

CHAPTER THREE

Valid and Invalid Marriages

MOST STATES DEFINE MARRIAGE as a civil contract between a man and woman to become husband and wife.

The moment a man and woman marry, their relationship acquires a legal status. The United States Supreme Court, when discussing marriage in a 1888 case, said: "The relation once formed, the law steps in and holds the parties to various obligations and liabilities."

The rights and obligations of married persons are not the same as single persons. Married persons may have rights to their partner's property and future income; they may be responsible for each other's debts; and they are subject to different tax rates than single persons. State and federal laws determine the scope of the married person's new rights and duties.

Of course, marriage is a private bond between two people, but it is also an important social institution.

Today, society also recognizes marriage as:

- a way to express commitment, strengthen intimate bonds, and provide mutual emotional support;
- a stable structure (hopefully) within which to raise children;
- a financial partnership in which spouses may choose from a variety of roles. Both spouses may work to support the family, the husband may support the wife, or the wife may support the husband.

As our society becomes more complex, there is no longer a short answer to the question "What is marriage?" Definitions and opinions of the proper functions of marriage continue to

change. The women's rights movement and the gay and lesbian rights movement have changed some people's ideas of marriage. Marriage will remain, but it also will continue to evolve.

Requirements of Getting Married

The requirements of getting married are simple, although they vary from state to state. In general, a man and woman wishing to marry must obtain a license in the state in which they wish to be married, usually from a county clerk or a clerk of court. The fee usually is low.

Many states require the man and woman to have blood tests for venereal disease--but not for AIDS--before the license is issued. Some states do not require this test if the two already have been living together. If the test shows that a would-be spouse has a venereal disease, certain states will not issue a license. Other states will allow the marriage as long as the couple knows the disease is present.

In some states, the couple must show proof of immunity or vaccination for certain diseases. A few states demand a general physical examination.

If one or both of the parties have been married before, the earlier marriage must have been ended by death, divorce, or annulment (although in some states, if a marriage was never valid, a legal action for annulment may not be necessary).

Parties who wish to marry must have the **capacity** to do so. That means the man and woman must understand that they are being married and what it means to be married. If because of drunkenness, mental illness, or some other problem, one of the parties lacks capacity, the marriage will not be valid.

Close blood relatives cannot marry, although in some states, first cousins can marry. Of the states that allow first cousins to marry, a few also require that one of the cousins no longer be able to conceive children.

Most, but not all, states require a waiting period, generally one to five days, between the time the license is issued and the time of the marriage ceremony. The purpose of the waiting period is to give a short time to cool off during which the parties can change their minds if they wish. The waiting period can be waived for good reason. For example, if the groom is arriving in the bride's town only one day before the wedding, but the state has a three-day waiting period, the waiting period probably can be waived by a judge or clerk of court.

In most states, a man or woman may marry at age eighteen without parental consent. Most states also allow persons age sixteen and seventeen to marry with consent of their parents or a judge.

A marriage that is valid in the state or country where it was performed generally will be considered valid in a state or country to which the couple later moves.

The Marriage Ceremony

A marriage ceremony may be religious or civil.

A religious ceremony should be conducted under the customs of the religion, or, in the case of a Native American group, under the customs of the tribe. Religious ceremonies normally are conducted by religious officials, such as ministers, priests, or rabbis. Native American ceremonies may be presided over by a tribal chief or other designated official.

Civil ceremonies usually are conducted by judges. In some states, county clerks or other government officials may conduct civil ceremonies. Contrary to some popular legends, no state authorizes ship captains to perform marriages.

Most states require one or two witnesses to sign the marriage certificate. The person who performs the marriage ceremony has a duty to send a copy of the marriage certificate to the county or state agency that records marriage certificates. Failure to send the marriage certificate to the appropriate agency does not necessarily nullify the marriage, but it may make proof of the marriage more difficult.

States generally do not require that certain words be used in a marriage ceremony, but the person or persons conducting the ceremony should indicate that the man and woman agree to be married.

Most states consider a couple to be married when the ceremony ends. Lack of subsequent sexual relations does not automatically affect the validity of the marriage, although in some states non-consummation could be a basis for having the marriage annulled. (For more information on annulments, [see chapter 8.](#))

Common-law Marriages

In times past, particularly the frontier days, it was common for states to consider a woman and man to be married if they lived together for a certain length of time, had sexual intercourse, and held themselves out as husband and wife, even though they never went through a marriage ceremony. Such a marriage was often called a **common-law marriage**.

Today, at least three-quarters of the states no longer recognize common-law marriages. The remaining states recognize common-law marriages, but with significant restrictions. In order

for there to be a legal common-law marriage (in the states that recognize them), the couple must: have the capacity to marry; regard themselves as husband and wife; live together; and clearly represent themselves to others as being husband and wife. Merely living together is not enough to create a marriage.

If a common-law marriage is valid, the partners have the same rights and duties as if there had been a ceremonial marriage. An interesting problem occurs if a couple had a valid common-law marriage in a state that recognizes common-law marriages, but then moved to a state that does not recognize common-law marriages. Would the marriage still be valid? Under principles of **conflict of laws**, the answer usually would be “yes.” Conflict of laws principles generally state that if a contract (in this case a marriage agreement) is valid in the place in which it was created, it will be treated as valid in a state to which the parties move, even though the parties could not have entered into a such an agreement in the new state.

A common-law marriage that is legal may end only with a formal divorce. There is not a United States counterpart to the tradition in Muslim law that allows a divorce to be accomplished by one party to the marriage--in Muslim law, that’s the husband--pronouncing the “Talek”: “I divorce thee. I divorce thee. I divorce thee.”

Sidebar:

CHANGE OF NAME

A woman who marries may change her last name (also known as "surname") to that of her husband, but she is not required to do so. In the past, it was widely assumed that a woman would change her last name to her husband's name when she married. Now society recognizes a woman's right to take her husband's name, keep her original name, or use both names. The

general rule is that if a woman uses a certain name consistently and honestly, then that is her true name.

[End of Sidebar]

Invalid Marriages

Occasionally, people who live as a married couple learn that their marriage is not legal. For example, one supposed spouse may have kept a prior marriage secret, or both may have thought incorrectly that an earlier marriage had ended in divorce or the death of a spouse. Or a marriage may be invalid because it is between close relatives, underage persons, or people incapable of entering into the marriage contract because of mental incompetence.

If a marriage was improper for reasons such as these, a court may grant an **annulment** instead of a divorce. An annulment is a legal declaration that a valid marriage never existed. An annulment is different from a divorce in that a divorce is a legal declaration that a *valid* marriage is over. (Divorces will be discussed more in [chapter 8](#).)

When a court grants an annulment, the parties often are free to go their separate ways without any further obligations to each other. Many states, however, apply additional principles of law to protect a person who thought he or she was in a valid marriage, but, in fact, was not. An individual who believed that he or she was in a valid marriage, but was not, is referred to as the **putative spouse**, and the rule of law that gives that person protection is sometimes referred to as the **putative-spouse doctrine**. (In some states, protection also may be given without labeling the remedy the "putative spouse doctrine.")

Under the putative spouse doctrine, a putative spouse may be entitled to the same benefits and rights of a legal spouse for as long as she or he reasonably believed the marriage to be valid.

From time to time, people discover that their marriage is invalid only when filing for divorce. After a long union that both parties believed to be valid, a court may refuse to declare the marriage invalid and require a divorce to end the marriage. In that event, the usual rules of property distribution and support apply. (Later chapters cover those topics.)

If one party to the marriage thought the marriage was valid, but the other party knew the marriage was not valid, an additional principle may apply: **estoppel**. Estoppel means that a person's conduct may prevent that person from doing something he or she would otherwise be entitled to do. In this case, if one party to a marriage tricked the other into thinking the marriage was valid, a court might not allow the deceiver to declare the marriage invalid. Thus, the deceiving partner would not be able to profit from property division or support by deception.

If the party who was deceived learned recently of the deception and wanted to get out of the marriage on the basis of annulment instead of divorce, the court probably would allow the annulment. On the other hand, if the party who was deceived learned of the deception and chose to continue in the marriage for a long period of time before seeking to end the marriage, the doctrine of **laches** (long delay) may prevent even the "innocent" party from seeking to declare the marriage invalid. In that case, the parties may be required to follow the rules of divorce rather than annulment.

Same-sex Marriages

The question of whether state law should provide for same-sex marriages has been furiously contested for a number of years. For many years, not only did no state pass a law recognizing marriages of persons of the same sex, but many states passed laws explicitly prohibiting them.

Therefore, if two members of the same sex were to go through a marriage ceremony, the

courts would not consider the marriage to be valid, and, in the event the parties split up, they could not seek a legal divorce.

A decision by the Hawaii Supreme Court in the 1990s made it appear that Hawaii would become the first state to authorize same-sex marriages. The state, however, amended its constitution to preclude such marriages. Meanwhile, the Vermont legislature has enacted a statute that allows same-sex couples to form "civil unions" to give same-sex couples the same benefits and protections as opposite-sex couples who enter into marriages. The law is being challenged in the courts by persons opposed to same-sex unions. The Vermont Supreme Court has already ruled, however that same-sex couples should have the same rights as opposite sex couples.

Domestic Partnerships

Some governmental units (primarily cities so far) have passed laws providing for **domestic partnerships**. Domestic partnerships can be used by homosexual couples and by heterosexual couples who are living together without being married. To become domestic partners, the couple usually must register their relationship at a government office and declare that they are in a "committed" relationship.

Domestic partnerships provide some--but not all--of the legal benefits of marriage. Some of the common benefits are:

- the right to coverage on a family health insurance policy,
- the right to family leave to take care of a sick partner (to the same extent a person would be able to use family leave to care for a sick spouse),
- bereavement leave,
- visiting rights to hospitals and jails, and
- rent control benefits (to the same extent a spouse would retain reduced rent if his or her partner died).

Domestic partnership laws are not uniform. The level of benefits varies with the jurisdiction that enacted the laws.

Even without domestic partnership laws, some insurance companies will offer family rates on health and auto policies to unmarried couples who demonstrate a long-term, financially interdependent relationship.

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