and desire of Catholic missionaries and Spanish authorities to destroy indigenous people's traditions and Christianize them.[218] Essentially, these attempts to establish formal marriage requirements and eradicate common law marriage were ways for the state to control its people and impose its values on them.[219] In effect, formal marriage seems to have been a tool for colonial authorities to shape the practices and society of the people they colonized.[220] The endurance of common law marriage practices, despite efforts to enforce formal marriage requirements, is likely why states in the Southwest United States like California and Arizona, which were previously part of Mexico, recognized common law marriage, and such as in the case of Texas, still recognizes it.[221]

d. The Native American Tradition

One other possible reason for the adoption of common law marriage in some states is the indication that a Native American tradition of common law marriage existed.[222] While acknowledging the complexity of Native American familial traditions, it can be said that they were different from European colonial traditions, and that type of common law marriage relationship structure was likely the norm.[223] Some argue that this was a reason for the adoption of common law marriage in some states, like Oklahoma, but there are other anomalous states where this is not the case.[224]

3. The Abolition of Common Law Marriage

Starting in the late 19th century, states began to abolish common law marriage for a variety of reasons, although a minority of states retained it.[225] These reasons include the following: concerns of fraudulent claims, especially considering the desire of deceased individuals to keep their property and wealth within their family; lack of frontier-type conditions as the United States urbanized; threats to the alleged sanctity of marriage and institution of marriage; concerns about government benefits; concerns about the administrative and judicial burden it imposes; racism; classism; and misogyny.[226] However, many states that have abandoned common law marriage in favor of formal licensed or ceremonial marriage have made this decision prospectively, usually leaving intact common law marriages entered

218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.* at 727.
222. *See id.* at 728.
223. *See id.* at 732, 740–50.
224. *See id.* at 730–31.
225. *See id.* at 732, 740–41.
226. *See id.*

into prior to the decision.[227] The practice of common law marriage is not without criticism though, even in the states where it still exists.[228]

Dr. Cynthia Grant Bowman, a feminist legal scholar and professor of law, argues that the strongest justifiable reason for abolishing common law marriage is reducing the burden on administrative and judicial resources.[229] However, considering that other types of legal claims also create an administrative and judicial burden, the question is whether the burden of common law marriage litigation is worth the expense.[230] Arguably, the burden is worth it because of the harm that arises to vulnerable and minoritized people from abolishing common law marriage.[231] This theme will be central in exploring any solution to the common law marriage-formal licensed marriage dynamic; the people who are affected by the dissolution of a long-term relationship that is not a formal licensed marriage are generally women, poorer individuals, Black people, and other people of color.[232]

It is worth addressing the other reasons courts have given for abolishing common law marriage because they contextualize the judicial attitude of the United States, which this Comment's hypothetical fact pattern fits.[233]

a. Development of the United States and Disappearance of Frontier Conditions

The characteristics of the frontier United States were one rationale for the adoption of common law marriage.[234] During the industrial revolution and into the period of urbanization and development of the economy, frontier conditions started to disappear.[235] New methods of transportation developed, populations increased, and the characteristics that had made common law marriage a good solution in former times of wagons and small towns no longer made as much sense to courts presented with the question of common law marriage validity.[236] If not being able to access a minister was previously a bar to obtaining a formal marriage license, for example, the growth of a city and increase in its population likely meant that there would now be a minister or official who could officiate a marriage.[237]

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227. Stone v. Thompson, 833 S.E.2d 266, 270 (S.C. 2019).

228. *See* Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 552 (2006).

229. Cynthia Grant Bowman, CORNELL L. SCH., https://www.lawschool.cornell.edu/faculty/bio_cynthia_bowman.cfm (last visited Sept. 9, 2021) [https://perma.cc/VZ7H-KWVX].

230. *See* Bowman, *supra* note 115, at 752.

231. *See id.* at 754.

232. *See id.* at 769–70.

233. *See supra* Section II.A.

234. *See* Bowman, *supra* note 115, at 732.

235. *See id.*

236. *See id.* at 732–33.

237. *See id.* at 732.

b. Fraudulent Claims

The concern with fraudulent claims is interesting because there simply was not much fraud happening or real-life legal issues to warrant such concern.[238] Logically, this motivation to abolish common law marriage made little sense and more so reflected stereotypes about women held by lawmakers and judges.[239]

The growth of the economy in the United States led to the growth of people's wealth, and naturally, they wanted to protect it by controlling who would inherit it.[240] Unlike formal marriages, common law marriages would not be recorded and would create confusion in public records and in the true chain of title for property.[241] The ability to prove or disprove the existence of marriage through records prevented the determination of title to property from being contingent on a court's decision about the validity of an ancestor's marriage.[242] Courts were concerned that "gold-digging women" would make fraudulent claims against the estates of the deceased, and in doing so, divest legitimate heirs of their wealth.[243] This purported concern of course fails to take into account that actual occurrences of gold-digging could happen with formal licensed marriages too.[244]

One Pennsylvania court stated, among numerous other criticisms of common law marriage, that the practice was a "fruitful source of perjury and fraud" and something that should "be tolerated, not encouraged."[245] While Texas describes reasons for having common law marriage, it also criticizes it and alludes to the possibility of fraud, stating that if the conduct of the couple "does not show clearly an honorable abiding by such [contractual] agreement before the eyes of their world of associates and contacts, then [the marriage] should not receive judicial sanction."[246] Notice the focus on marriage as a contractual agreement to be entered into instead of a status that two people acquire.[247]

Dr. Bowman finds that despite this widespread concern, there was a low incidence of fraud.[248] In fact, the requirements of common law marriage were helpful in rooting out fraud.[249] For example, it is likely difficult for a couple

238. *See id.* at 733.
239. *See id.*
240. *See id.*
241. Weyrauch, *supra* note 66, at 99.
242. Bowman, *supra* note 115, at 736.
243. *See id.* at 733.
244. Weyrauch, *supra* note 66, at 102.
245. Baker v. Mitchell, 17 A.2d 738, 741 (Pa. Super. Ct. 1941).
246. McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. App.—Fort Worth 1934, no writ).
247. *See id.*
248. *See* Bowman, *supra* note 115, at 733.
249. *See id.* at 735.

to hold themselves out as married if they do not actually intend to do so or prove cohabitation when that itself is a very visible aspect of a relationship.[250]

c. Allegedly Protecting the Institution of Marriage and the Family

Another reason courts cited as motivation to abolish common law marriage was the desire to protect the institution of marriage and the family.[251] Of course, marriage in this context refers to formal marriage, the type that fits into religious ideas and beliefs about the sanctity of the marriage relation and the foundation it allegedly establishes for family and society.[252] This idea makes sense when we consider how marriage was seen originally as a private contract based on natural law.[253]

However, since those times, marriage and these supposedly natural law ideas have evolved into an interest of the state:

> Marriage, they contended, was not merely a private relation between a man and a woman. It exemplified a private relation in which the state and society had a legitimate public interest. As the United States Supreme Court opined, marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." In this view, then, marriage was not only a contract, but also a status.[254]

Perhaps the biggest flaw in this reasoning is it assumes that common law marriage somehow takes away from formalized marriage and is not equal to formalized marriage. Here, "equal" does the work of alluding to common law marriage as a status and not just a contract.[255]

The existence of common law marriage does not mean that people cannot choose the route of a formal licensed marriage.[256] But it is the desire for a state-sanctioned and regulated form of marriage that has informed state law preference for formal licensed marriage, and the majority of states by this point have abolished common law marriage.[257] Beyond that, common law marriage usually grants the same rights as a formal marriage, and both types of marriage are still marriage![258] Additionally, even if formal marriage is supposed to be sanctimonious because it signifies and reflects the

250. *See id.* at 734–35.
251. *See id.* at 736.
252. *See id.*
253. *See id.* at 718.
254. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 971–72 (2000).
255. *See* Bowman, *supra* note 115, at 736–37.
256. Author's original thoughts.
257. *See* Bowman, *supra* note 115, at 715.
258. *See Common Law Marriage*, TEX. L. HELP, https://texaslawhelp.org/article/common-law-marriage (July 3, 2019) [https://perma.cc/CWT9-WTHF].

commitment two people have made to each other, the fact that a couple has a government issued piece of paper does not make their relationship qualitatively different or better than that of a couple who has made the same commitment to each other and has proven their relationship by meeting the higher burden of common law marriage requirements.[259] Common law marriage allowed for the transformation of relationships that were "subversive in their disregard for the social and legal institution of marriage into complete traditional relationships."[260]

d. Racism and Eugenics

Unsurprisingly, racism and eugenics are another reason why courts abolished common law marriage.[261] Common law marriage was more widespread among Black people, poorer people, and people who were undesirable to the state, such as people with disabilities and other individuals who had some kind of "defect."[262] Consequently, regulating common law marriage and subsequently abolishing it was a way for the state to regulate these groups of people and their reproduction.[263] Requiring a legal marriage license would be a direct way for the state to control marriage and prevent miscegenation.[264]

One court rationalized the frequency of common law marriage among these groups of people with the belief that this "stratum of society . . . prefers to shun or disregard legal ceremonies and adopt a coarser and less conspicuous way of forming domestic ties."[265] The argument then is that common law marriage should be abolished because it is connected to and "tainted" by African-American customs.[266]

e. Decreased Stigma Towards Unmarried Mothers

Other reasons for abolishing common law marriage include confusion and decreased stigma towards unmarried women with children.[267] One commentator notes that the majority of common law marriage cases involved situations of women in need of financial support after the death of a husband.[268] Therefore, common law marriage was a method of shifting the

259. *See* Bowman, *supra* note 115, at 737.
260. Dubler, *supra* note 254, at 969.
261. *See* Bowman, *supra* note 115, at 744.
262. *See id.* at 745–46.
263. *See id.*
264. Weyrauch, *supra* note 66, at 94.
265. *In re* Est. of Soeder, 220 N.E.2d 547, 563 (Ohio Ct. App. 1966).
266. *See* Bowman, *supra* note 115, at 745–46.
267. *See* Dubler, *supra* note 254, at 998.
268. *See id.*

financial burden off unmarried women and their accompanying children born out of wedlock.[269] To put it bluntly:

> The doctrine of common law marriage provided judges with a way to privatize the financial dependency of economically unstable women plaintiffs. By declaring a woman to be a man's wife or widow at common law, courts shielded the public fisc from the potential claims of needy women, effectively deflecting those claims inward to a particular private, family unit. In addition, holding a couple married at common law avoided branding their children with the legal status of illegitimacy.[270]

In effect, as society has changed and people have grown to ignore traditional views that unmarried mothers and their children are a burden to society, for whatever moral or religious reasons, the stigma of the issues this behavior created—that of "female economic dependency"—has decreased alongside the need for common law marriage, according to the courts.[271] The Supreme Court of South Carolina expressly adopted this reasoning when it abolished common law marriage in the state: "reasons for having common law marriage in the first place are no longer present according to the court."[272]

f. Efforts to Abolish Common Law Marriage in Texas

The Texas Supreme Court first recognized common law marriage in 1847.[273] The law on common law marriage has evolved over the years despite attempts by state lawmakers to abolish it.[274] In 1970, the state legislature refused to repeal common law marriage despite institutional pressure to do so, and instead, added the declaration of an informal marriage provision.[275] In 1989, the statute was amended to make proving common law marriage more difficult as a compromise with lawmakers seeking to abolish common law marriage.[276] The amendment took away courts' ability to infer an agreement to marry from evidence of cohabitation and representation in favor

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269. *See id.* at 968–69; Kathryn S. Vaughn, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 HOUS. L. REV. 1131, 1142–45 (1991).

270. Dubler, *supra* note 254, at 968–69.

271. *Id.* at 968.

272. Stone v. Thompson, 833 S.E.2d 266, 269 (S.C. 2019).

273. *See* Tarpley v. Poage's Adm'r, 2 Tex. 139, 149 (1847).

274. *See* GEORGE, *supra* note 36, at 493.

275. Vaughn, *supra* note 269, at 1150.

276. *See* Russell v. Russell, 865 S.W.2d 929, 931 (Tex. 1993); *id.* (stating that Section 1.91(b) (the old numbering of the statute) of the pre-1989 amendment statute provided that "in the proceeding in which a marriage is to be proved under Section (a)(2) of this section, the agreement of the parties may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married." The corresponding language in the amended statute reads: "A proceeding in which a marriage is to be proved under this section must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later."); GEORGE, *supra* note 36, at 493 (comparing the statutory language).

of a one-year limitations period for proof of the three common law marriage elements.[277] One commentator describes this change as "an almost unsurmountable burden of proof and an insufficient limitation period" and says that the 1989 amendment "effectively abrogate[s] common-law marriage in Texas."[278] However, in the 1997 iteration of the statute, the legislature replaced the one-year limitation provision with a two-year rebuttable presumption, which is also the language in the currently effective 2005 statute.[279]

g. To Keep or to Abolish – Potential Harms of Abolition

It cannot be ignored that licenses for formal marriages, which are recorded, do provide benefits that result from the government's ability to keep track of vital statistics and other helpful demographic data in addition to promoting clarity in chains of title and inheritance.[280] But health-related benefits are narrow, and the census is an alternate source for this type of demographic information.[281] When considering how formal marriage falls short in this way and how the abolition of common law marriage harms more vulnerable people than it helps, it is difficult to argue for a society where it should be taken away.[282]

One way that the abolition of common law marriage hurts rather than helps is in the case of domestic violence and other forms of abuse towards women.[283] Dr. Bowman describes the situation of a former domestic violence clinic client in Illinois who had managed to leave a fifteen-year abusive relationship.[284] The facts were briefly mentioned above.[285] The woman had never married her former partner although they had children.[286] If Illinois had been a state that recognized common law marriage, the woman's relationship would have sufficed as a marriage and would have provided her with remedies upon its dissolution.[287] Because Illinois also did not recognize claims brought by unmarried cohabitants, the law prevented this woman from obtaining any kind of support from the former partner beyond child support if she could retain custody of her children.[288] For fifteen years, this woman lived her life just as a formally married woman would have, albeit while in

277. *Russell*, 865 S.W.2d at 932.
278. Vaughn, *supra* note 269, at 1152, 1155.
279. GEORGE, *supra* note 36, at 493; TEX. FAM. CODE ANN. § 2.401.
280. *See* Bowman, *supra* note 115, at 752; Weyrauch, *supra* note 66, at 99; Vaughn, *supra* note 269, at 1136.
281. *See* Bowman, *supra* note 115, at 752.
282. Vaughn, *supra* note 269, at 1140–41; *see* Bowman, *supra* note 115, at 754.
283. *See* Bowman, *supra* note 115, at 754.
284. *Id.* at 709–10.
285. *See supra* notes 115–19 and accompanying text.
286. *See* Bowman, *supra* note 115, at 709–10.
287. *Id.*
288. *Id.*

an abusive relationship, but at the relationship's end, the woman received none of the corresponding benefits because of the lack of common law marriage.[289]

In *Staudenmayer v. Staudenmayer*, the court addressed the situation presented in this Comment of a couple who transitioned from an alleged common law marriage to a licensed ceremonial marriage.[290] The trial court initially found that the parties had not been common law married, but the appellate court reversed and decided that a common law marriage existed between the parties.[291] The spouses entered into litigation over a dispute about whether the husband's tort settlement money was marital property because the settlement had occurred prior to their ceremonial marriage during the time in which the wife alleged that they were common law married.[292] The husband contended that they were not common law married at that time and that the settlement money was not marital property.[293] The court mentioned certain factors in deciding that the couple had not been common law married prior to their ceremonial marriage: failure of the wife to testify about when exactly she and her husband had said out loud to each other that they were common law spouses, lack of a reason why the wife thought the civil ceremony necessary if they were supposedly already common law married, as well as inconsistencies in the record.[294]

V. SOCIOPOLITICAL AND LEGAL CONTEXT

Context is important when discussing common law marriage in the United States but specifically in Texas because it informs the kind of solution that can work in the state.[295] The previous two sections addressed the historical legal context of both common law marriage and community property.[296] This next section will address the more modern context of common law marriage, including the trend of increasing rates of cohabitation, negative sentiment towards same-sex marriage and the legal battles that it has engendered, and the *Obergefell* decision and its effects.[297] Addressing the anti-same-sex marriage sentiment is particularly relevant because it reflects a bias in the lack of clear statutory guidance that would help resolve the issues presented by the hypothetical.[298]

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289. *Id.*
290. *See* Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 (Pa. 1998).
291. *See id.*
292. *Id.* at 1018.
293. *Id.*
294. *Id.* at 1022.
295. *See infra* Part VII
296. *See supra* Parts III, IV.
297. *See infra* Section V.A.
298. *See supra* Section II.A.

A. Changes in Living Patterns

Significant changes have taken place over the last several decades in living patterns among adults.[299] In the last twenty-five years, the percentage of married adults has decreased from 58% to 53%, but the percentage of unmarried people who live with a partner has increased from 3% to 7%.[300] Acceptance of cohabitation is greater among those in the eighteen to twenty-nine age group.[301] Despite this increased acceptance of and participation in cohabitation, married adults express more satisfaction, trust, and closeness than unmarried cohabiting adults.[302] Additionally, 63% of married adults say that "making a formal commitment was a major factor in their decision to get married[,]" and 66% of married adults who previously cohabited with their spouse viewed cohabitation as a step towards marriage.[303] About two-thirds of adults favor extending rights that come with marriage to unmarried couples.[304] This increase in the rate of cohabiting adults is also present in Texas's demographic information.[305]

B. Attitudes Towards Same-Sex Couples

Texas has a long history of opposing same-sex relationships and creating obstacles for those individuals to marry and live out their lives.[306] The first recorded same-sex marriage in Texas occurred in 1972, when Antonio Molina and William Ert, who was disguised as a woman in a wedding dress and wig, married in the Houston area, defying the county clerk and creating news headlines across the world.[307] It was the start of the gay rights movement, the Stonewall Riots only having occurred three years prior, and Texas took it as an opportunity to expressly prohibit gay marriage by codifying gendered language into its marriage statute and eliminating the law's formerly gender-neutral language.[308] The state also forced Molina and Ert into drawn-out legal battles concerning the validity of their marriage that

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299. Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), https://www.pewresearch.org/2019/11/06/marriage-and-cohabitation-in-the-u-s/ [https://perma.cc/PT3Q-U52H].

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *See* Stephen J. Naylor & Chris H. Negem, *Common Law, Informal, and Putative Marriage*, 36 ANN. MARRIAGE DISSOLUTION INST. 1 (2013), https://www.naylorfamlaw.com/wp-content/uploads/2018/01/Common-Law.pdf [https://perma.cc/LHN2-RJGC].

306. *See* Lauren McGaughy, *Unlikely Gay Marriage Pioneers Tied Knot in Houston*, HOUS. CHRON., https://www.houstonchronicle.com/news/politics/texas/article/Unlikely-gay-marriage-pioneers-tied-knot-in-5923174 (Dec. 1, 2014, 6:02 PM) [https://perma.cc/7V23-55ZE].

307. *See id.*

308. *See id.*

subsequently destroyed their relationship.[309] In 2005, Texas voters "enshrined" the prohibition in Article I, Section 32 of the Texas Constitution, which stated that marriage in Texas "shall consist only of the union of one man and one woman."[310]

After these developments and prior to the Supreme Court's July 2015 ruling in *Obergefell*, other developments occurred regarding the rights of LGBTQIA individuals in Texas.[311] After the 2005 constitutional amendment, significant activism took place in the state to promote understanding of same-sex couples and related issues.[312] In 2013, attorneys and same-sex couples filed a federal lawsuit seeking respect and the freedom to marry.[313] The district judge did rule in favor of same-sex marriage, but the litigation was stayed pending appeal to the Fifth Circuit, which delayed making a ruling until the resolution of *Obergefell*.[314] In February 2015, the Travis County clerk issued the first legal same-sex marriage license in the state pursuant to an order from a state district court judge, which garnered severe condemnation from Texas Republican leadership.[315] Shortly after, on June 25, 2015, the Supreme Court of the United States ruled in *Obergefell v. Hodges* that same-sex couples had the right to marry and the denial of that right was an unconstitutional denial of due process and equal protection.[316] Consequently, the Fifth Circuit adhered to the decision and ruled the same in *De Leon*, thereby holding unconstitutional Article I, Section 32 of the Texas Constitution and various other statutory provisions prohibiting same-sex marriage.[317]

Although *Obergefell* simplified the lives of same-sex couples, LGBTQIA individuals, and attorneys in some ways, it created uncertainty and problems for estate planning.[318]

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309. *See id.*

310. *See id.*; TEX. CONST. art I, § 32.

311. *The Freedom to Marry in Texas*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/texas (last visited Sept. 10, 2021) [https://perma.cc/6ETS-UVVH].

312. *Id.*

313. *Id.*; *see* De Leon v. Perry, 975 F.Supp.2d 632, 658–59 (W.D. Tex. 2014), *aff'd sub nom*; De Leon v. Abbott, 791 F.3d 619, 624 (5th Cir. 2015).

314. *The Freedom to Marry in Texas*, *supra* note 311.

315. Chuck Lindell, *Travis County Clerk Issues First Legal Gay Marriage License in Texas*, STATESMAN (Sept. 26, 2018, 6:39 PM), https://www.statesman.com/NEWS/20160924/Travis-County-clerk-issues-first-legal-gay-marriage-license-in-Texas [https://perma.cc/VPR6-CASQ].

316. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

317. *See De Leon*, 791 F.3d at 625; *see, e.g.*, TEX. FAM. CODE. ANN. § 2.401.

318. *See* Angela Morris, *In Pictures: 5 Years After Legalized Same-Sex Marriage, Family Law Shifts for Couples 'Not Immune to Divorce'*, TEX. LAW. (June 25, 2020 3:40 PM), https://www.law.com/texaslawyer/2020/06/25/in-pictures-5-years-after-legalized-same-sex-marriage-family-law-shifts-for-couples-not-immune-to-divorce/ [https://perma.cc/P73L-9P5G]; Beyer, *supra* note 2.

C. Obergefell *and Retroactivity*

In the hypothetical situation described in Part II above, state law prohibited a same-sex couple from getting married until the *Obergefell* decision invalidated the law, which presents a situation in which a transition from common law marriage to formal licensed marriage may arise.[319] After *Obergefell*, many same-sex couples in Texas and elsewhere formalized their relationship by seeking a formal marriage license.[320] Although Texas does not record the number of same-sex marriage licenses issued, an estimated 123,000 marriages occurred within the first year after the Supreme Court's decision, and as of May 2020, nearly 300,000 same-sex couples have married.[321]

As mentioned, *Obergefell* created issues related to estate planning and probate.[322] These include questions about whether *Obergefell* is applied retroactively in a way that will allow same-sex couples to backdate their marriage, what the appropriate date for backdating a marriage should be, and whether a constitutional wrong occurs if same-sex couples are not permitted to backdate their marriage.[323] All of these questions are relevant because they impact the characterization of property as community property or separate property by broadly addressing the length of same-sex marriages.[324]

Additionally, attorneys working on estate planning and probate matters need to understand the state of and effect of same-sex marriage in Texas because over 3% of Texans identify as gay or lesbian.[325] Marriage grants many different rights, obligations, and benefits to spouses.[326] *Obergefell* brought a whole group of individuals into the position of needing to plan and make legal decisions related to marriage and property, which motivated many attorneys to expand their services to the LGBTQIA community.[327]

1. Backdating

Backdating a marriage means backdating its legal start date to an earlier time at which point the same-sex couple would have gotten married but for

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319. *See supra* Section II.A.

320. *See* Madeline Conway, *A Year Later, Texas Gay Marriage Debate Shifts*, TEX. TRIB. (June 26, 2016, 6:00 AM), https://www.texastribune.org/2016/06/26/year-later-same-sex-marriage-debate-lingers-texas/ [https://perma.cc/HP8J-DNHB].

321. Beyer, *supra* note 2; Christy Mallory & Brad Sears, *The Economic Impact of Marriage Equality Five Years After* Obergefell v. Hodges, UCLA SCH. OF L. WILLIAMS INST. (May 2020), https://williamsinstitute.law.ucla.edu/publications/econ-impact-obergefell-5-years/ [https://perma.cc/QDJ5-NZ29].

322. Beyer, *supra* note 2.

323. *See id.*; Gates, *supra* note 3, at 263 (discussing *Obergefell* and retroactivity); Nicolas, *supra* note 75, at 397–99 (providing a discussion of constitutional issues).

324. *See* Nicolas, *supra* note 75, at 395.

325. Beyer, *supra* note 2.

326. *See id.*

327. *See* Morris, *supra* note 318.

the prohibition on same-sex marriage.[328] This procedure puts same-sex couples on an equal playing field as opposite-sex couples because their date of marriage is not artificially shortened to a later date on or after the date of the *Obergefell* decision, and consequently their accrual of community property is not artificially diminished.[329] Backdating marriages is a relatively new concept and thus far has taken the forms of legislative backdating, administrative backdating, and judicial backdating.[330]

Legislative backdating in some states has entailed a process of essentially converting non-marriage relationship statuses like civil unions into formal marriages via a statutory scheme.[331] Administrative backdating involves federal or state agencies reinterpreting statutes to allow for backdating, such as in the case of social security and veteran's benefits.[332] Judicial backdating involves courts deciding in cases to backdate a common law marriage.[333] Section 2.401(b) of the Texas Family Code has conveniently allowed for common law spouses to file a Declaration of Informal Marriage, which would provide couples a way to establish a marriage date before any potential litigation occurs.[334]

2. Retroactivity and Cases

The question of whether *Obergefell* is applied retroactively asks whether "statutes or state constitutional provisions prohibiting same-sex marriage (1) [have] always been unconstitutional or (2) became unconstitutional as of the date of the opinion, June 26, 2015."[335] The marriage date becomes important here because it can impact when the couple began accruing community property.[336] *Obergefell* is likely applied retroactively; case law suggests as much, and retroactive application of law is not out of the ordinary, although this application depends on the circumstances of a case, facts, and the law itself.[337]

In one unique case resolved just months after *Obergefell*, a Travis County probate judge ordered that Sonemaly Phrasavath, the long-term partner of Stella Powell (who died intestate in 2014), was Powell's surviving

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328. Nicolas, *supra* note 75, at 404.
329. *See id.*
330. *Id.*
331. *See id.* at 404–07.
332. *See id.* at 407–08.
333. *See id.* at 414–18.
334. *See* TEX. FAM. CODE ANN. § 2.401(b); *id.* at 416.
335. Beyer, *supra* note 2.
336. *See id.*; *supra* Section V.C.1.
337. *See* Interlocutory Judgment Declaring Heirs at 1–2, *In re* Est. of Powell, No. C-1-PB-14-001695, (Travis Cty. Prob. Ct. No. 1, Tex. Oct. 5, 2015); Ranolls v. Dewling, 223 F. Supp. 3d 613, 625 (E.D. Tex. 2016); Gates, *supra* note 3, at 283–84, 288–91 (This article provides an analysis for retroactive application of *Obergefell* in Texas.).

spouse and thus was entitled to her respective share of Powell's estate.[338] Phrasavath's opposing parties in the suit were the Texas Attorney General, as an intervenor, and Powell's surviving family members.[339] They argued that even after the *Obergefell* ruling and Phrasavath and Powell's marriage ceremony, Phrasavath should not be allowed to inherit from Powell's estate.[340] The Attorney General and family members reasoned that Phrasavath and Powell were unable to hold themselves out as married and satisfy the common law marriage elements because there was no way they could comply with the Section 2.401 requirement that a husband and wife be the two individuals to satisfy the common law marriage elements.[341]

Powell's siblings expressly argued that backdating Phrasavath and Powell's marriage would result in problems and uncertainty in dividing same-sex couples' property because of the lack of clarity of when acquisition of marital property would begin and the effect of this on property rights.[342] In a condescending embrace of the importance of property rights for heterosexual people over human rights for all people, Powell's family members wrote that it "seem[ed] patently unfair to apply a property regime to a decedent's estate that the Decedent, while alive, could not have fathomed would apply to her."[343] Whether a person can benefit from or be subject to inheritance laws should not depend on whether they could imagine a future without discrimination.[344]

The State and the Powells argued that *Obergefell* could not be applied retroactively, but the judge disagreed and backdated the legal start of Phrasavath and Powell's marriage to the date when Phrasavath became Powell's surviving spouse and was entitled to her share of separate property and all community property from the Powell estate.[345]

In another Texas case, the court applied *Obergefell* retroactively to find that the deceased's same-sex partner and potential common law spouse had

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338. *See* Interlocutory Judgment Declaring Heirs at 1–2, *Estate of Powell*, No. C-1-PB-14-001695.

339. *See* James Powell and Alice Huseman's No Evidence Motion and Motion on the Pleadings for Summary Judgment at 2–3, *In re* Est. of Powell, No. C-1-PB-14-001695, (Travis Cty. Prob. Ct. No. 1, Tex. Aug. 25, 2015).

340. *See id.* at 5–6, 10–13; Traditional and No Evidence Motion for Summary Judgment of the State of Texas at 1, 4–5, *In re* Est. of Powell, No. C-1-PB-14-001695, (Travis Cty. Prob. Ct. No. 1, Tex. Aug. 25, 2015).

341. *See* James Powell and Alice Huseman's No Evidence Motion and Motion on the Pleadings for Summary Judgment at 2–3, *Estate of Powell*, No. C-1-PB-14-001695; Traditional and No Evidence Motion for Summary Judgment of the State of Texas at 1, 4–5, *Estate of Powell*, No. C-1-PB-14-001695; *See also* Sonemaly Phrasavath's Amended Motion for Summary Judgment, *In re* Est. of Powell, No. C-1-PB-14-001695, (Travis Cty. Prob. Ct. No. 1, Tex. Aug. 25, 2015) (providing arguments of decedent's partner).

342. *See* James Powell and Alice Huseman's No Evidence Motion and Motion on the Pleadings for Summary Judgment at 10–12, *Estate of Powell*, No. C-1-PB-14-001695.

343. *Id.* at 13.

344. *See id.*

345. *See* Interlocutory Judgment Declaring Heirs at 1–2, *In re* Est. of Powell, No. C-1-PB-14-001695, (Travis Cty. Prob. Ct. No. 1, Tex. Oct. 5, 2015).

standing to sue as a surviving spouse despite the couple not having been married.[346] The defendants argued that *Obergefell* was to be applied prospectively, but the court reasoned from a line of United States Supreme Court and other federal cases finding a retroactive application and disagreed.[347]

Courts in other states, like Pennsylvania and Utah, have also recognized common law marriage between individuals who satisfied the common law marriage elements of their state before *Obergefell*.[348] The Supreme Court of California recognized same-sex marriage in 2008 until voters disapproved of it via Proposition 8, which reinstated the constitutional ban on same-sex marriage.[349] Although same-sex marriages became permissible again a few years later in 2013, there existed a period of five years during which previously married same-sex couples were in legal limbo, and the rights, obligations, and benefits of their particular marriages were tenuous.[350]

In sum, while there is a trend to apply *Obergefell* retroactively and backdate marriages to the benefit of same-sex couples, this practice is a novel one that only now addresses the legal needs of these individuals and highlights a significant gap in the law.[351] If we consider this gap alongside the growing rates of cohabitation, one potential route to resolving the issues the hypothetical presents is to examine how other jurisdictions regulate and attach rights to other types of relationship statuses.[352]

VI. COHABITATION AS A FRAMEWORK

Cohabitation, in a legal sense, refers to the situation of two unmarried people living together; however, a useful framework also comes from thinking about cohabitation in the broader, dictionary sense of people simply living together.[353] Risk comes with cohabitating in a state that does not recognize common law marriage.[354] However, we can look at the way the law treats not only formal marriage and common law marriage but also other ways in which people organize their relationships, including civil partnerships, putative marriages, and meretricious relationships so as to gain insight into a potential resolution for the issues the hypothetical presents.[355]

346. Ranolls v. Dewling, 223 F. Supp. 3d 613, 625 (E.D. Tex. 2016).
347. *Id.* at 624.
348. Filisko, *supra* note 86.
349. *Id.*
350. *See id.*
351. *See supra* notes 335–50 and accompanying text.
352. *See infra* Part VI.
353. *See Cohabitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).
354. *See* BOWMAN, *supra* note 122, at 38.
355. *See infra* Sections VI.B–C.

A. Contract and Status-Based Rights

Only a minority of states recognize common law marriage currently; some of the ways courts resolve issues that result from the lack of common law marriage protection are by attaching property rights to contract-based agreements or statuses.[356] There are both positives and negatives to these legal treatments of cohabitating relationships.[357]

1. Contract-Based Rights

Most states now will recognize contracts between cohabitants concerning their property.[358] The seminal case addressing contract rights is *Marvin v. Marvin*, in which the Supreme Court of California recognized the right of unmarried cohabitants to make implied, express, oral, and written contracts concerning their property.[359] Prior to this case, courts considered cohabitant contracts unenforceable because they involved meretricious relationships.[360] The *Marvin* plaintiff claimed that she and the defendant had cohabited with an agreement that she would give up her career to devote her time to the defendant, who in turn would provide for all her financial support.[361] The plaintiff brought an action for breach of contract and a petition for the imposition of a constructive trust upon part of the defendant's property, which the defendant disputed.[362] The court discussed the prevalence of people in nonmarital cohabitating relationships in modern society and their increased social acceptance, compared to earlier times:

> [W]e believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.[363]

356. *See* Bowman, *supra* note 115, at 709–10, 770.
357. *See* BOWMAN, *supra* note 122, at 50–52, 56–58.
358. *Id.* at 47–48.
359. Marvin v. Marvin, 557 P.2d 106, 122–23 (Cal. 1976).
360. BOWMAN, *supra* note 122, at 48; *infra* Section VI.B.3.
361. *Marvin*, 557 P.2d at 110–11.
362. *Id.*
363. *Id.* at 122.

Although the lower courts had found in favor of the defendant, the California Supreme Court ultimately found in favor of the plaintiff and upheld the agreement as a contract.[364]

Mixed reactions greeted the *Marvin* decision across states; some adopted its approach, but others rejected or limited it.[365] Texas rejected it and passed a statute of frauds requiring cohabitant contracts to be in writing.[366] Some of the concern was related to the large scope of examination into the intimate details of the plaintiff and defendant's relationship.[367] Additionally, contract-based remedies suffer from issues such as the difficulty of proving oral contracts; the fact that cohabitating adults are not usually making contracts and likely do not understand the consequences of making contracts, especially those who are in more vulnerable positions; and the nature of contracts not binding third parties.[368] This type of contract will also not apply to federal marital benefits, like social security, which are a significant type of benefit that working-class and middle-class cohabitants seek upon the death of a spouse.[369]

2. Status-Based Rights

Other states have implemented status-based remedies when rights attach to people who have a quasi-marital status.[370] The *Marvin* court rejected this approach.[371] These types of rights have been established more so as a result of the demand for recognition of same-sex marriage.[372] Courts have taken two main approaches to status-based remedies: the Washington meretricious relationship doctrine, and other states' domestic partnership regimes.[373]

In *In re Marriage of Lindsey*, the Washington Supreme Court held that trial courts must make a just and equitable distribution of a couple's property after examining the nature of the meretricious relationship involved.[374] Trial courts should accomplish this distribution by determining whether a meretricious relationship exists, considering several aspects of the relationship including continuous cohabitation and pooling of resources, and evaluating and classifying each party's interest.[375] The Washington approach is beneficial because instead of having individuals opt into a contract

364. *Id.* at 110.
365. BOWMAN, *supra* note 122, at 50.
366. *Id.*; *see* TEX. BUS. & COM. CODE ANN. § 26.01(b)(3).
367. BOWMAN, *supra* note 122, at 50.
368. *See id.* at 52; Vaughn, *supra* note 269, at 1148.
369. Vaughn, *supra* note 269, at 1148–49; BOWMAN, *supra* note 122, at 69.
370. *See* BOWMAN, *supra* note 122, at 53.
371. Marvin v. Marvin, 557 P.2d 106, 119–22 (Cal. 1976).
372. BOWMAN, *supra* note 122, at 53.
373. *Id.*
374. *See id.* at 53–54 (striking down the Creasman presumption).
375. *Id.* at 55–56.

agreement, it simply requires that individuals opt-out if they do not want to take on the obligations or commitments to a partner.[376] This opt-out measure protects more vulnerable individuals who became economically dependent on a relationship.[377] The approach is limited in that it applies only to property distribution and not to support payments, and, like the contract approach, it applies only to cohabitants and not to any relevant third parties like the government.[378]

Domestic partnership laws arose out of the call for same-sex marriage and thus are often limited to same-sex couples.[379] These laws also vary considerably state by state in the benefits they provide, but there has been a focus on partner benefits that arise from the other partner's employment.[380]

B. Cohabitation in Texas

In Texas, relationships can be characterized in several ways: formal licensed marriage, informal common law marriage, domestic partnership, putative marriage, and meretricious relationship.[381] Texas does not recognize civil unions.[382] As a brief review of what has already been discussed above about valid formal and informal marriages, Texas grants to both a variety of rights and benefits, including property rights upon marriage, divorce, and death, tax benefits, social security benefits, homestead rights, spousal privileges at trial, and more.[383] When dealing with other forms of cohabitation that may not rise to the level of common law marriage, attorneys in Texas encourage making cohabitation agreements.[384]

1. Domestic Partnerships

Domestic partnership agreements describe the legal rights and responsibilities of couples in long-term relationships.[385] These agreements are available for both same-sex and opposite-sex couples.[386] These

376. *Id.* at 56.
377. *Id.* at 58.
378. *Id.* at 56–57.
379. *See id.* at 60–61.
380. *See id.* at 53.
381. *See infra* Sections VI.B.1–3.
382. Gates, *supra* note 3, at 273–74; *see* TEX. FAM. CODE ANN. § 6.204(b).
383. Beyer, *supra* note 2.
384. *See* Larry Upshaw, *Unmarried and Living Together? Why and When a Cohabitation Agreement Is a Must*, CONNATSER FAM. L., https://connatserfamilylaw.com/unmarried-and-living-together-why-and-when-a-cohabitation-agreement-is-a-must/ (last visited Sept. 29, 2021) [https://perma.cc/KR7J-M56X]; *Non-Marital Conjugal Cohabitation Agreements for the Unmarried Couple in Texas*, L. OFF. BRYAN FAGAN (Jan. 9, 2017), https://www.bryanfagan.com/family-law-blog/2017/january/non-marital-conjugal-cohabitation-agreements-for/ [https://perma.cc/M4UE-S3Q6].
385. Gates, *supra* note 3, at 275.
386. *Id.*

agreements can be used to specify the division of a couple's property and can also be used to obtain employer benefits.[387] They must be signed by both parties and filed with the county clerk.[388] Only some counties in Texas recognize and offer domestic partnership agreements; Texas as a whole does not.[389]

2. Putative Marriages

A putative marriage is a marriage that is invalid and void due to existing impediments that one or both parties were in good faith ignorant of, such as a prior marriage of one of the putative spouses that was not legally dissolved or terminated.[390] A putative marriage can arise from either a formal marriage or a common law marriage.[391] The putative spouse doctrine does not validate the void putative marriage; rather, it allows for the expected outcomes of a lawful marriage because of the injustice that would otherwise result to the innocent putative spouse.[392]

Despite the technical invalidity of the marriage, a putative spouse has all the regular rights and benefits of a lawful marriage relationship, including the same marital property rights.[393] These property rights are limited to the property acquired during the putative marriage, and the putative marriage exists only until the time it is dissolved, terminated, or the impediment is discovered, which also terminates the marriage.[394] When an impediment to the putative marriage is discovered, the spouses have to "perfect the marital status" to become lawful spouses.[395] This remedy can entail agreeing, intending, and continuing to live as if lawfully married spouses.[396] When it comes to probate issues, the existence of the putative marriage depends on the putative spouse remaining ignorant of the impediment during the life of the deceased.[397] The putative marriage doctrine is also limited simply because it does require a marriage, as opposed to a relationship that lacks legal recognition as a formal or informal marriage.[398]

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387. *Id.* at 276; *see Same-Sex Marriage in Texas*, TEX. L. HELP, https://texaslawhelp.org/article/same-sex-marriage-texas (Aug. 3, 2021) [https://perma.cc/M7UJ-S9N8].

388. Gates, *supra* note 3, at 275.

389. *Id.*; *Same-Sex Marriage in Texas*, *supra* note 387.

390. Whaley v. Peat, 377 S.W.2d 855, 857 (Tex. App.—Houston [1st Dist.] 1964, writ ref'd n.r.e.); GEORGE, *supra* note 36, at 477; Naylor & Negem, *supra* note 304, at 9.

391. Hupp v. Hupp, 235 S.W.2d 753, 756 (Tex. App.—Fort Worth 1950, writ ref'd n.r.e.).

392. Naylor & Negem, *supra* note 304, at 9.

393. Davis v. Davis, 521 S.W.2d 603, 606 (Tex. 1975).

394. *Id.* at 607; Dean v. Goldwire, 480 S.W.2d 494, 496–97 (Tex. App.—Waco 1972, writ ref'd n.r.e.).

395. Naylor & Negem, *supra* note 304, at 10.

396. Curtin v. State, 238 S.W.2d 187, 190–91 (Tex. Crim. App. 1950).

397. Consol. Underwriters v. Taylor, 197 S.W.2d 216, 218 (Tex. App.—Beaumont 1946, writ ref'd n.r.e.).

398. Vaughn, *supra* note 269, at 1148–49.

3. Meretricious Relationships

A meretricious relationship exists when two unmarried people knowingly cohabit.[399] Compared with the other four statuses addressed, this one requires intent and understanding that no marriage relationship exists or shall exist.[400] No family code provisions address property rights of meretricious relationships.[401] None of the legal effects of marriage apply to meretricious relationships, including homestead rights and a community estate.[402]

C. Cohabitation-Based Solutions

Cohabitation comprises a variety of relationship structures and rights that attach.[403] Outside of Texas, status-based approaches exist that protect larger groups of individuals who can then choose to opt-out if they do not want to undertake the commitment.[404] Within Texas, a contract-based approach seems to be the most common approach for cohabitating unmarried individuals.[405] Formal and informal marriage will provide all the benefits that come with marriage, but a couple can obtain those same benefits if they are in a putative marriage.[406] A domestic partnership agreement is like a contract-based approach in terms of flexibility, but it does not equate to a marriage and does not provide marriage benefits.[407] A couple in a meretricious relationship could contract, but otherwise they have no protections.[408] However, this review indicates that there are a variety of ways that a relationship can be organized and recognized in Texas, which suggests that the state is not so rigid in its granting of property rights and cohabitation remedies that it refuses to grant rights to any individuals not in a formal marriage.[409]

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399. GEORGE, *supra* note 36, at 477.
400. LEOPOLD, *supra* note 128, at § 21.1.
401. *Id.* § 21.5.
402. *Id.* §§ 21.1, 21.5.
403. *See supra* Section VI.B.
404. *See supra* Section VI.A.2. *See also* BOWMAN, *supra* note 122, at 173–220 (discussing approaches to cohabitation rights in other countries).
405. *See* Upshaw, *supra* note 384; *Non-Marital Conjugal Cohabitation Agreements for the Unmarried Couple in Texas*, *supra* note 384.
406. Beyer, *supra* note 2; *see supra* notes 390–98.
407. *See supra* Section VI.B.2.
408. *See supra* Section VI.B.3.
409. *See supra* Section VI.B.

VII. A SOLUTION FOR TEXAS

The goal of any solution to the property-related problems that arise from the interplay of community property and common law marriage in Texas should be to protect people in vulnerable positions by making it easier for them to retain ownership of their property and seek a remedy in the case that a controversy arises.[410] To those ends, here are some action items or changes that could encourage these results:

1. Retain the common law marriage system and implement a status-based approach to cohabitation rights that would ensure that more people in the state are protected in the case that an individual's cohabiting non-marital relationship ends and they are in a financially vulnerable position.[411] This blanket-type of protection would cover more people in Texas, where so many people are already in financially vulnerable positions and less likely to know how to make a contract and understand its consequences.[412] Any individuals who are in a better financial position or more knowledgeable of what a status-based protection would entail could easily opt-out without issue.[413]

2. Implement a legislative or administrative marriage backdating procedure so that people in the situation of Jane and Susan do not have their marriage relationships artificially shortened.[414] Texas has strong property protections, and a backdating procedure would allow more people to retain more of their property.[415] In the case of Jane and Susan, such a backdating procedure would ensure that their house is characterized as community property and that they both retain an ownership interest in it.[416]

3. For the situation of dual marriage, that is, a transition from common law marriage to formal marriage, backdate a couple's marriage date to what was the date of the common law marriage.[417] Avoid invalidating the common law marriage because that would artificially shorten the overall length of marriage, and avoid invalidating the subsequent formal marriage to prevent an artificial termination of the marriage relationship.[418] A conversion method by which the earlier common law marriage is converted or absorbed into the subsequent formal marriage

410. *See* Bowman, *supra* note 115, at 709–10.

411. *See id.*

412. BOWMAN, *supra* note 122, at 56; *see Poverty in Texas: 4.1 Million Texans Live in Poverty*, CENT. FOR PUB. POL'Y PRIORITIES (Mar. 2019), https://everytexan.org/images/2019_Poverty_in_Texas.pdf [https://perma.cc/UW6A-NFHU].

413. BOWMAN, *supra* note 122, at 56.

414. *See supra* notes 327–29.

415. *See supra* Section V.C.1.

416. *See supra* Section II.A.

417. *See supra* Section V.C.1.

418. *See supra* Section V.C.1.

could be an effective way to protect the external boundaries of a marriage relationship between the same two people while recognizing that the formal marriage is more concrete evidence of the relationship.[419]

VIII. CONCLUSION

This Comment seeks to address what essentially is a disconnect between the legal treatment of marriage in Texas and people's understanding and manifestation of a marriage-like relationship.[420] Because Texas has both community property and common law marriage, property distribution upon death becomes more complex, and any difficulty in determining the start of a marriage directly impacts whether property is separate or community before it is even distributed.[421] Understanding that people may have all kinds of motivations for organizing committed relationships in any particular way (especially if they have been prohibited from getting married) and recognizing that living patterns continue to change will set up Texas to have a more flexible and comprehensive approach for dealing with marriage and property.[422] It is not useful to create laws that assume that all people enter into marriages or marriage-like relationships in similar ways.[423] Regardless of the type of relationship someone may be in, people experience similar challenges when it comes to the end of relationships and the property issues that follow.[424]

419. *See* Nicolas, *supra* note 75, at 404–07.
420. *See supra* Section I.D.2.
421. *See supra* Section I.D.2.
422. *See supra* Sections I.D.2., II.C.
423. *See supra* Section VI.
424. *See supra* Section VI.B.