CHAPTER 1. MARRIAGE

A. RESTRICTIONS ON WHO CAN MARRY

1. The Traditional Restrictions: Bigamy

WHITNEY
v.
WHITNEY
1942 OK 268, 134 P.2d 357

BAYLESS, JUSTICE.

Mary P. Whitney sued Wayne Whitney in the district court for a divorce, and other appropriate relief with respect to their minor children and property. She alleged that

> on October 1, 1928, plaintiff and defendant were married in Oklahoma City and ever since that date have been husband and wife.

The ground for divorce was extreme cruelty. Whitney filed an answer wherein (1) he denied the marriage in Oklahoma City; (2) he set out in detail his marriage to another woman in 1913, and asserted that marriage had never been dissolved; (3) and by reason of the marriage existing between him and another woman, he was incapable in 1928, of contracting a marriage with plaintiff.

During the trial the fact that Whitney had a living wife in 1928 and was still bound in matrimony to her at the time of the trial became so obvious that plaintiff asked and was given permission to amend her petition to allege as ground for divorce that Whitney had a former wife alive at the time of the subsequent marriage. 12 O.S. § 1271(1).

At the close of the hearing plaintiff was granted a divorce from Whitney on the ground that he had a living wife at the time he married plaintiff in 1928. The matter of settlement of property rights and the custody of the children was deferred, and settled at a later hearing.

The appeal involves all of the issues disposed of by the trial court. However, it is proper to say at this point that no contest is presented to us concerning the children. * * *

Whitney contends first that the alleged marriage with plaintiff is bigamous and void. This is correct. The Constitution of Oklahoma, Art. 1, § 2 says: "Polygamous or plural marriages are forever prohibited." At the time plaintiff and Whitney undertook to establish a marital status he was a married man, having a wife from whom he was not divorced and to whom he was bound in a legal marriage, and therefore he was incapable of entering into a contract of marriage with plaintiff.

Considerable discussion is indulged by the parties as to whether, since it is admitted there was no ceremonial marriage, there was a common law marriage, and cases are cited from this and other jurisdictions setting out the elements to a common law marriage.

We think this is beside the point. Common law marriages are valid in Oklahoma. * * * Where the prescribed essentials are shown a common law marriage is as valid as one based on a license and ceremony.

But, if one of the parties to a so-called common law marriage has a living spouse of an undissolved marriage, the common law marriage attempted is as polygamous and plural and, therefore, as void as a ceremonial marriage attempted under the same circumstances.

Plaintiff argues that because the first ground for divorce in our statutes, 12 O.S. 1941 § 1271(1), the one relied on by her, is the existence of a valid prior marriage as to one or both of the parties, the Legislature has thereby invested the attempted subsequent marriage with some validity and sanctity, the effect of which is to give our courts power to adjust the so called marital rights and other incidents thereto.

Plaintiff has furnished us with a memorandum calling attention to the statutes of several states (Arkansas, Colorado, Florida, Illinois, Mississippi, Ohio and Kansas) providing for divorce on the ground of an existing marital relation at the time of the subsequent marriage, and decisions from several states discussing the legislative power, and the tendency of the courts to further such a policy, to deal less harshly with plural marriage than was customary at common law. * * *

The statute just cited was first put into effect in Oklahoma prior to statehood, Stat. 1893, § 4543, and was adopted from Kansas. After statehood the statute was carried forward and now reads as it did prior to statehood. But whatever were its connotations prior to statehood, and granting it may have been construed to lend support to plaintiff's argument, it ceased to have any meaning contrary to the fundamental policy of our State as expressed in Art. 1, § 2, Constitution of Oklahoma. With the adoption of our constitution any validity, or any sanctity theretofore accorded the subsequent marriage in cases of bigamous or plural marriages ceased, and such bigamous or plural marriages when attempted are void and wholly ineffectual to create a marital status or any of the legal incidents that usually flow therefrom as between the parties. * * *

A search has not shown that any of the states, whose statutes are cited in the memorandum, have a constitutional prohibition against plural marriages as we have. The Legislatures of those states are free to establish the public policy thereon, and may accord any status or privileges to the parties to a plural marriage that seems desirable. We think this makes the problem in those states sufficiently different from the problem in this state as to deprive the statutes and decisions cited of any analogous value to the issue in Oklahoma.

We are impressed by what is said in 18 R.C.L. 441, § 69:

> A marriage void in its inception does not require the sentence, decree or judgment of any court to restore the parties to their original rights or to make the marriage void, but though no sentence of avoidance be absolutely necessary, yet as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction.

The legislature has the power and ought to provide for a judicial declaration of the void nature of the subsequent marriage.

We do not think it beyond the power of the Legislature to adopt the mechanics of the divorce action as a method for the courts to determine the issue of fact and law, that a marriage is plural and void, and it probably does not matter that the decree or judgment is called divorce rather than annulment. *Whitebird v. Luckey*, 180 Okl. 1, 67 P.2d 775. But the power in the Legislature to provide for such a judicial determination and the use of the term "divorce" as applied thereto cannot have the effect of adopting the philosophy underlying divorce as applied to the dissolution of a valid marriage so as to carry with it the power to adjust rights as though a valid marriage was being dissolved. Many incidents attach to divorce in the dissolution of a valid marriage, such as allowances pendente lite, separate maintenance, permanent alimony, custody and support of children and division of property on the basis of matters implied from joining in lawful wedlock, and are countenanced by equity or provided by statute.

Where there is no marriage there can be no allowance pendente lite. *Baker v. Carter*, 180 Okl. 7, 68 P.2d 85.

When the marriage is void there can be no alimony, no dower, courtesy or interest in property equivalent thereto. *Krauter v. Krauter*, 79 Okl. 30, 190 P. 1088 and *Whitebird v. Luckey*, 180 Okl. 1, 67 P.2d 775.

Insofar then as our divorce statute is concerned, when the court has determined that one or both of the parties to a marriage were incapable of contracting the marriage because of being then bound in a valid marriage, it has exhausted the Legislative power conferred on it, and it cannot assume to exercise the other powers inherent or statutory in a divorce relating to valid marriages. *Whitebird v. Luckey, supra*.

The trial court was correct in determining that the relation of the parties to each other should be stated by a judgment determining that Whitney was a married man in 1928, and at all times up to the rendition of the judgment, and therefore incapable of marrying plaintiff, and in granting to her an order or judgment that neither was bound to the other.

The trial court undertook to adjust the property rights of the parties as though there was some sort of a marriage that vested the court with the powers stated by statute in rendering a divorce following a legal marriage.

We are of the opinion that when it conclusively appears, as herein, or is adjudged on competent evidence that the relation of husband and wife never existed legally, the statutory power to adjust property rights, 12 O.S. 1941 § 1278, has no application, but that the power to adjust such rights is equitable. *See Krauter v. Krauter, supra, and Tingley v. Tingley*, 179 Okl. 201, 64 P.2d 865.

The matter of adjustment of property rights between a man and a woman involved in a bigamous marriage has frequently engaged the attention of the courts, . . . 75 A.L.R. 733. . . . For purposes of classification the relation of the parties is likened to that of partnership, and while in earlier cases there was a desiring to question whether the man and woman should be treated as partners with respect to their property rights, the later cases seem to approach closer agreement on this issue and to recognize that it is probably an easier settlement of a difficult problem to regard the parties to a bigamous marriage as partners with respect to their property rights arising during the cohabitation. We have said it is a quasi partnership. *Krauter v. Krauter, supra*.

This brings us then to the contention made by Whitney, that after this litigation arose the parties entered into a written contract adjusting and settling their property rights and such contract is binding on the court.

Following the rule applicable to partnerships generally, we think this is correct. It is elemental that partners may dissolve their relationship by contract, and may adjust, settle and dispose of the property rights thereby . . . ; and, in the absence of an attack thereon by either of the parties on any of the recognized grounds for rescission, the contract will be enforced by the courts. No such attack is made upon the contract that calls for rescission.

The plaintiff took the position that the contract entered into was for the purpose of adjusting the differences between the parties and to permit the reconciliation between them and we gather from what is said in her brief that they lived together after the contract had been executed. In support of this position the plaintiff *cites Hale v. Hale*, 40 Okl. 101, 135 P. 1143, and other Oklahoma cases to the effect that a contract made between a husband and wife in a divorce proceeding in settlement of differences between them is nullified by the reconciliation and resumption of the marital relation. We suppose that the trial court adopted this view and seems to have assumed that because the litigation was not terminated the contract was destroyed by the reconciliation, or the plaintiff was free to repudiate because not wholly execut-

ed, and that thereby the contract ceased to be effective for any purpose. We think this view of the matter is erroneous. Plaintiff and Whitney were not husband and wife. The rule announced in *Hale v. Hale, supra*, applies to parties who are legally husband and wife. These parties were not legally married and at the time the contract was entered into each of them knew that there was a serious question of its validity and they were not eligible to reconcile themselves and resume the marital relation with the effect of thereby rendering ineffective a contract entered into. They were with respect to their property partners and were free to deal with each other as such. Until such time as an attack is made on the contract on any of the recognized grounds, the contract must stand. Therefore with the record before us as it is, the trial court erred in treating the contract as not binding and not assuming to adjust the property rights of the parties.

* * * *

WELCH, C.J., and RILEY, OSBORN, HURST, and DAVIDSON, JJ., concur.

CORN, V.C.J., and GIBSON, J., dissent.

ARNOLD, JUSTICE (dissenting).

* * * *

Courts of enquiry may entertain suits to adjudge the nullity of any void contract, so unquestionably the plaintiff in this action might have maintained a suit in equity to nullify the purported contract of marriage. However, the remedy of divorce was also available. The legislature had the unquestioned power to authorize the bringing of such an action in our divorce courts, which are creatures of our legislative body, and authorize divorcement on the ground of the incapability of one of the parties by reason of the existence of a living spouse. This it did by 12 O.S. 1941 § 1271-(1), wherein is provided, as a ground for divorce "when either of the parties had a former husband or wife living at the time of the subsequent marriage." * * * I cannot believe the legislature intended to do a useless thing. There are good reasons why the legislature so authorized such a person, while it failed to authorize the bringing of a divorce action in any other case where the contract was void *ab initio*. The family is the most sacred of all institutions and its preservation and integrity, and the welfare of children are matters of very vital public concern. The legislature evidently knew, as I know, that a party to a marriage contract might be, while wholly innocent of any wrongdoing, imposed upon grossly by the other party in the manner as contended by the plaintiff herein. Knowledge of a living spouse of a party to a marriage contract might easily be unknown to the other contracting party and such a fact easily be fraudulently undisclosed or covered up. Such a defrauded party to such a void marriage, if innocent of any wrongdoing or knowledge thereof, would morally be entitled to the same protection, rights, and privileges as one who was lawfully married, . . .

* * * *

Notes & Questions

1. If parties to a bigamous marriage continue to live together as husband and wife following the removal of the impediment through death or divorce, they have a common law marriage as of the time the impediment is removed. *Hill v. Shreve*, 1968 OK 182, 448 P.2d 848 ("The rule is that the acts of living together and holding themselves out as husband and wife, after removal of a legal impediment to marriage constitute a common-law marriage, even though both parties knew of the impediment.").

2. Should Mr. Whitney be estopped from denying his marriage to Mrs. Whitney? *See* the conflicting opinions of *Sutton v. Sutton*, 143 S.W.3d 759 (Mo. Ct. App. 2004) and *Falk v. Falk*, 2005 WL 127077 (Tenn. Ct. App. 2005).

3. The following note appeared recently on a family law listserv for attorneys:

> Female client walks into the office saying she wants to get a divorce from husband #4 to marry guy # 5. Attorney asks about previous marriages, client replies:
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> She married husband # 1 in the early 1970s, divorced him (does not remember when) and marries husband # 2 early 1980. She thinks she divorced husband # 2 but is not clear about the facts. She then goes and marries husband # 3 in the late 1980s. She is almost positive that another legal services agency divorced her from husband #3. She then marries husband # 4 in early 2000.
>
> Attorney goes to the clerk's office of the county and searches for a divorce judgment. The only judgment of divorce found is for husband #1. There are no divorce judgments found for husband # 2 or # 3. Client also expresses a wish that if it is found that she is still married to husband # 2 then she does not want to divorce him and will not marry guy # 5. (It appears husband # 2 is the only one that has a decent job).
>
> QUESTION: What should be done about husband # 3 and # 4? Should the marriages to # 3 and # 4 be declared void? Was it bigamy if she lacks mens rea?

What advice do you have for this lawyer?

4. Plural marriages are prohibited in every state. Freedom-of-religion objections concerning Mormons were overruled in *Reynolds v. United States*, 98 U.S. 145 (1878) and *Utah v. Green*, 99 P.3d 820 (Utah 2004). Privacy objections to banning plural marriage have also been rejected. *Bronson v. Swenson*, 2005 WL 1310482 (D. Utah 2005) (unpublished, text in Westlaw).

5. A number of plural marriage households secretly exist in Arizona, New Mexico, Idaho, Nevada, Montana and Utah. How immoral are such homes? Should the children of such households be taken away from their parents? The State of Utah has done so. *See State ex rel. Utah v. Black,* 283 P.2d 887 (Utah 1955). However, the Utah Supreme Court has held that it was error for a trial court to base an award of custody solely on the fact that the mother was involved in a polygamous relationship. *Sanderson v. Tyson,* 739 P.2d 623 (Utah 1987).

6. Bigamy is criminally proscribed in all states. *See* 21 O.S. §§ 881-884 (2001). The penalty is five years in prison. Anyone who knowingly marries a person who is still married to a third person can be punished by a sentence of one to five years in prison or by a fine of $500.

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2. The Constitutional Question

OBERGEFELL
v.
HODGES
135 S.Ct. 2584
(U.S. 2015)

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. *See*, *e.g.*, MICH. CONST., Art. I, § 25; KY. CONST. § 233A; OHIO REV. CODE ANN. § 3101.01 (Lexis 2008); TENN. CONST., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder*, 772 F.3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. ___, ___ S.Ct. ____, ___ L.Ed.2d ____ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 LI CHI: BOOK OF RITES 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." *See* DE OFFICIIS 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same—sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. *See* N. Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–17 (2000); S. Coontz, MARRIAGE, A HISTORY 15-16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. *See* 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. *See Brief for Historians of Marriage et al. as Amici Curiae* 16-19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. *See generally* N. Cott, PUBLIC VOWS; S. Coontz, MARRIAGE; H. Hartog, MAN & WIFE IN AMERICA: A HISTORY (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. *See Brief for Organization of American Historians as Amicus Curiae* 5-28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. *See Position*

Statement on Homosexuality and Civil Rights, 1973, in 131 AM. J. PSYCHIATRY 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. *See Brief for American Psychological Association et al. as Amici Curiae* 7-17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea [n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. *See Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. Two Terms ago, in *United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id*., at ___, 133 S.Ct., at 2689.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, *see Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864-868 (C.A.8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. * * *

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. * * *

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. *See Duncan v. Louisiana*, 391 U.S. 145, 147-149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See*, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. *See Lawrence*, *supra*, at 572, 123 S.Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. *See*, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Griswold*, *supra*, at 486, 85 S.Ct. 1678; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes

of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. *See*, *e.g.*, *Lawrence*, 539 U.S., at 574, 123 S.Ct. 2472; *Turner*, *supra*, at 95, 107 S.Ct. 2254; *Zablocki*, *supra*, at 384, 98 S.Ct. 673; *Loving*, *supra*, at 12, 87 S.Ct. 1817; *Griswold*, *supra*, at 486, 85 S.Ct. 1678. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. *See*, *e.g.*, *Eisenstadt*, *supra*, at 453-454, 92 S.Ct. 1029; *Poe*, *supra*, at 542-553, 81 S.Ct. 1752 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. *See* 388 U.S., at 12, 87 S.Ct. 1817; *see also Zablocki*, *supra*, at 384, 98 S.Ct. 673 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. *See Lawrence*, *supra*, at 574, 123 S.Ct. 2472. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386, 98 S.Ct. 673.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N.E.2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See Windsor, 570 U.S., at ____, 133 S.Ct., at 2693-2695. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. *Cf. Loving*, *supra*, at 12, 87 S.Ct. 1817 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485, 85 S.Ct. 1678. * * * And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. *See* 482 U.S., at 95-96, 107 S.Ct. 2254. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at ____, 133 S.Ct., at 2689. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. Lawrence invalidated laws that made same-ex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U.S., at 567, 123 S.Ct. 2472. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in inti-

mate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. *See Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer*, 262 U.S., at 399, 43 S.Ct. 625. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U.S., at 384, 98 S.Ct. 673 (quoting *Meyer*, *supra*, at 399, 43 S.Ct. 625). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at ____, 133 S.Ct., at 2694-2695. Marriage also affords the permanency and stability important to children's best interests. *See Brief for Scholars of the Constitutional Rights of Children as Amici Curiae* 22-27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. *See Brief for Gary J. Gates as Amicus Curiae*. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. *See Windsor*, *supra*, at ____, 133 S.Ct., at 2694-2695.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. * * * In *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been " 'a great public institution, giving character to our whole civil polity.' " *Id*., at 213, 8 S.Ct. 723. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. *See generally* N. Cott, PUBLIC VOWS. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making

authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. *See Brief for United States as Amicus Curiae* 6-9; *Brief for American Bar Association as Amicus Curiae* 8-29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. *See Windsor*, 570 U.S., at ____-____, 133 S.Ct., at 2690-2691. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which called for a " 'careful description' " of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. *See also Glucksberg*, 521 U.S., at 752-773, 117 S.Ct. 2258 (Souter, J., concurring in judgment); *id*., at 789-792, 117 S.Ct. 2258 (Breyer, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. *See Loving*, 388 U.S., at 12, 87 S.Ct. 1817; *Lawrence*, 539 U.S., at 566-567, 123 S.Ct. 2472.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-

sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. *See M.L.B.*, 519 U.S., at 120-121, 117 S.Ct. 555; *id*., at 128-129, 117 S.Ct. 555 (Kennedy, J., concurring in judgment); *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S., at 12, 87 S.Ct. 1817. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383, 98 S.Ct. 673. It was the essential nature of the marriage right, discussed at length in *Zablocki*, *see id*., at 383-387, 98 S.Ct. 673, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid-20th century. These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." GA. CODE ANN. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. *See*, *e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980); *Califano v. Westcott*, 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (plurality opinion); *Weinberger v. Wiesenfeld*,

420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M.L.B. v. S.L.J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. *See* 519 U.S., at 119-124, 117 S.Ct. 555. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. *See* 405 U.S., at 446-454, 92 S.Ct. 1029. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. *See* 316 U.S., at 538-543, 62 S.Ct. 1110.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. *See* 539 U.S., at 575, 123 S.Ct. 2472. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id*., at 578, 123 S.Ct. 2472.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. *See*, *e.g.*, *Zablocki*, *supra*, at 383-388, 98 S.Ct. 673; *Skinner*, 316 U.S., at 541, 62 S.Ct. 1110.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

V

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. *See DeBoer*, 772 F.3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 amici make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U.S. ____, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id*., at ____-____, 134 S.Ct., at 1636-1637. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id*., at ____, 134 S.Ct., at 1636. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id*., at ____, 134 S.Ct., at 1637. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid*. It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. *See* 478 U.S., at 186, 190-195, 106 S.Ct. 2841. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles nec-

essary to a correct holding were known to the *Bowers* Court. *See id*., at 199, 106 S.Ct. 2841 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id*., at 214, 106 S.Ct. 2841 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U.S., at 578, 123 S.Ct. 2472. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. *See Kitchen v. Herbert*, 755 F.3d 1193, 1223 (C.A.10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams v. North Carolina*, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-ex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

Notes: The Constitution and Marriage

1. As noted in the opinion the Supreme Court has decided several major cases involving the right to marry. The first of these was *Loving v. Virginia*, 388 U.S. 1 (1967), striking down the Virginia statute prohibiting marriages between persons of different races. Oklahoma prohibited miscegenation when the *Loving* case was decided. *See* 43 O.S.§§14, 15, *and* 16 (1961)(repealed). The Oklahoma Supreme Court sustained the constitutionality of the interracial prohibition just one year before *Loving* was decided. *See Jones v. Lorenzen*, 441 P.2d 987 (Okla. 1965). For inexplicable reasons the court decided the case in 1965, but did not publish the opinion until 1968.

2. The second case was *Zablocki v. Redhail*, 434 U.S. 374 (1978). That case struck down, on substantive due process grounds, a Wisconsin statute that prohibited marriage by an individual who owed back due child support. It also prohibited marriage of people who were current on their child support, but the child was a public charge. The analysis in this case was very different than in *Obergefell*. The court used a more traditional standard of review in that it required Wisconsin to demonstrate a sufficiently important reason for the statute and that the statute was narrowly tailored to effectuate that permitted purpose without being under inclusive or over inclusive. The court acknowledged that child support collec-

tion was a valid state interest, but concluded that the statute was over inclusive in that it included people who might marry someone wealthy enough to help with the child support. It also was under inclusive in that it only prohibited marriage but not the contracting of other debts by a child support obligor. The *Zablock*i analysis is the used more frequently in determining whether a particular prohibition on marriage is constitutionally infirm.

3. The history involved in the recognizing of same-sex marriage is well set out in the opinion. Oklahoma was one of the states that prohibited same-sex marriage, both by statute and by constitutional amendment. *See* 43 O.S. §3.1 *and O'Darling v. O'Darling*, 2008 OK 71, 188 P.3d 137. Same-sex marriage became legal in Oklahoma when the Supreme Court denied certiorari on *Bishop v. Oklahoma*, 760 F.3d 1070 (10th Cir. 2014*), cert. denied*, 135 S.Ct. 271 (U.S. 2014), which struck down, on equal protection grounds, Oklahoma law prohibiting same-sex couple from marrying. The ramifications of this development will be discussed in this casebook under their appropriate heading.

4. The decision in *Obergefell* also mooted the discussion as to whether transgender people should be allowed to marry and, if so, to whom. Most of the decisions concerning the transgendered found that for marriage purposes the gender of a person is the one they were born with. Therefore, they could marry a person of the opposite gender to their birth gender, even though the individual had undergone a complete sexual change. *See Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Ct. App. 2004) (marriage between a female to male transsexual and another female is void); *Marriage of Simmons*, 825 N.E.2d 303 (Ill. Ct. App. 2005)(same). There were cases to the contrary. *See M.T. v. J.T.*, 355 A.2d 204 9 (N.J. Super Ct.), *cert. denied*, 364 A.2d 1076 (N.J. 1976). For an Oklahoma case involving a name change for a transgendered individual, *see Application of Harvey*, 2012 OK CIV APP 112, 293 P.3d 224. 234.

3. The Traditional Restrictions: Incest

CATALANO
v.
CATALANO
170 A.2d 726
(Conn. 1961)

MURPHY, JUSTICE.

The plaintiff appealed to the Superior Court from the action of the Probate Court denying her application for a widow's allowance for support from the estate of Fred Catalano. * * *

. . . Fred Catalano, a widower and citizen of this state, was married on December 8, 1951, in Italy to the plaintiff, his niece, an Italian subject. Such a marriage was prohibited by § 87 of the Italian Civil Code, but since the parties obtained a legal dispensation for the marriage from the Italian government, it was valid in Italy. Fred returned to this country. The plaintiff remained in Italy until 1956, when she joined Fred and they came to Hartford, where they lived as husband and wife until his death in 1958. A son was born to the couple. The plaintiff claims to be the surviving spouse of the decedent and, as such, entitled to an allowance for support. . . .

The determination of the question propounded depends on the interrelation and judicial interpretation of our statutes, . . . * * *

* * * *

It is the generally accepted view that a marriage valid where the ceremony is performed is valid everywhere. * * * There are, however, certain exceptions to that rule, including one which regards as invalid incestuous marriages between persons so closely related that their marriage is contrary to the strong policy of the domicil though valid where celebrated. RESTATEMENT, CONFLICT OF LAWS § 132(b). That exception may be expressed in terms of a statute or by necessary implication. * * *

To determine whether the marriage in the instant case is contrary to the public policy of this state, it is only necessary to consider that marriages between uncle and niece have been interdicted and declared void continuously since 1702 and that ever since then it has been a crime for such kindred to either marry or carnally know each other. At the time of the plaintiff's marriage in 1951, the penalty for incest was, and it has continued to be, imprisonment in the state prison for not more than ten years. * * * This relatively high penalty clearly reflects the strong public policy of this state. We cannot completely disregard the import and intent of our statutory law and engage in judicial legislation. The marriage of the plaintiff and Fred Catalano, though valid in Italy under its laws, was not valid in Connecticut because it contravened the public policy of this state. * * * The plaintiff therefore cannot qualify . . . as the surviving spouse of Fred Catalano.

* * * *

MELLITZ, JUSTICE (dissenting).

We are dealing here with the marriage status of a woman who was validly married at the place of her domicil and who, so far as the record discloses was entirely innocent of any intent to evade the laws of Connecticut. * * * There is no suggestion anywhere in the record that at the time of the marriage she intended to come to America, that the parties had any intention of coming to live in Connecticut, or that the marriage was entered into in Italy for the purpose of evading the laws of Connecticut. If a marriage status resulting from a valid marriage, such as the one here, is to be destroyed, the issue bastardized, and the re-

lations of the parties branded as illicit, it should follow only from an explicit public policy which compels such harsh consequences to ensue from a marriage entered into under the circumstances disclosed here.

The cases cited in the majority which deal with the question we have here are all cases where the parties went to a foreign state to evade the law of the domicil and the marriage celebrated in the foreign state was refused recognition in the place of their domicil when they returned to live there after the marriage. * * *

The provisions [of our statutes], prohibiting marriage within specified degree of consanguinity, apply only to marriages celebrated in Connecticut and are not given extraterritorial operation. . . . * * *

* * * Mrs. Catalano was innocent of any intent to violate our laws, and she is entitled to have recognition here of her marriage status, with all of the rights flowing from that status. The following from the opinion in *Pierce v. Pierce*, 58 Wash. 622, 109 P. 45, expresses what I conceive to be the correct view in the situation here. "We know of no public policy which will warrant a court in annulling a marriage between competent parties if there be any evidence to sustain it and especially so where it appears that the parties have consummated the marriage, a child has been born, and the offending party has been openly acknowledged as a spouse. It will not be done unless it appears that the parties willfully went beyond the jurisdiction of the courts of this state to avoid and defy our laws. It is not clear that they did so in this case."

* * * *

Notes & Questions: Problems of Incest

1. All states prohibit marriages between brother and sister, parent and child, and aunt and nephew. A few states permit marriages between uncle and niece when allowed by the religion of the contracting parties.

2. Twenty states and the District of Columbia permit marriages between first cousins. In Oklahoma such marriages are prohibited. However, 43 O.S. § 2 (2001) contains an exception for marriages of first cousins performed in states that recognize such marriages. Texas allows first cousins to marry. Is there any justification for the continued ban on first cousin marriages?

3. What is the rationale for extending the incest ban to first cousins? Consider the following excerpt from Sharon Begley, *Kissing Cousins*, NEWSWEEK, December 30, 2008:

> A good way not to win friends in an immigrant community is to blame its high rate of birth defects on the practice of cousin marriages. That's what British environment minister Phil Woolas did in February, blaming birth defects in children in the UK's Pakistani community on marriages between first cousins. "If you have a child with your cousin, the likelihood is there will be a genetic problem," he told the Sunday Times. That belief is reflected in laws in 31 U.S. states that either bar cousin marriage entirely or permit it only if the couple undergoes genetic counseling or cannot have kids.
>
> But in a paper in the journal PLoS Biology, Hamish Spencer of New Zealand's University of Otago and Diane Paul of Harvard's Museum of Comparative Zoology argue that the genetic risk to children born of cousin marriages is much less than widely believed.
>
> Risk is in the eye of the beholder, of course. But in 2002 an expert panel convened by the National Society of Genetic Counselors found that the risks of a first-cousin marriage are about 1.7% to

> 2% above the background risk for congenital defects and 4.4% above background (which is vanishingly low to begin with) for dying in childhood.
>
> Whether 2% and 4% seem like a big extra risk or a piddling one probably depends on how much you want to marry your cousin, but Spencer concludes that "neither the scientific nor social assumptions behind [anti-cousin-marriage laws] stand up to close scrutiny. Women over the age of 40 have a similar risk of having children with birth defects and no one is suggesting they should be prevented from reproducing. People with Huntington's disease or other autosomal dominant disorders have a 50 percent risk of transmitting the underlying genes to offspring and they are not barred either."
>
> And what of the belief that humans have an incest-avoidance gene that keeps people from lusting after their cousins? None has ever been found. And if avoiding incest with a cousin is part of human nature, as some evolutionary psychologists contend, then an awful lot of humans haven't noticed. In Turkey and Morocco, first-cousin marriages account for 22% of all marriages, and second-cousin marriages for another 29%, finds demographer Georges Reniers of the University of Ghent. Cousin marriages are similarly common among China's majority Han ethnic group and in the Middle East and sub-Sahara Africa."

So what is the rationale for banning incestuous marriage? Do you think any rationale can survive an analysis under either *Zablocki* or *Obergefell*? Colorado held its incest ban unconstitutional as applied to a case where a woman with one child, a daughter, married a man with one child, a son, and the daughter and the son wished to marry. *See Isreal v. Allen*, 577 P.2d 762 (Colo. 1978).

4. Should criminal incest statutes be treated differently than marriage incest statutes? *See* 21 O.S. § 885 (2001). THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE, § 230.2 (1980), applies the criminal incest provision to people related by affinity. The comment to the section notes:

> The inclusion of adopted children reflects the conclusion that the incest law properly serves the function of protecting the nuclear family and that the concept of adoption seeks to duplicate, insofar as possible, the structure of the natural family. Adoption agencies, courts, and other participants in the process try to insure that the artificial family will mirror a natural family not only in definition of legal relationship but also in the emotional content and social significance of those relationships.

5. In this country, marriage, divorce, and other family regulations are primarily a matter of state law. State statutes regulating the marriage and divorce process differ radically. Thus, many people find that the law governing their family relations changes as they move from state to state. The resulting problems form an essential part of the Family Law course and practice.

6. The typical rule for multi-state marriage is set out in RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1971):

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage.
>
> (2) A marriage which satisfied the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

Do you suppose there is much difficulty applying this section? Is not the validity of marriage an area where the rules should be firm and not subject to argument? Recall that *Obergefell* held that all states

must recognize same-sex marriages entered into in other states. Should this approach be applied to all marriages that are valid in the state where the marriage was celebrated?

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4. The Traditional Restrictions: Age

WHITE
v.
MCGEE
1931 OK 280, 299 P. 222

CLARK, V.C.J.

This action was commenced in the district court of Oklahoma county by plaintiffs in error, Samuel K. White and Nellie E. White, against defendants in error, Reece E. McGee, Marland Pipe Line Company, Marland Oil Company of Oklahoma, and the Marland Refining Company, corporations, for damages for the death of their son, James Leo White, and allege that James Leo White died without issue or lawful wife; that plaintiffs in error are his sole and only heirs at law; that no administrator of the estate of James Leo White is or has been appointed, and that said deceased's estate has not been administered; that a purported marriage was attempted between James Leo White, their son, and one Elizabeth Mae Wentworth, and that the same was unlawful, for the reason that the said James Leo White was under the age of 18 years at that time, being only 17 years of age, and the said Elizabeth Mae Wentworth was only 15 years of age at the said time, and that the consent of the parents to said marriage was not obtained either orally or in writing; that James Leo White and Elizabeth Mae Wentworth did not live together at the time of his death, and had been separate and apart for some time prior thereof, and that he had wholly abandoned and refused to live with and support her; that, because of the nonage of the parties, said attempted marriage was not lawful and is expressly prohibited and forbidden by law; and that the said attempted marriage was made within the state of Oklahoma, and in violation of its statutes, and that she was not his lawful wife.

On December 2, 1927, by leave of court first had, Elizabeth Mae White filed motion for leave to intervene in said cause, asking that she be made a party defendant, and alleging that she was the lawful wife of James Leo White, deceased, and is the lawful widow and heir at law of James Leo White, and that the petition of plaintiffs below, plaintiffs in error here, attacks the validity of the marriage of James Leo White and herself, and therefore she is a proper party defendant.

Thereafter Elizabeth Mae White, by Floyd C. Wentworth, her father and next friend, as intervener, filed a demurrer in said cause alleging that the petition failed to state facts sufficient to constitute a cause of action.

Thereafter the plaintiffs in error filed a motion to strike intervener's petition and plea, alleging that the same is unlawful and fails to show that petitioner has or claims an interest in the controversy adverse to the plaintiffs' rights, or that she is a necessary party to the complete determination of the action, and that the petition is unverified, that intervener has at this time a cause of action pending, involving the same subject-matter and against the same defendants, and that a full determination of the present action would not prejudice her rights in her own action, and that she is interjecting herself in this action against the will or consent of both plaintiffs in error and defendants in error.

The court overruled said motion to strike, and made said intervener a party defendant.

The general demurrer of intervener was sustained, and plaintiffs in error refused to plead further. Judgment was entered for defendants below, and the petition of plaintiffs below was dismissed. Motion for new trial was filed and overruled. Plaintiffs in error bring the cause here for review.

* * * *

The next contention of plaintiffs in error is:

> 2. Where alleged wife was a minor, aged 15, at the time of marriage, and alleged husband 17 years and no issue of such marriage, Has the surviving infant the right under our law to sue for wrongful death of the other or does this right go to the next of kin, and did the court err in sustaining intervenor's demurrer.

Section 825, C.O.S. 1921, provides:

> In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow. * * *

Under the above section, a widow is the proper person to bring actions of this kind where there is no personal representative. *See C., R. I. & P. Ry. Co. v. Owens*, 78 Okl. 50, 186 P. 1092; *Id*., 78 Okl. 114, 189 P. 171.

The next question to be determined is whether or not Elizabeth Mae White is the lawful widow of James Leo White.

Section 7490, C.O.S. 1921, provides:

> Any unmarried male of the age of twenty-one years or upwards, or any unmarried female of the age of eighteen years or upward and not otherwise disqualified, is capable of contracting and consenting to marriage; but no female under the age of eighteen years and no male under the age of twenty-one years shall enter into the marriage relation, nor shall any license issue therefor, except upon the consent and authority expressly given, either in person or in writing, by a parent or guardian, and if such consent be given in writing, the written instrument must be acknowledged before some officer authorized to take acknowledgments of deeds, and every male under the age of eighteen years, and every female under the age of fifteen years are expressly forbidden and prohibited from entering into the marriage relation: Provided, that this section shall not be construed to prevent the courts from authorizing the marriage of persons under the ages herein mentioned, in settlement of suits for seduction or bastardy, when such marriage would not be incestuous under this chapter.

In construing this section in connection with the penal statutes for marriage of persons under the ages set forth in the above section, this court held that such marriage is voidable only, and not void. *See Hunt v. Hunt*, 23 Okl. 490, 100 P. 541.

In the opinion, this court said, after reviewing the decisions from other states:

> The rule to be gathered from all of the foregoing cases of this character is that, notwithstanding the statute may penalize those who solemnize or those who enter into marriage contrary to statutory authority, the marriage itself is not void unless the statute itself so makes it, and hence in the case at bar, although the marriage was expressly forbidden and prohibited, it was voidable, and not void. While marriage is a personal relation arising out of a civil contract, it differs to such an extent from all other contracts in its consequences to the parties and to the public that the rule that prohibited and penalized contracts are void does not apply thereto. * * * This conclusion on our

part necessarily establishes the proposition that the relation entered into between these parties constituted them husband and wife.

In the case of *Hunt v. Hunt, supra*, the male was 16 and the female 14 years of age.

Plaintiffs in error's only contention as to the marriage being unlawful was on account of the nonage of the parties. No questions were raised which would bring the marriage under the statutes with reference to void marriages.

Void marriages are defined by section 7489, C.O.S. 1921, as follows:

> Marriages between ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with stepson, between uncles and nieces, aunts and nephews, except in cases where such relationship is only by marriage, between brothers and sisters of the half as well as the whole blood, and first cousins, or second cousins, are declared to be incestuous, illegal and void, and are expressly prohibited.

Such marriages are illegal and void, as defined in section 7489, *supra*, but this statute does not apply in the case at bar. In the case at bar the parties were husband and wife, and the marriage was merely voidable and not void.

The cases cited by plaintiffs in error relate to void marriages and not to voidable marriages.

The marriage entered into between Elizabeth Mae Wentworth and James Leo White on account of nonage was voidable and not void, and, said relation being in existence at the time of the death of the said James Leo White, left Elizabeth Mae White his surviving widow, and as such, in the absence of a personal representative of his estate, could maintain an action for his wrongful death, and plaintiffs in error are without authority to maintain such action, and the court did not err in sustaining intervener's demurrer to the plaintiffs in error's petition.

Judgment of the trial court is affirmed.

LESTER, C.J., and RILEY, HEFNER, CULLISON, SWINDALL, ANDREWS, and KORNEGAY, JJ., concur. MCNEILL, J., disqualified, not participating.

Notes & Questions

1. The census bureau reports that 5.5 percent of Oklahoma teens are married. This is one of the highest rates in the country. Oklahoma's teen pregnancy rate is 12th-highest nationally, only a slight improvement from a decade earlier, according to the National Centers for Disease Control and Prevention (CDC). CDC figures show that in 2000, the Oklahoma pregnancy rate of women ages 15 to 19 was 60.1 births per 1,000. For those 18 to 19, the rate was 99.8 births per 1,000. In 1991, Oklahoma ranked 13th nationally with a rate of 72.1 births per 1,000 for women ages 15 to 19. For ages 18 and 19, it was 115.6 births per 1,000. The national rate in 2000 was 48.5 births per 1,000 for the 15 to 19 age group and 79.2 births per 1,000 for those 18 and 19, the CDC said. The state with the highest teen pregnancy rate in the nation is Mississippi, which had 72 births per 1,000 women ages 15 to 19. In Washington, D.C., the rate was 80.7 per 1,000 women in that age bracket. Do any of these statistics explain Oklahoma's high divorce rate?

2. In a rather startling decision, the Colorado Court of Appeals recently held that a twelve-year-old girl had a valid common law marriage, because when the legislature changed the age of consent for ceremonial marriages, it never changed the common law age of consent for common law marriages. *In re J.M.H.*, 143 P.3d 1116 (Colo. Ct. App. 2006). In Oklahoma the age for marriage is eighteen. Persons between sixteen and eighteen can be married with parental consent. *See* 43 O.S. § 3 (2001). The divorce rate for people who marry before the age of eighteen is extremely high. Is this a constitutionally valid reason for raising the marriage age to 21, 25, etc.?

The U.S. Census Bureau reports that in three states—Arkansas, Utah and Oklahoma—women married the youngest, at an average age of 24. For men in those states, the average age was 26. In the northeastern states of New York, Rhode Island and Massachusetts, men and women waited about four years longer to marry. Education also appeared to influence the age of marriage. In states with higher numbers of college-educated adults, couples tended to wed at older ages, while the opposite was true in states with lower education levels. A smaller share of Americans, however, are walking down the aisle, continuing a 50-year trend, the study said. The U.S. Census Bureau's 2008 American Community Survey showed 52 percent of men and 48 percent of women older than 15 are married.

Nevada, Maine and Oklahoma have the highest percentage of divorced adults. Arkansas and Oklahoma have the highest rates of people who have walked down the aisle at least three times.

3. A marriage license for people who wish to marry under the age of eighteen with parental consent must be on file for three days prior to the performance of the marriage. 43 O.S. § 5(C). Should people under the age of eighteen who wish to marry be required to have marital counseling? If a couple seeking a marriage license successfully completes a premarital counseling program conducted by a health care professional or an official representative of a religious institution, they will be charged a reduced fee for a marriage license. 43 O.S. §5.1

Notes & Questions: The Void and Voidable Distinction

Suppose two people marry at age 15 and live together for 50 years before one dies. Is the survivor entitled to the benefits usually afforded the survivor of a marriage? Could the marriage be annulled? At any time?

Annulment is an action to declare the invalidity of a particular union at its inception. Divorce, by comparison, is an action to legally terminate a valid marriage as of a specific date after the union is in existence. Despite the simplicity of this conceptual framework, our legal treatment of annulment has created considerable confusion.

The distinction between void and voidable unions is of considerable importance in most jurisdictions. An attempted incestuous marriage, or one involving a person who is still married to a third person is generally considered void. Under the purist approach, a void marriage needs no formal judicial action or declaration to establish its invalidity. The void marriage can be attacked by third persons, and may be challenged even after the death of the parties. In states that recognize the void marriage concept in this "pure" form, courts nevertheless entertain annulment actions in order to accord certainty to wealth transactions.

A voidable marriage typically reflects encroachment on some lesser public policy concern. It can be ratified by the parties' conduct after removal of the legal impediment that made it vulnerable. Unless the voidable marriage is judicially annulled in a timely fashion, it becomes a valid union from its inception. If it is annulled, the marriage is deemed void *ab initio*. Voidable marriages are generally those entered into in violation of many of the procedural rules regulating marriage. Age restrictions vary from state to

state. In Oklahoma, a marriage that violates the age restrictions becomes a common law marriage if the parties continue the marriage relationship after removal of the age impediment.

Marriages can also be annulled for a variety of defects relating to the personal relationship of the parties before marriage (i.e. fraud). In this day and age with divorce being available for practically any reason, the action for annulment has fallen into disuse.

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5. The Traditional Restrictions: Mental Capacity

HOUSER
v.
HOUSER

#57,134 (Ok. Ct. Civ. App. 1984) (unpublished), *certiorari denied*, 55 O.B.J. 2552 (Okla. 1984)

ROBINSON, JUDGE.

The single issue in this case is whether Everett B. Houser (decedent) was competent when he entered into a marriage contract with Appellant. If he was, Appellant is a surviving spouse and entitled to appointment as his Administratrix, if not, Ruby Proctor as one of the heirs of decedent is entitled to Letters of Administration with Appellant being denied her intestate wife's share of decedent's estate.

Oklahoma defines marriage in 43 O.S. 1981 § 1 as:

> A personal contract to which the consent of parties legally competent of contracting and of entering into it is necessary, and the marriage relation shall only be entered into, maintained or abrogated as provided by law.

Consent of the parties to a contract must be free, mutual and communicated by each other. 15 O.S. 1981 § 51. Consent involves a "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another. It supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of the powers." BLACK'S LAW DICTIONARY 276 (5th ed. 1979). In the present case we find there was no such free mutual consent and the deceased was not capable of knowingly entering into a contract.

Decedent was an 83 year old man who had severe emphysema requiring oxygen frequently. On April 8, 1980, his female live in companion of 40 years, apparently his common law wife, died. Testimony revealed that this was an extremely traumatic event for decedent. Apparently a few days before decedent's common law wife died, Appellant appeared on the scene offering her help and sympathy. At that time decedent was being cared for by a nurse. After decedent's common law wife died, the nurse ceased to be employed by decedent and Appellant began caring for him. Approximately one month and a half later Appellant married decedent on May 22, 1980. Decedent expired February 16, 1981; about nine months after his marriage. In the period between those two events decedent caused two annulment proceedings to be started and virtually all of decedent's savings, $40,000, were withdrawn and spent by Appellant. The annulment proceedings were never completed because of a written request to abandon the same, apparently signed by decedent. One of the attorneys, who decedent requested to file an annulment, testified that deceased "was very absent-minded. It took at least 30 minutes for him to understand who I was." One witness characterized decedent as a "sick, senile, old man." There was testimony that decedent was extremely volatile and would curse and threaten various people around him frequently. The nurse that took care of decedent prior to Appellant's appearance on the scene testified that Appellant had told her that she

planned to marry decedent for his money. This witness was present when Appellant came to decedent's home on May 21, 1980. The nurse testified that "she (Appellant) went into the bedroom, got him up by the arms and pulled him up and told him she was taking him out to get a haircut." Actually, Appellant took decedent to get a blood test and a marriage license, not a haircut. The witness further testified that when decedent returned with Appellant, decedent had missed his medicine and was near collapse from fatigue. Further, decedent was not sure where he had been or what he had done, although he thought he had been to get a blood test. Further testimony revealed that decedent had called the police on one occasion to have Appellant removed from his home.

A deputy court clerk testified that she was present when Appellant brought decedent to the courthouse to get the marriage license and stated "I really don't think he knew what he was doing." Finally, decedent's personal attorney who saw him frequently, arranged for nurses, paid decedent's bills and managed decedent and his common law wife's business affairs, testified that in his opinion "I don't believe he was competent."

Appellant and decedent were married by a minister who was a friend of Appellant's and was witnessed by friends of Appellant.

Appellant's witness, decedent's barber, testified that he cut decedent's hair approximately once a month and decedent knew what he was there for and was, in his opinion, mentally competent. One of decedent's renters testified that he saw decedent once a month to deliver a rent check and believed "he was in his right mind." The minister who married Appellant and decedent testified that he was competent on the date of the marriage, however, he had only talked with decedent on approximately two or three occasions. Finally, decedent's personal physician testified that "several days before his death, I was introduced by him to his wife, one Louise McClendon Houser. He appeared to be in good spirits at that time and mentally competent." This testimony, however, was right before decedent's death and is not relevant to decedent's competency at the time of his marriage.

The State of Oklahoma has a legitimate interest in the marital status of parties. *Ross v. Bryant*, 90 Okl. 300, 217 P. 364 (1923). Here the clear weight of the evidence shows decedent did not freely and mutually consent to enter this marriage contract and was not legally competent to contract. 15. O.S. 1981 § 1. We therefore agree with the trial court's determination that "E.B. Houser was not competent to enter into a marriage contract and such marriage is held to be invalid."

Lastly, pursuant to Appellee's request we grant Appellee's their appellate costs and attorney fees for the defense of this action.

AFFIRMED.

Questions

1. Is the "marriage" in *Houser* void or voidable? If it is the latter, should a collateral attack have been permitted? Is 43 O.S. § 128 (2001) applicable?

2. Is the problem in *Houser* likely to arise more in the future? Yes, according to the Wall Street Journal:

Unholy Matrimony: How to Fight Back
By KELLY GREENE
WALL STREET JOURNAL, page B8

It is difficult enough to entrust an elderly parent's care to someone you hire. But what do you do when that worker secretly marries their charge—and claims a chunk of your inheritance?

Although no one tracks the numbers of such marriages, lawyers who handle estate-related litigation say they are seeing increasing numbers of "predatory unions," as life spans increase and dementia becomes more common.

"Let's face it—baby boomers are heading into old age," says Susan Slater-Jansen, an estate-planning attorney at Kurzman Eisenberg Corbin & Lever in White Plains, N.Y. "It's going to be an increasing problem."

What's worse, it is virtually impossible for children to challenge the property consequences of a parent getting married once the parent dies, says Terry Turnipseed, an associate law professor at Syracuse University, who has studied "deathbed marriages" and analyzed state laws.

How could families be duped into not knowing their own parents had married? In one case, an adult daughter left her elderly father in the care of a longtime friend while she took a short vacation. In one week, the friend married the father, started transferring assets into joint accounts and named herself his pension beneficiary. The children learned of the marriage a month later. When they confronted their father, he recalled nothing about it.

In another case, a hired caretaker secretly married her charge of nine years about a year before his death. She told his children about it the day before his funeral.

In most states, the inheritance rights of widows and widowers trump any estate plan—even if the new spouse wasn't named in the will, and even if the marriage took place shortly before the death of someone unable to recall a few days later that they said "I do."

The only way many state courts can fix things is to annul a marriage after death. Typically the only person who has legal standing to sue is the surviving spouse, "who of course has no incentive whatsoever to annul the marriage," Mr. Turnipseed says.

But in a few states, courts and lawmakers are starting to make it easier to unwind a twilight union. Florida closed a loophole last year by enacting a law that gives heirs and others the legal standing to challenge any marriage—even after a spouse's death—on the grounds of fraud, duress or undue influence.

Florida's statute found a way around the big legal concern: that state laws could be challenged as messing with the constitutional right to marriage, says Samantha Weissbluth, an estate litigator with Foley & Lardner in Chicago. "It doesn't narrow any existing right to marry; it severs marriage from its usual property consequences in certain circumstances," she says.

In New York, an appeals court last year ruled in favor of the families of two men with dementia who had secretly married outside caregivers before their deaths, by denying their surviving spouses a share of the dead men's assets.

"The spouses were deemed to be committing fraud because the decedents didn't have the capacity to know what they were doing," Ms. Slater-Jansen says.

But until more state legislatures and courts take action, families need to watch out when employing caregivers. Distance often exacerbates the problem. It is tough to supervise workers in a parent's home from afar. Before you hire anyone, extensive background checks are crucial, along

with making sure any paid caregivers are bonded and insured, says Patricia Maisano, chief executive of Ikor USA in Kennett Square, Pa., which provides case-management and advocacy services for elderly and disabled clients.

Ask the aide to consent to a background check and provide a Social Security number if he or she hasn't been screened or formally trained, she says. Don't hire anyone who refuses. You may want to hire a geriatric-care manager to keep an eye on home health-care aides.

If you do sense that your parent is developing a relationship with an aide, don't keep it to yourself. Tell your family, and your parent, about your concerns. The worst thing the child and parent could do is to quit speaking to each other, says John Morken, a partner at Farrell Fritz in Uniondale, N.Y.

If your parent is diagnosed with dementia, one defense against fraud is a durable power of attorney—a legal arrangement that helps older people turn over management of their finances to a family member or others—assuming he or she can still execute one. If used, it is a good idea to require all of the adult children's consent for transactions over a certain dollar amount. That way, you can make sure that no one in the family falls sway to the hired help—or takes advantage of the situation himself, says Ms. Slater-Jansen.

Another defense: having your parent put their assets in a trust. If the assets involved are worth less than $5 million—and you set it up this year or next, when there is no gift tax on that amount—make the trust irrevocable, meaning it can't be unwound during the parent's lifetime. If you use a revocable trust, make sure the paid caregiver doesn't know about it, she says.

Many parents, though, are suspicious of their own children's attempts to help them. If your parents refused to shield their assets in advance, and you worry that a deathbed marriage is looming, there is one more step that may make sense: Going to court to have a parent ruled as lacking the capacity to tie the knot.

Can a conservator, who was appointed because a person lacks capacity to make responsible decisions concerning their health and welfare, prevent a ward from contracting a marriage? *See In re Mikulanec*, 356 N.W.2d 683 (Minn. 1984).

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6. The Traditional Restrictions

Notes & Questions: Restrictions and Incentives on Marriage

1. Private restraints on marriage in wills or contracts have been made illegal in many states. *See* 15 O.S. § 220 (2001) (Every contract in restraint of the marriage of any person, other than a minor, is void.) Should this statute apply only to a total restraint? Would a partial restraint be acceptable?

2. This chapter has focused on state restrictions on who may marry. Sometimes state laws have put pressure on unwilling parties to marry. *See* 43 O.S. § 3 (2001).

3. Breach of promise actions are almost extinct. Historically, breach of promise actions forced people into unwanted matrimony, but they are no longer much of a threat. Over half of the states have abolished the action and many of the rest have severely restricted the damages recoverable. Traditionally, the damages were measured by the lost lifestyle the person would have had if the marriage had occurred.

However, with divorce available on a no-fault basis, it is cheaper to marry and divorce the person to whom the promise was made. While Oklahoma provides in 23 O.S. § 40 (2001) that the damages in breach of promise actions shall be left to the sound discretion of the jury, there has not been a reported case in 50 years. *See Roberts v. Van Cleve*, 1951 OK 251, 237 P.2d 892 (plaintiff recovers $25,000).

B. FRAUD AND THE MARRIAGE RELATIONSHIP

SEIRAFI-POUR
v.
BAGHERINASSAB
2008 OK CIV APP 98, 197 P.3d 1097

Opinion on Remand by Jane P. Wiseman, Judge.

Masoumeh Bagherinassab (Appellant) appeals from an order of the trial court, which annulled her marriage to Mohammad Ali Seirafi-Pour (Appellee). The issue on appeal is whether the trial court's decision that the parties' marriage had been procured by fraud practiced by Appellant is supported by the evidence. We find that the trial court's decision to annul the marriage due to fraud is supported by the evidence and affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellee and Appellant were married in Iran on August 29, 2002, and again in a ceremony in the United States on February 22, 2003. Prior to the Iranian ceremony, Appellee entered into a prenuptial agreement with Appellant's family regarding the dowry he would pay upon Appellant's demand. Appellee claims that Appellant orally promised him she would never make demand for the dowry.

The parties returned to the United States together in December 2002 after Appellant secured a visa. Appellee testified that Appellant left him just a few days after returning to the U.S. They reconciled shortly thereafter and then separated again in April 2003 for approximately four months. In September, Appellant returned to Iran to visit her family. While she was out of the country, Appellee filed for divorce in Iran and also filed for annulment in Oklahoma.

At trial, Appellee testified that Appellant constantly ridiculed him and refused to consummate their relationship through sexual intercourse, all of which was denied by Appellant. After two days of testimony, the trial court found that Appellee established by clear and convincing evidence that Appellant fraudulently induced him into the alleged marriage, granted Appellee an annulment, and refused to enforce the premarital agreement regarding the dowry claimed by Appellant.

On appeal, Appellant claims that the trial court erred in refusing to enforce the prenuptial agreement and in relying on contradictory testimony to find that Appellee proved by clear and convincing evidence that Appellant fraudulently induced him into the marriage.

After completion of briefing on appeal, Appellee filed a motion to dismiss the appeal claiming Appellant had remarried, thus making the appeal moot. Appellant failed to respond to the motion, and this Court granted Appellee's motion to dismiss. The dismissal, based on *Davis v. Flint*, 1928 OK 34, 265 P. 101, stated that Appellant "cannot accept the benefits of the judgment and recognize its validity without waiving her right to pursue the appeal of that judgment." We subsequently denied Appellant's motion to reconsider or vacate the dismissal.

Appellant then petitioned the Oklahoma Supreme Court for certiorari claiming the appeal was not moot because she was not asking for her marriage to be reinstated but rather for the judgment to be recast from one for an annulment to one for a divorce and for the enforcement of the prenuptial agreement. In her petition, Appellant cited cases that prove an exception to the Davis rule, stating that an appellant does not waive the right to appeal in situations where the appellant could receive a more favorable judgment but not a less favorable one. She asserted that "[i]t is possible for her to obtain a more favorable judgment, insofar as having the judgment for annulment transmuted into a decree of divorce will grant her contractual and property rights that may provide her with some assets, but it is not possible to obtain a worse outcome than what she is appealing." The Supreme Court granted certiorari, vacated this Court's order of dismissal, and remanded "for a consideration of the record and briefs."

STANDARD OF REVIEW

A trial court's power to annul a marriage is based in equity. *See Brooks v. Sanders*, 2008 OK CIV APP 66, ¶ 18, 190 P.3d 357, 360; *see also In re Mo-se-che-he's Estate*, 1940 OK 453, 107 P.2d 999 ("A District Court, under its broad, general equity jurisdiction conferred by the Constitution, has power and jurisdiction to annul a marriage . . . ."). "In an equity case this court will examine the whole record and will reverse the judgment of the trial court if found to be against the clear weight of the evidence or contrary to established principles of equity." *Mayfair Bldg. Co. v. S & L Enters., Inc.*, 1971 OK 42, ¶ 4, 483 P.2d 1137, 1138-39.

ANALYSIS

Appellant asserts that the trial court committed reversible error in deciding that she fraudulently induced Appellee into marriage. The question before this Court is whether Appellee presented sufficient evidence to the trial court to support his fraud claim.

The trial court cited cases involving "green card" fraud when it announced its decision to annul the marriage. "[I]f an alien marries a citizen of this country for the only purpose of entering the United States, and without any intention of assuming the duties and responsibilities of the marriage, in a proper case an annulment may be decreed." *Kurys v. Kurys*, 209 A.2d 526, 528 (Conn. Super. Ct. 1965). In *Miller v. Miller*, 1998 OK 24, ¶ 42, 956 P.2d 887, 903, the Oklahoma Supreme Court stated, "Misrepresentations which have been found to go to the essence of the marital relationship, generally in an action for annulment, include . . . concealment of the fact that one party married the other for the sole purpose of obtaining a 'green card' from the Immigration Department." The Supreme Court cited a California case in support of its position on "green card" misrepresentation, *Rabie v. Rabie*, 115 Cal.Rptr. 594 (Cal. Ct. App. 1974).

In *Rabie*, the California court upheld an annulment that had been sought by an American appellant against her Iranian husband. The evidence before the court showed that the husband had spent time looking for a woman to marry him in order to secure a green card and that he married the plaintiff even though "he possessed a very low opinion of her." *Id*. at 597. The marriage quickly disintegrated after the husband received his green card. *Id*. The Court of Appeal found that the trial court did not abuse its discretion in granting the annulment. The court found that there was substantial evidence that the defendant husband never intended to fulfill any of his marital duties to his wife, "especially the duties to remain faithful to [her] and to remain married to her." *Id*. It stated, "Where fraud is so grievous that it places the injured party in an intolerable relationship, it robs the marital contract of all validity." *Id*.

Another California Court of Appeal also addressed the issue of fraudulent inducement to marry involving a "green card" in *Liu v. Liu*, 242 Cal.Rptr. 649 (Cal. Ct. App. 1987). In *Liu*, husband met wife, a citizen of Taiwan, in Taiwan after wife's sister had arranged for the parties to meet. *Id*. at 651. Husband traveled to Taiwan again approximately eight months later and married wife in a civil ceremony. *Id*.

Husband returned home to the United States, but wife was not able to join him for several months until after she obtained a visa. *Id*. Wife refused to have sexual relations with husband and moved to a separate bedroom only four days after moving into husband's home. *Id*. Within a month, husband asked for a separation, and then later served wife with a petition for annulment. *Id*. Husband testified that he never had sexual relations with wife during the marriage. *Id*. Wife asserted that the marriage had been consummated and tried to introduce "newly discovered evidence" to that effect in a motion for new trial. *Id*. at 655.

The Court upheld the trial court's decision that husband's consent to marry was obtained by fraud. The Court stated, "An annulment may be had for fraud where a wife harbors a secret intention at the time of the marriage not to engage in sexual relations with her husband." *Id*. at 656. The Court found ample evidence to support the trial court's conclusion that the wife did not intend to engage in sexual relations with the husband. *Id*. The Court stated the following:

> First, respondent testified that he never had sexual relations with appellant. (*See Lamberti v. Lamberti* (1969) 272 Cal.App.2d 482, 485, 77 Cal.Rptr. 430 [annulment of an unconsummated marriage may be secured more readily than one where the parties have cohabited as husband and wife].) Secondly, there is evidence here that appellant had an ulterior motive for entering into the marriage: namely, to obtain a green card to allow her to reside in the United States. Finally, the rapidity with which the marriage deteriorated after appellant arrived in the United States also supports the trial court's findings.

Id.

In the present case, the trial court found the circumstances remarkably parallel to the *Liu* case. The evidence reveals that before Appellant met Appellee, she applied for a student visa to come to the United States, but her application was denied. Appellee proposed to Appellant only two weeks after meeting her in person in Iran. Appellee also testified that after the two were married and her visa was approved, Appellant came home with him. During the flight home, Appellee claims that Appellant started complaining about his age, his appearance, and the way he walks. After they got off the plane, they went to Appellant's sister's home. Appellee claims that Appellant did not want to go home with him but wanted to stay at her sister's home. Appellee claims that he had to persuade her to go home with him. Appellant received her "green card" in the mail, then left Appellee only nine days after she arrived in the United States. Appellant stayed at her sister's home for three days, and Appellee and his mother had to go to the sister's home to try to convince Appellant to return to Appellee's home.

In February 2003, the parties had a wedding ceremony and reception. Appellee testified that the parties never consummated the marriage. He claims that he asked Appellant to have sex with him, but she refused. Appellee claims that Appellant left his home again on April 16, 2003, and stayed at her sister's home until August 12, 2003.

After returning home, Appellant spent a lot of time "chatting" on the internet. When she returned to Iran in late September 2003, Appellee hired a computer forensic recovery specialist to install software on the computer that Appellant had been using. The software recovered logs of several chats that appeared to have taken place between Appellant and an individual with the screen name "Pentagon 666 2000." Appellee claims that upon reading the chat logs, he concluded that the person Appellant was chatting with was her boyfriend and that he lived in Iran. The recovery specialist testified that he also recovered web cam images of Appellant, one of which showed Appellant partially undressed.

One of Appellant's co-workers, testifying on behalf of Appellee, stated the following: "Well, I just asked [Appellant] if she was married or single, and she said single." Appellee's sister testified that Appellee confided in her that he did not have a sexual relationship with Appellant.

Appellant claims that she had sexual intercourse with Appellee and denied that she married Appellee to obtain a green card. She claimed that Appellee told her not to come home after she went to her sister's house in April 2003. She denied chatting on the internet with anyone named Pentagon 666 2000. She claimed that she loved Appellee.

The trial court stated that it found Appellee "far more credible" and found "inconsistencies on the part of" Appellant. It found Appellee's demeanor to be "reassuring" and Appellant's "to be less reassuring."

"The trial court is entitled to choose which testimony to believe as the judge has the advantage over this Court in observing the behavior and demeanor of the witnesses. The court's judgment need not rest upon uncontradicted evidence." *Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112, 114. The trial court is "in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence," and we will defer "to the conclusions it reaches concerning those witnesses and that evidence." *Beale v. Beale*, 2003 OK CIV APP 90, ¶ 6, 78 P.3d 973, 975.

The relief sought by Appellee in the form of an annulment is based on a claim of fraud. "Fraud is never presumed, but must be proven by clear and convincing evidence." *Tice v. Tice*, 1983 OK 108, ¶ 8, 672 P.2d 1168, 1171. The testimony of the parties conflicted on the issue of whether Appellant fraudulently induced Appellee to marry her. "When fraud is properly alleged by one party and denied by the other party, the existence or non-existence of fraud becomes a question of fact." *Id*. The trial court found that the facts supported Appellee's contention that Appellant fraudulently induced him into the marriage. After reviewing the record on appeal, we find no basis on which to conclude that this determination is against the clear weight of the evidence. We therefore affirm the decision of the trial court.

Appellant also contends that the trial court erred in refusing to enforce the parties' marriage contract which contained a provision for a dowry. "An annulment is said to 'relate back' and erase the marriage and all its implications from the outset." *Liu*, 242 Cal.Rptr. at 657. When consent to a marriage agreement has been procured by fraud and the marriage is therefore annulled, contract law precludes the enforcement of such an agreement. The trial court's finding of fraud is not against the clear weight of the evidence, nor does it violate established principles of equity. Such a finding erases the marriage, and with it, the right to any benefits under the contract. Having concluded that the marriage should be annulled, the trial court was correct in refusing to enforce the dowry provision.

Appellee asks this court to award him appeal-related attorney fees.[1] We find that Appellee should bear his own attorney fees for this appeal. *See Stepp v. Stepp*, 1998 OK 18, ¶ 20, 955 P.2d 722, 727 (holding parties responsible for their own appeal-related attorneys' fees).

[1] [Footnote omitted.]

CONCLUSION

We find that the trial court's decision to annul the marriage at issue based on fraudulent inducement is supported by the evidence and further find no error in its refusal to enforce Appellant's dowry claim under the marriage contract. Accordingly, we affirm the decision of the trial court.

AFFIRMED.

GOODMAN, P.J., and FISCHER, J., concur.

Notes & Questions: Annulments

1. There is a noticeable division in judicial attitudes regarding annulment for fraud. The evaluation of whether a particular fraud goes to the essence of the marriage may proceed either in terms of (a) the special nature of the marriage, e.g., having children is an essential ingredient of marriage (or at least it used to be), whereas the presence or absence of money is not, so that a misrepresentation as to wealth cannot be a basis for annulment, or (b) the defrauded party's perception in terms of a reliance test, i.e., would he or she have entered into this marriage contract absent the fraud? The latter is obviously the looser test.

2. The only Oklahoma annulment statute is 43 O.S. § 128 (2001), which relates to avoiding marriages of incompetents. Nonetheless, the Oklahoma Supreme Court has authorized annulments for all cases involving void and voidable marriages, including fraud. *See Kildoo v. Kildoo*, 1989 OK 6, 767 P.2d 884.

TICE
v.
TICE
1983 OK 108, 672 P.2d 1168

HODGES, JUSTICE.

The question presented is whether a person who induces another to marry by the oral promise to reimburse any lost alimony in the event of a subsequent divorce is liable to pay alimony awarded under a previous divorce decree.

Evalyn (appellee-wife) and Charles Tice (appellant-husband) were married in Las Vegas, Nevada on December 31, 1979. Previously, Evalyn had received an alimony award from her first husband of $72,000. The divorce decree provided that the alimony would terminate upon her death or remarriage. At the time of her marriage to Charles, there was $44,500 remaining to be paid. On July 18, 1980, Evalyn filed a divorce petition alleging that Charles had orally agreed to indemnify her for the alimony which she would lose as a result of their marriage; and that this promise was made as an inducement for the marriage. The trial court severed the two causes of action. A divorce was granted, and the action based on the indemnification agreement was set for jury trial which was waived by Evalyn. The trial judge made factual findings that: as an inducement to marriage Charles promised to indemnify Evalyn; in reliance upon this promise Evalyn promised to marry him; and that Charles did not intend to fulfill his promise.

The facts were disputed. According to Evalyn, numerous proposals of marriage were made to her before she accepted. Confronted with the forfeiture of her right to the alimony payments from her former

husband, she told Charles in the latter part of October, 1979, that she "couldn't afford to give up" her alimony. Charles assured her that he could make a "good living" and that she would not need the alimony. Evalyn responded that if the marriage did not work out, she could not live on her salary as a secretary. Evalyn testified that Charles told her he would give it to her if she married him. She told Charles the certainty of forfeiting the right to alimony was the only reason she would not accept his proposal. Charles told her he would put $45,000 in escrow, the amount which she would have received had she not remarried. Evalyn testified this was the only reason she married Charles.

Charles denied that he had ever promised to indemnify Evalyn for any loss resulting from the marriage. His testimony was that: both parties had been previously married; Evalyn told him of her right to alimony as a result of the termination of her prior marriage; he disclosed his financial obligations and indebtedness to her; Evalyn knew his economic conditions would not warrant the payment of $45,000; and the first time Evalyn ever mentioned indemnity of the lost alimony was when she first threatened divorce. The court ordered Charles to pay $41,900 to Evalyn to compensate her for the alimony which was terminated when she married him.

It is argued on appeal that the evidence presented was insufficient to warrant judgment for Evalyn; the alleged antenuptial agreement was not reduced to writing nor fraudulently induced, and that even if a contract existed it was a contract of guaranty which must be in writing.

The dispositive issues are whether Charles fraudulently induced Evalyn to marry him, and if the promise must be in writing. The statute of frauds requires that an agreement made upon consideration of marriage, other than mutual promises to marry must be in writing to be enforceable.[1] Evalyn testified at trial that Charles promised to reimburse her for any loss from the previous divorce decree. She stated that she would not have married Charles had he refused to make the promise and that it was the only reason she married him. This testimony established that the sole consideration for the agreement was the marriage of the parties.

Under the facts of this case, because the agreement is not in writing, Evalyn may only recover if Charles fraudulently induced her to marry him by promising to compensate her for her losses.[2] Marriage is a personal relation which arises from a civil contract, and which requires the voluntary consent of parties who have the legal capacity to contract. It is a present agreement to be husband and wife and to assume all rights and duties of the marital relationship.[3] A common law duty to perform with skill, care, reasonable expediency and faithfulness accompanies every contract. Insofar as property interests are concerned, marriage is founded on business principles in which utmost good faith is required from all parties, and fraud in the inducement of a marriage is the subject of judicial cognizance.[5] Actionable fraud consists

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[1] Title 15 O.S. 1981 § 136 provides in pertinent part:

> "The following contracts are invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:
>
> * * * *
>
> (3) An agreement upon consideration of marriage, other than a mutual promise to marry."

See also Byers v. Byers, 618 P.2d 930,933 (Okla. 1980); Stanley v. Madison, 11 Okl. 288, 66 P. 280 (1901).

[2] Sellers v. Sellers, 428 P.2d 230,240 (Okla. 1967); Scriviner v. Scriviner, 207 Okl. 225, 248 P.2d 1045,1046 (1952); Whitney v. Whitney, 194 Okl. 361, 151 P.2d 583 (1941); In re Cantrell's Estate, 154 Kan. 545, 119 P.2d 483 (1942); Mashundashey v. Mashundashey, 189 Okl. 60, 113 P.2d 190 (1941).

[3] *See* Title 43 O.S. 1981 § 1; Williams v. Williams, 543 P.2d 1401,1403 (Okla. 1976); Beach v. Beach, 160 Iowa 346, 141 N.W. 921-22 (1913).

[5] *Beach v. Beach, supra*, note 3.

of a false material representation made as a positive assertion which is known either to be false, or made recklessly without knowledge of the truth, with the intention that it be acted upon, and which is relied upon by a party to his/her detriment. Fraud can be predicated upon a promise to do a thing in the future when the promisor's intent is otherwise. The basis of fraudulent misrepresentation is the creation of a false impression and damage sustained as a natural and probable consequence of the act charged. The fraudulent representation need not be the sole inducement which causes a party to take the action from which the injury ensued. The key is that without the representation the party would not have acted. The liability for misrepresentation depends upon whether the person relying thereon was in fact deceived, not whether an ordinarily prudent person should have been misled.

Fraud is never presumed, but must be proven by clear and convincing evidence. Evalyn had the burden of proving that the promise was made, and that Charles did not intend to perform the promise. The testimony of the parties to this action is in conflict. When fraud is properly alleged by one party and denied by the other party, the existence or non-existence of fraud becomes a question of fact. The trial court specifically found that: a party to a marriage should not suffer detriment because of the fraud of the other party. Charles promised to indemnify Evalyn for any loss of alimony which she might suffer as the result of the marriage as an inducement to the marriage; in reliance upon his promise, she agreed to marry him; and that Charles did not intend to fulfill his promise. The factual findings will not be disturbed on appeal by this Court if there is any evidence reasonably tending to support the verdict. The testimony supports the trial court's conclusion that Charles fraudulently induced Evalyn to marry him.

AFFIRMED

BARNES, C.J., and IRWIN, HARGRAVE, OPALA and WILSON JJ., concur.

SIMMS, V.C.J., and LAVENDER and DOOLIN, JJ., dissent.

MILLER
v.
MILLER
1998 OK 24, 956 P.2d 887

OPALA, JUSTICE.

* * * *

Jimmy D. Miller ("Jimmy") sued his former wife, Judy A. Miller ("Judy") and her parents, Bill and Nora Hall ("Judy's parents") for damages and equitable relief based on the theories of fraud, intentional infliction of emotional distress, and quantum meruit. He alleges in his petition that for the purpose of inducing him to marry Judy, defendants in 1980 knowingly misrepresented to him that she was pregnant with his child, and continued to perpetrate this fraud against him for the next fifteen years for the purpose of causing him to perform the duties of husband and father. He further alleges that after carrying out this fraud for almost fifteen years and permitting him to develop a loving parent-child relationship, Judy and her parents suddenly and unexpectedly pulled the proverbial rug out from under him by revealing to the child that Jimmy was not in fact her father. Jimmy alleges that the defendants then further undermined his bond with the child by encouraging her to develop a relationship with her "real father" and her "real family."

The defendants responded with a motion to dismiss the petition for failure to state a cause of action. The trial judge granted defendants' motion, and plaintiff appealed. The Court of Civil Appeals, Division No. 1, affirmed the order of the trial court, holding that the theory of intentional infliction of emotional distress because the acts complained of fail to meet the minimum degree of outrageousness necessary to state, prima facie, a claim for intentional infliction of emotional distress. We disagree and hold that plaintiff's petition states a claim for fraud and intentional infliction of emotional distress . * * *

I

THE ANATOMY OF LITIGATION

Jimmy D. Miller and Judy A. Hall were dating in the early months of 1980. Jimmy was seventeen years old and Judy was fifteen. According to Jimmy, in March of 1980, Judy and her parents, Bill and Nora Hall, informed him that Judy was pregnant, that the child was his, and that the child could only be his inasmuch as Judy had not had sexual relations with any man other than Jimmy. Relying on these representations, Jimmy married Judy on October 24, 1980, and they proceeded to live as husband and wife for nearly five years.

The child Judy was carrying at the time of her marriage to Jimmy, subsequently named A, was born on December 29, 1980. During their nearly five-year marriage, Jimmy, together with Judy, raised the child as his own, never disputing her legitimacy, believing at all times that the little girl was his biological child. Jimmy and Judy divorced in 1985. The divorce decree recites that Jimmy and Judy are the parents of a minor child named A. Jimmy alleges that Judy made that recitation to the court in the divorce proceeding, knowing it to be false. The court ordered Jimmy to pay child support for A in the amount of One Hundred Fifty Dollars ($150.00) per month beginning on August 1, 1985. Jimmy alleges that he has faithfully paid that amount as ordered. He was granted joint, but not primary, custody of A and has maintained a continuous parent-child relationship with his daughter since the divorce.

In early 1995, when A was approximately fifteen years old, she decided she no longer wanted to live with her mother. She moved into Jimmy's home. According to Jimmy, in January, 1996, almost one year after coming to live with her father, A informed him that when she had originally expressed a desire to live with him, her mother and her grandparents, Bill and Nora Hall, had told her that Jimmy was not her real father and had urged her to "get to know her 'real' family." According to Jimmy, A told him that her mother and grandparents had identified her real father, had introduced her to members of her "real family," had given photographs of A to members of this "real family", and had stated to her that there was nothing either she or Jimmy could do about it. Jimmy states that A's revelations in January, 1996 were the first notice he had that Judy and her parents had deceived him in 1980 as to his paternity of the child Judy was then carrying. Jimmy and A underwent that very month a paternity test, which verified that Jimmy was not A's biological father.

Jimmy filed his petition on March 8, 1996, approximately two months after first learning that his paternity of A was being denied by his ex-wife and her parents. *For his first theory of recovery*, Jimmy alleges that he was fraudulently induced to marry Judy in 1980 by the knowing misrepresentations of Judy and her parents that he was the father, and that he was the only man who could possibly be the father, of the child with whom she was then pregnant because she had not had sexual intercourse with any other man. Relying on these allegedly knowing misrepresentations, Jimmy married Judy and took on the responsibilities of husband and father. * * *

For his second theory of recovery, Jimmy alleges that the defendants' marriage-inducing misrepresentations, the cruel paternity hoax perpetrated against him for fifteen years, the callous revelation of this hoax to him through A, and the effort to undermine his bond with A amount to extreme and outrageous

conduct, causing him severe emotional distress. For the tort of intentional infliction of emotional distress, Jimmy seeks damages against all defendants.

[The court held that as the legal father of the child, Jimmy was not entitled to reimbursement of child support.]

* * * *

V

PLAINTIFF'S PETITION STATES A CLAIM BASED ON THE THEORY OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

* * * *

It is the trial court's responsibility initially to act as gatekeeper: to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the standards. Only when it is found that reasonable people would differ in an assessment of this central issue may the tort of intentional infliction of emotional distress be submitted to the jury.

The trial court did not specifically address in this case the issue of the outrageousness of defendants' conduct when it dismissed plaintiff's action for failure to state a claim. The parties' briefs below were limited to arguments addressing the statutory and preclusion bar and did not discuss outrageousness or any other aspect of the tort of intentional infliction of emotional distress. The Court of Civil Appeals upheld the trial court's dismissal of Jimmy's theory of intentional infliction of emotional distress because, in its view, the defendants' conduct failed to cross the threshold degree of outrageousness necessary to proceed with this tort. We disagree and hold that plaintiff has stated sufficient facts upon which reasonable people could conclude that defendants' conduct was indeed extreme and outrageous.

The Court of Civil Appeals described the behavior complained of as "confessing a fifteen year lie and revealing the identity of . . . [A's] biological father." This rather cold and lifeless characterization of defendants' conduct fails to take into account much of what plaintiff alleges, including (1) the telling of a premarital falsehood going to the heart of the marital and parental relationship, a falsehood which was implicitly repeated every day until the defendants decided the falsehood was no longer useful to them, (2) causing the plaintiff to develop a parental relationship with a child, believing that child to be his biological offspring, and then causing plaintiff to learn that the child was not biologically his own, (3) using the plaintiff to fulfill the emotional, physical, and financial obligations of a husband for almost five years and of a father for fifteen years, knowing that these obligations were not really his, (4) undermining the plaintiff's relationship to his child, first by gratuitously revealing to the child that plaintiff, the man she knew as her father, was not in fact biologically related to her, and then by attempting to establish and foster a parental relationship between the child and another man whom the defendants identified as A's "real father", and his family, (5) failing to reveal the truth to the plaintiff in the divorce action, resulting in plaintiff joining in a legal document acknowledging his parental relationship to A, (6) failing to reveal the truth to the court in the divorce action, thereby showing contempt for the judicial system and making the divorce court an unwitting accomplice to fraud, (7) causing the plaintiff to suffer from the knowledge that he had been hoodwinked and used, and (8) boasting that nothing could be done about their fraud.

Whether plaintiff can prove these allegations, as well as prove the other elements of the tort and whether a jury would in fact find such conduct extreme and outrageous are questions about which we express no opinion. We need only consider whether the allegations of defendants' conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards. We believe they may reasonably be so regarded. That rational people might differ as to whether plaintiff's allegations may reasonably be regarded as outrageous is demonstrated by the split decision in this case by the Court of Civil

Appeals. Where reasonable people may differ on this issue, the threshold has been crossed and dismissal is improper.

VI

PLAINTIFF STATES A CLAIM FOR FRAUDULENT INDUCEMENT TO MARRY

An action for damages for fraudulent inducement to marry has been recognized in Oklahoma with respect to both void and valid marriages. *Tice v. Tice*, 1983 OK 108, 672 P.2d 1168; *Whitney v. Whitney*, 194 Okl. 361, 151 P.2d 583 (1944). Like other fraud-based actions, a claim for fraudulent inducement to marry must allege all the elements of common law fraud. These are: 1) a false material representation, 2) made as a positive assertion which is either known to be false, or made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied upon by a party to that party's detriment. The requirement that the false representation be material is easily met where the person misrepresents that he or she has the capacity to marry when in fact he or she lacks such capacity, as in the case of bigamy. We have held in that circumstance that the marriage is void and that the injured party can have the marriage annulled or can seek a divorce and damages for fraud.

The only case decided by this court in which a party has alleged fraudulent inducement into a valid marriage is *Tice v. Tice*, in which we held that a husband's alleged breach of a prenuptial oral promise to reimburse any lost alimony which the wife would have received under a previous divorce decree had she not remarried entitled the wife to recover damages to compensate her for the lost alimony. The court stated that insofar as property interests are concerned, marriage is founded on business principles, and marital fraud affecting a plaintiff's property interests should be treated no differently than fraud in any other context. While the court in *Tice* did not explicitly discuss the materiality of the fraudulent promise in that case, implicit in its holding is the principle that a misrepresentation affecting property interests which induces a party to marry can be a material misrepresentation. This court has never had occasion to consider the materiality of a misrepresentation made to induce a party to enter into a valid marriage, which affects an interest other than a party's property interest. The present case presents this issue.

We hold that a misrepresentation inducing one to enter into a valid marriage must go to the essential ingredients of the marriage in order to sustain a finding of materiality sufficient to support a cause of action for fraudulent inducement to marry. This is a necessary restriction. Every premarital representation of boundless affection, eternal love, and endless commitment cannot be allowed to give rise to an action for fraud when a marriage breaks down, and love and commitment prove unenduring. Limiting materiality to those representations which go to the essence of the marital relationship will avoid misuse of the judicial system to avenge hurt feelings and disappointed dreams.

The question here is whether the defendants' misrepresentation concerning plaintiff's paternity is material. Does it go to the essence of the marital relationship? In this regard, it is useful to consider those cases in which an annulment has been granted based upon a claim of fraudulent inducement to marry. These cases are instructive because they deal with whether a fraud is sufficiently material to vitiate the marriage contract. If a claim of fraud is sufficient to support an annulment, then it ought to be sufficient to support an action for damages where an annulment is unavailable because the marriage has already been dissolved by divorce.

Misrepresentations which have been found to go to the essence of the marital relationship, generally in an action for annulment, include concealment of the fact that one party was suffering from syphilis, concealment by the husband that he lacked the physical and mental capacity to engage in normal sexual relations with his wife, concealment of the fact that one party married the other for the sole purpose of obtaining a "green card" from the Immigration Department, concealment of a former narcotics addiction and a prior criminal record, concealment of heroin addiction, and concealment of a criminal record and a

false representation that joint funds were being used for child support when they were really being used to pay fines and restitution.

Misrepresentations which have been found not to be essential to the purposes of the marriage relationship include: misrepresentation of affection, concealment of lesbian activities and drug use prior to marriage, concealment of prior marriage and divorce, concealment of the fact that inheriting the property of the spouse at death was the motive for the marriage, and concealment of a misdemeanor narcotics conviction coupled with a periodic, but not consistent, disabling narcotics addiction.

Cases involving misrepresentations of pregnancy fall into two categories. One category consists of a false claim of a pregnancy which the woman knows does not in fact exist. Relief has been denied under these circumstances on the ground that a false representation of pregnancy does not go to the essence of the marital relationship because it does not prevent the future performance of the marital obligation to bear only the children of the spouse. The other category consists of a true claim of an existing pregnancy coupled with a false representation that the prospective spouse is the child's father when in fact the father of the child is known or suspected to be another man. The majority of cases, especially those decided since the turn of the century, have held that such fraud goes to the essence of the marital relationship and vitiates the marriage contract.

We hold that a true claim of an existing pregnancy coupled with a false representation that the child is that of the prospective spouse goes to the essentials of the marital relationship and will support an action based on fraud.

* * * *

Problems

1. The wife alleges that she worked to put her husband through medical school. He began an extramarital affair and fraudulently concealed that fact from her, knowing that her knowledge of the affair would probably lead to the breakup of the marriage. He did not intend to continue the marriage after completing medical school. He breached the oral contract to pay her one-half interest in his increased earning capacity in return for her financial support while he attended school. The husband had indeed done everything alleged. Should his motion to dismiss the wife's suit for failure to state a cause of action be granted? *See Church v. Church*, 630 P.2d 1243 (N.M. Ct. App. 1982).

2. Barbara McKettrick met Robert Bridgeman in her hometown of Augusta, Georgia in April 1982. Dr. Bridgeman was a dentist, practicing in New Martinsville, West Virginia. Mrs. McKettrick worked for a utility company in Augusta. Dr. Bridgeman was a widower, and Mrs. McKettrick was a divorcee. Mrs. McKettrick received alimony for $850 per month from her first husband, payable until Mrs. McKettrick's remarriage or the death of either. Dr. Bridgeman courted Mrs. McKettrick ardently for eighteen months, from the time they met until their marriage on July 2, 1983. In the course of this courtship, Dr. Bridgeman wrote Mrs. McKettrick many letters containing boiler-plate language of undying devotion, like: "You really need someone to take care of you and look after you and I'm applying for that job," he loved her so much "it hurt," that she should "be his forever," and that he would "change the weather" to please her. Mrs. McKettrick also wrote Dr. Bridgeman letters, but she destroyed those after they were married. Some three weeks after the couple were married, Dr. Bridgeman told the new Mrs. Bridgeman that he had made a mistake in marrying her. Mrs. Bridgeman claims that Dr. Bridgeman's courtship letters to his future wife constituted an express contract to support Mrs. Bridgeman for life. The trial court agreed. What result on appeal? *See Bridgeman v. Bridgeman*, 391 S.E.2d 367 (W.Va. 1990).

C. FORMALITIES FOR A CEREMONIAL MARRIAGE

Notes & Questions

1. Marriage formalities are governed by 43 O.S. §§ 4-37 (2001).

2. In 2004, SB 1582 repealed the blood test for infectious syphilis. The bill authorizes the State Board of Health to require blood tests for infectious diseases prior to obtaining a marriage license. The State Board of Health has not issued any regulations as to what tests, if any, are required for a marriage license.

3. AIDS testing requirements for those seeking marriage licenses have been enacted in several states. *See, e.g.*, TEX. CIV. STAT., Art. 4419(b)-1, § 9.02(e) (when the prevalence rate of confirmed positive HIV infection is .83 percent the Board of Health shall promulgate emergency rules for mandatory testing for HIV infection as a condition for obtaining a marriage license). Louisiana mandated such testing for a brief period but repealed that requirement along with other medical requirements.

Illinois required AIDS testing (Tit. 40, § 204(b)) in 1987 over the strong opposition of health care officials who argued that the program would be counterproductive and very expensive. In 1988, the first full year of the law's operation, marriage licenses issued in the state declined by 25% because many couples went out of state to get married and others simply declined to get married. In the first 18 months, of the 221,000 people married in Illinois, only 44 tested positive for the HIV virus. Health officials suspected that nearly a dozen of those were false positives. Given the test cost of $30 to $125 per person, it was calculated that the total cost in 1988 for Illinoisans was $5.4 million or about $209,000 for each case of HIV infection detected. In late July 1989 the legislature repealed the testing requirement. Walkerton, *Illinois Legislature Repeals Requirement for Prenuptial AIDS Tests*, N.Y. TIMES, June 25, 1989, p.12. For an analysis of the AIDS testing statute's constitutionality and the right to marry, *see* Goodman, *In Sickness or in Health*, 38 DEPAUL L. REV. 87 (1989).

Utah attempted to go even further and prohibit marriages by persons who had contracted AIDS. UTAH CODE ANN. § 30-1-2(i). The statute was stricken as a violation of the Americans with Disabilities Act. *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993).

4. Does it matter who performs the marriage? For example, in *Cramer v. Commonwealth*, 202 S.E.2d 911 (Va. 1974), the Supreme Court of Virginia held that "ordained" ministers of the Universal Life Church, Inc. did not qualify as "ministers" within the meaning of the Virginia statute describing who could celebrate the rites of marriage. The court noted that the organization's only dogma was "that each person believe that which is right and that each person shall judge for himself what is right," and that "Universal ministers are ordained without question of their faith, for life for a free-will offering." The court said, "The interest of the state is not only in marriage as an institution, but in the contract between the parties who marry, and in the proper memorializing of the entry into, and execution, of such a contract. In the proper exercise of its legislative authority it can require that the person who performs a marriage ceremony be certified or licensed."

In *State v. Lynch*, 272 S.E.2d 349 (N.C. 1980), a bigamy conviction was reversed because the defendant's first marriage was performed by a person holding only a mail-order certificate purchased for $10

giving him "credentials of a minister" in the Universal Life Church. The court held the certification was invalid and, thus, the second marriage could not be bigamous. Do you think the court would arrive at the same result if the question was whether the survivor of the marriage was entitled to a forced share in the decedent's estate? Suppose the issue was whether the court had jurisdiction to grant a divorce? In *Ranieri v. Ranieri*, 539 N.Y.S.2d 382 (N.Y. App. Div. 1989), the court found that Universal Life Church ministers are not "ministers" or "clergymen" under the relevant state statute and, thus, unauthorized to perform weddings. Therefore, the court could not grant a divorce. The court also held that the couple's antenuptial agreement was void for failure of consideration. The parties had only been "married" for four months and New York law provides that support and attorney fees may be obtained in an action to declare a marriage a nullity. Do you think that had any effect on the court's decision? For a case sustaining marriage performed by ministers of the Universal Life Church, *see Matter of Blackwell*, 531 So.2d 1193 (Miss. 1988). How should these cases come out in Oklahoma?

5. The parties have gone through a full ceremonial marriage before an ordained minister. However, they have somehow neglected to obtain a marriage license and somehow the minister did not require one. They have lived together for fifteen years and have four children. Are they validly married? Does it depend on what the issue is? *See Carabetta v. Carabetta*, 438 A.2d 109 (Conn. 1980); *contra Dire v. Dire-Blodgett*, 102 P.3d 1096 (Idaho 2004).

6. When does a marriage occur? Is it when the parties exchange mutual promises, or when the person officiating pronounces them husband and wife? If the man dies after the promises but before the officiant pronounces, is the woman entitled to a forced share in his estate? For an actual case, *see In re Neiderhiser*, 850 A.2d 68 (Pa. Ct. Comm. Pleas, 2004).

D. COMMON LAW MARRIAGE

ESTATE OF PHIFER
1981 OK CIV APP 21, 629 P.2d 808

BOYDSTON, JUDGE.

This is an appeal by Treva K. Walters, a/k/a Kay Walters from the district court's denial of her application to establish priority as the surviving spouse and heir of Henry Phifer. Ms. Walters filed the application for the purpose of contesting the appointment of Valerie Joe Phifer, now Dickenson, as administratrix of the estate of Henry Phifer.

Ms. Walters claimed to be the common law wife of the deceased physician. The trial court after hearing the evidence, ruled she has failed to carry her burden of proof and denied her application.

In a case of this nature, this court on appeal is required to weigh all the evidence and unless the judgment is clearly against the weight of the evidence to uphold the decision of the trial court.[1] Furthermore, the burden of proof in this instance is upon Ms. Walters to establish the existence of a common law marriage[2] and under Oklahoma law that burden must be met by "clear and convincing evidence."[3]

The party asserting a common law marriage must prove the following elements:

(1) an actual and mutual agreement between spouses to be husband and wife;[4]

(2) a permanent relationship;[5]

(3) an exclusive relationship;[6]

(4) cohabitation as man and wife;[7]

(5) the parties to the marriage must hold themselves out publicly as husband and wife.[8]

It is the function of this court to carefully scrutinize and weigh the evidence in order to determine if these points were proven in the case at bar. After a careful review we conclude the trial court's decision was correct and is not clearly against the weight of the evidence.

Ms. Walters' strongest evidence consisted of three or four witnesses who testified that on several occasions deceased had referred to her as his wife. Even though such may have been the case, isolated instances are not sufficient to establish a community-wide reputation that they were a married couple. Ms. Walters only testified to three instances where deceased had specifically held her out publicly or introduced her as his wife. She testified to his having introduced her as "Kay Phifer" at medical conventions and further testified her name tag read "Kay Phifer" instead of Kay Walters. We hold this is equivocal

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[1] Briggs v. Sarkeys, Inc., Okl., 418 P.2d 620 (1966).

[2] Quinton v. Webb, 207 Okl. 133, 248 P.2d 586 (1952).

[3] Maxfield v. Maxfield, Okl., 258 P.2d 915 (1953).

[4] Vann v. Vann, 186 Okl. 42, 96 P.2d 76 (1939).

[5] Marshall v. State, Okl.Cr., 537 P.2d 423 (1975).

[6] Rath v. Maness, Okl., 470 P.2d 1011 (1970).

[7] *In re* Miller's Estate, 182 Okl. 534, 78 P.2d 819 (1938); *Quinton v. Webb*, *supra*.

[8] Red Eagle v. Cannon, 201 Okl. 511, 208 P.2d 557 (1949); In re Troop's Estate, 190 Okl. 453, 124 P.2d 733 (1942).

evidence which is not necessarily conclusive because of the social-professional ramifications inherent in these gatherings.

Ms. Dickenson established that Dr. Phifer and Ms. Walters were separated from time to time, particularly during the summer of 1978, at which time Ms. Walters returned to Texas with her two children for a period of several months.

Ms. Dickenson offered much more conclusive evidence from the testimony of tax accountants, deceased's office employees, business associates and members of the community which directly contradicted the claimed marriage.[9] This was further substantiated by the admission of recently executed mortgages and deeds.

Rather, it is apparent from a fair reading of the record that the deceased never considered himself married and indeed took great pains not to leave that impression from both a private and business standpoint.

In fact Ms. Walters testified that this was a deliberately established course of conduct between them.

Under these circumstances we find Ms. Walters failed to prove by clear and convincing evidence that the claimed "marriage" had in fact been agreed to, consummated and adhered to during the four or five years in which she apparently resided under the same roof with the doctor on a part time basis.

We therefore affirm the decision of the trial court and tax costs of this appeal to Ms. Walters.

BACON, P.J. and BRIGHTMIRE, J., concur.

STANDEFER
v.
STANDEFER
2001 OK 37, 26 P.3d 104

HODGES, J.

The following issues are presented for this Court's review: (1) Whether the district court properly found a common-law marriage existed as of November 1988; (2) Whether the district court erred by including funds acquired from a settlement in a personal injury suit as part of the marital estate; and (3) Whether the division of property was equitable.

I. Facts

Charles Standefer and Cynthia Birdsong began cohabitating in November of 1988. At the time, Cynthia had two children from a previous marriage. As a result of the death of her husband from the previous marriage, Cynthia and the two children were receiving social security benefits. Charles was a truck driver. Cynthia worked for a time during the cohabitation as a waitress and at another time as a medical care giver.

[9] There is ample documentary evidence that the deceased considered himself to be an unmarried man right up to the time of his death. These included income tax returns, mortgages, loan applications and deeds. Further, evidence was offered that Ms. Walters had recently applied for and obtained a beer license while residing in deceased's home, in the name of Kay Walters, that she maintained her own separate bank account, that she never had a joint bank account with the doctor nor had she been included in any of the transactions in which a wife would normally participate.

On September 28, 1996, while on a metal-roofed shed adjacent to the home in Chouteau, Oklahoma, Charles came in contact with a high voltage electrical wire. As a result of the electrocution, Charles was burned over 65% of his body, had numerous operations, had diminished use of his legs, and, for social security purposes, is 100% disabled. At the time of the accident, Cynthia was in the house. When she saw a bluish ball of fire and heard a horrible noise, she went outside. When Cynthia saw flames coming out of both of Charles' legs, she started shaking. Then, Cynthia turned the electricity off, ran in the house, and called 911. The rescue team removed Charles from the shed, and he was air lifted to a medical center in Tulsa.

Charles was in a burn center for three months. During most of this time, Cynthia rented a room and stayed at the hospital. Her parents and friends helped care for her children. Most weekends, she would bring the children to the hospital to visit Charles. When Charles was moved to a rehabilitation center, Cynthia returned to live at home but made daily trips to the hospital. When Charles returned home, Cynthia helped him with daily activities, changed his bandages, provided medical assistance, pushed his wheelchair, and gave other necessary assistance.

On February 5, 1997, Charles and Cynthia and Cynthia on behalf of her two children filed a lawsuit against one of the tortfeasors (Tortfeasor I). Charles sought compensation for his injuries and Cynthia and the children for loss of consortium. The law suit was settled. Even though they were informed that they could seek separate settlements, Charles and Cynthia instructed their attorneys to seek one lump-sum settlement. Charles stated that he wanted Cynthia to be taken care of if anything should happen to him. Charles and Cynthia were insistent that their claims should be joined and that they negotiate for and receive a combined settlement.

On November 12, 1997, Charles, Cynthia, and the children signed a "Memorandum of Agreement by Plaintiffs Regarding Settlement of Their Lawsuit" and directing the disbursement of the funds from the settlement. The parties acknowledged that they had the right to individually consult separate attorneys regarding their rights but elected not to do so. The children acknowledged that their claims were not legally recognized and, therefore, of dubious value. The memorandum stated specifically:

> Specifically, Charles R. Standefer and Cynthia Birdsong Standefer understand and acknowledge that their claims against [Tortfeasor I] were different in kind and value and that they freely choose that all payments made under the terms of the settlement be made [jointly] rather than to them individually in separate amounts. Charles R. Standefer and Cynthia Birdsong Standefer further acknowledge that they directed their attorneys not to negotiate separate settlements from [Tortfeasor I], but that their interests in the case be pursued collectively and result in one settlement to be shared jointly by them and their family.

There was no document or other statement which allocated the settlement funds to specific items of loss or injury of Charles and Cynthia.

The Standefers received slightly over half of the settlement funds in cash. Most of the cash was used for attorney fees, medical bills, and other bills which were incurred during the time after Charles' accident. With the remaining amount of settlement funds, Tortfeasor I purchased three annuities, one each from Metropolitan Life Insurance Company, from Berkshire Hathaway Life Insurance Company of American, and from United of Omaha Life Insurance Company. Charles and Cynthia dictated many of the terms of the annuities such as how they were to be paid and that the payments be made into a joint account. The Metropolitan Life annuity represented about 22.52% of the total value of the annuities, the Berkshire Hathaway annuity represented about 38.22%, and the Omaha Life annuity represented about 39.26%. The monthly payments for the Metropolitan Life and Berkshire Hathaway annuities were to be paid for the life of Charles but no less than thirty years. The Omaha Life annuity was to be paid until the

death of the last surviving of Charles or Cynthia but no less than twenty years. The Berkshire Hathaway annuity contract specifically stated that the interests of the payees, in this case Charles and Cynthia, were several and equal. The Omaha Life annuity policy listed Charles and Cynthia as the annuitants. The payments under each of these annuities were to be made monthly into an account held jointly by Charles and Cynthia. Charles and Cynthia were the payees for all the annuities. Charles wrote a check for $5,000.00 each month from the joint account and gave it to Cynthia to put in her separate checking account.

On December 24, 1997, Charles and Cynthia were married in a ceremony. In an attempt to show that they were not common-law spouses before the accident, Charles presented evidence that in January of 1995, Cynthia purchased a house (the Chouteau property, the place where Charles' injuries occurred) as a single person and that Charles and Cynthia had filed separate tax returns. In contrast, during the time after they started cohabiting, Charles gave Cynthia cards which stated they were for "his wife" or other indications that he considered Cynthia to be his wife. On March 30, 1992, Charles changed his insurance enrollment listing Cynthia as his wife and her two children as his stepson and stepdaughter. More importantly, Charles testified he considered that he and Cynthia were common-law married on Thanksgiving Day of 1988.

On July 26, 1998, Charles and Cynthia separated. However, before their separation Charles and Cynthia brought suit against the second tortfeasor (Tortfeasor II). In August of 1999, Charles settled this claim. However, Cynthia's claim remains pending.

II. TRIAL COURT'S JUDGMENT

The district court found the following facts. Charles and Cynthia were common-law married as of Thanksgiving Day of 1988. Using the analytical method of division, the Tortfeasor II settlement funds were Charles' separate property, and Cynthia's claim against Tortfeasor II was her separate property. Certain vehicles were gifts to Cynthia's children and parents. The proceeds from the settlement with Tortfeasor I were marital property and that the analytical method of division of property was inapplicable based on Charles' and Cynthia's actions. The parties had equitably divided the proceeds of the annuities by their practice of Cynthia receiving a fixed monthly amount of $5,000.00 from the annuity payments. An IRS debt was Charles' separate property, and the other debts totaling $15,100 were marital debts. The court awarded approximately 62% of the marital assets to Charles and approximately 38% to Cynthia. The district court ordered that Cynthia should receive approximately one-third of the monthly payments from the annuities.

III. COMMON-LAW MARRIAGE

On appellate review, a trial court's determination of the existence of a common-law marriage will not be disturbed if it is not clearly against the weight of the evidence. *Mueggenborg v. Walling*, 1992 OK 121, ¶ 5, 836 P.2d 112, 113. A common law marriage is formed when "the minds of the parties meet in consent at the same time." *Reaves v. Reaves*, 1905 OK 32, 82 P. 490. Some evidence of consent to enter into a common-law marriage are cohabitation, actions consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations by the parties. *See Reaves v. Reaves*, 1905 OK 32, 82 P. 490. The person seeking to establish a common-law espousal relationship has the burden to show by clear and convincing the existence of the marriage. *See Maxfield v. Maxfield*, 1953 OK 390, ¶ 24, 258 P.2d 915, 921.

In the present case, Charles testified that "as far as [he] was concerned, [he and Cynthia] had been married since Thanksgiving of 1988." Cynthia likewise believed that they were common-law spouses beginning in 1988. Other evidence of the common-law marriage is Charles listing Cynthia as his wife and her children as his step-children on his insurance and giving her cards to her as his wife, Charles and Cynthia celebrating their anniversary every year, her children giving them anniversary gifts, and Charles

and Cynthia holding themselves out to others as spouses. The evidence is clear and convincing that both parties assented to a marriage on Thanksgiving Day of 1988. According to the record, the trial court's finding that a common-law marriage existed as of Thanksgiving of 1988 was not against the weight of the evidence.

* * * *

In re ESTATE OF STINCHCOMB

1983 OK 120, 674 P.2d 26

This case is the consolidation of five (5) separate appeals. Jeanie Stinchcomb, appellant, contends that she was the common law wife of Glen C. Stinchcomb, the decedent and appellee's father, before they signed an antenuptial agreement and before Mr. Stinchcomb made a codicil to his will. Therefore, she claims that the documents are void, and that she should get the one third widow's share instead of the proceeds of a Texaco lease which was bequeathed to her in decedent's will. Appellant further claims that she is entitled to $30,000 that she withdrew from a safe deposit box that she and Mr. Stinchcomb held as joint tenants. The trial court ruled against appellant in both these matters, and further ordered appellant to reimburse appellee for any expenses connected with the lease, and to reimburse appellee for the amount she was paid as widow's allowance during the proceedings. The reimbursement was to be done when appellant began receiving proceeds from the lease. Appellant appeals.

AFFIRMED.

OPINION ON REHEARING

PER CURIAM.

The parties to this appeal have each filed petitions for rehearing following the adoption of our unpublished opinion dated June 14, 1983. The appellant's petition for rehearing is denied, however the appellee's is granted and the issue raised therein is dealt with in this opinion on rehearing.

In Texas in November 1971, Jeanie Stinchcomb, appellant, met Glen C. Stinchcomb, the decedent and appellee's father. Mr. Stinchcomb was still married at the time to his former wife, Agnes Stinchcomb. Appellant and Mr. Stinchcomb began seeing one another and in 1972, appellant moved to Oklahoma City where Mr. Stinchcomb had arranged for her to have a furnished apartment. On August 7, 1975, Mr. Stinchcomb and Agnes Stinchcomb were divorced.

Appellant testified that within a week of the divorce, she and Mr. Stinchcomb had agreed to live together as husband and wife. In December of 1975, appellant moved into Mr. Stinchcomb's house with him. Various testimony was given to the effect that Mr. Stinchcomb bought her two rings, referred to her as Mrs. Stinchcomb on several occasions, lived with her in a "typical" marriage setting, and that appellant's son introduced Mr. Stinchcomb as his step-father. On the other hand, in June 1976, a new home was purchased by Mr. Stinchcomb and he took the title in his name. He filed his income tax returns as a single man.

On January 9, 1978, the appellant and Mr. Stinchcomb signed an antenuptial agreement stating that both parties were single, but they intended to get married. Additionally, Mr. Stinchcomb made a codicil to his will leaving all of his furniture and household goods to appellant and an interest in his Northwest Expressway property from which appellant was to receive the proceeds of a Texaco service station lease. The proceeds are $48,000 per year for ten years with options to renew.

On February 21, 1978, the couple had a ceremonial marriage performed in Rio Grande City, Texas.

On June 20, 1981, Mr. Stinchcomb suffered a stroke. After admitting him to the hospital, appellant went to the bank and got $30,000 from a safety deposit box. With this money she bought a mink coat, gave $5,000 to her lawyer and carried the remaining $20,000 in her car before delivering it to a friend from Texas for safekeeping. Further testimony was elicited to the effect that appellant forged Mr. Stinchcomb's signature to the assignment on a car title and had a new title issued to herself, and caused fictitious hotel registration bills to be prepared and introduced into evidence.

On September 17, 1981, Mr. Stinchcomb died. On September 22, appellant signed an affidavit stating that Mr. Stinchcomb died on September 17, leaving no valid will. Glenn Lee Stinchcomb, appellee was appointed executor of his father's estate.

The trial court heard this case and held that appellant should only receive the interest in the lease property Mr. Stinchcomb had left to her in the codicil to his will; thereby upholding the validity of the antenuptial agreement, and giving no credence to the claims of appellant concerning the existence of a common-law marriage.

Appellant's basic contention is that she was the common law wife of Mr. Stinchcomb before the antenuptial agreement, codicil to the will, or ceremonial marriage. Therefore, she contends the antenuptial agreement is in essence a post nuptial agreement which purported to change the pre-existing common law marriage relationship, thus rendering it void. Consequently, she wants the statutory one-third widow's share of the estate instead of the proceeds of the lease.

A party asserting a common law marriage must prove the following elements: an actual and mutual agreement between the spouses to be husband and wife; a permanent relationship; an exclusive relationship, proved by cohabitation as man and wife; and the parties to the marriage must hold themselves out as husband and wife. *Matter of Phifer's Estate*. Appellant introduced extensive testimony that would seem to create a presumption of the existence of a common law marriage. However, a common law marriage must be established by evidence that is clear and convincing. *Maxfield v. Maxfield*, 258 P.2d 915 (Okla. 1953). Several facts interrelate to destroy the apparent presumption. Mr. Stinchcomb purchased a house and took title in his name alone, the antenuptial agreement stated that the parties to the agreement were single, Mr. Stinchcomb filed his income tax returns as a single man, and in the codicil to the will, Mr. Stinchcomb stated that he intended to marry appellant. The appellant failed to prove a pre-existing common law marriage by clear and convincing evidence; therefore, the antenuptial agreement is valid.

Since the trial court adequately weighed the circumstances and equities of this matter, we find that the trial court did not abuse its discretion in rendering its decision that the appellant must reimburse the estate the amount she is paid as widow's allowance once she receive the proceeds from Texaco.

* * * *

AFFIRMED

BARNES, C.J., LAVENDER, DOOLIN, HARGRAVE, OPALA, WILSON JJ., concur.

SIMMS, V.C.J., dissents.

Notes & Questions: Standard of Review and Common Law Marriages

1. Note the standard of review in the third paragraph of *Phifer* and compare it to the standard of review noted in the last paragraph of *Tice*. What accounts for the difference? The full standard of review for equity cases including divorce is set out in the case of *Carpenter v. Carpenter*, 1982 OK 38, 645 P.2d 476:

> [Divorce] contests are of equitable cognizance. The court may exercise continuing jurisdiction of disputed claims. On appeal, the trial court's disposition is reviewed by the standards applicable to chancery cases. The court's decision is presumed to include a finding favorable to the successful party upon every fact necessary to support it. While an appellate court may and will examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence. Whenever possible, an appellate court must render, or cause to be rendered, that judgment which in its opinion the trial court should have rendered. A decree need not rest upon uncontradicted evidence. It is not fatal to the validity of an equity decision if, on the basis of the evidence presented, the chancellor might have been equally correct in reaching a conclusion different from that which he actually did. If the result is correct, the judgment is not vulnerable to reversal because the wrong reason was given for the decision or because the trial court considered an immaterial issue or made an erroneous finding of fact. We are not bound either by the reasoning or the findings of the trial court. Whenever the law and the facts warrant, we may affirm the judgment if it is sustainable on any rational theory and the ultimate conclusion reached below is legally correct. Unless the decision is found to be against the clear weight of the evidence, the appellate court must indulge in the presumption that it is correct.

2. Only nine states continue to recognize common law marriages. Oklahoma consistently holds that the statutes regulating the form of ceremonial marriages are directory and not mandatory. *See Reaves v. Reaves*, 1905 OK 32 82 P. 490 (Okla. Terr. 1905); *In re Love's Estate*, 1914 OK 332 142 P. 305 (Okla. 1914).

3. What factors must be present to establish a common law marriage? Suppose either the husband or the wife has an affair during the course of the relationship. Does this mean that the third element cited by the *Phifer* court is not met and there is no marriage? Is cohabitation necessary? Suppose a couple lives together, holds themselves out as husband and wife, and files joint income taxes. Should this be sufficient to create a common law marriage without cohabitation? Are elements two through five, cited by the *Phifer* court, actual elements or merely evidence of the agreement? After the decision in *Standefer*, is anything necessary for a common law marriage other than the intent to be married?

4. Same-sex couples can have a common law marriage upon the same basis as opposite couples. Most same-sex couples who were together prior to the *Bishop* and *Obergefell* cases have a common law marriage that came into being when the *Bishop* cases became final.

5. Precisely why did Mrs. Stinchcomb need to establish a common law marriage? After all, she and Mr. Stinchcomb were clearly married.

Another variation on the problem area was discussed in *Estate of Carroll*, 1987 OK CIV APP 73, 749 P.2d 571. Mr. Carroll drew a will in which he left the bulk of his estate to his cohabitant. One year later, he married his cohabitant and divorced her four years after that. He never changed his will. His children challenged the will, alleging that he had a common law marriage at the time the will was executed. This would have the effect of rendering the subsequent ceremonial marriage a nullity, thus bringing the will under the terms of 84 O.S. § 114 (2001), which provides that all provisions in a will in favor of the testa-

tor's spouse are automatically revoked at the time of divorce. The appellate court rejected the children's arguments. For the latest common law marriage case involving workers' compensation, *see Oklahoma Dept. Of Mental Health & Substance Abuse v. Pierce*, 2012 OK CIV APP 73, 283 P.3d 894.

6. While couples living together rarely seek legal advice about their relationship, how should you advise a couple who wish to be certain that they have not entered into a common law marriage?

ESTATE OF SMART
v.
SMART
1983 OK CIV APP 49, 676 P.2d 1379

BACON, PRESIDING JUDGE.

This appeal involves an ancillary probate proceeding in Jefferson County, Oklahoma, for a deceased California resident. The trial court ruled that decedent's common law wife could elect to take her forced heir share of decedent's Oklahoma property. Decedent's children appeal from that ruling.

The pertinent facts necessary to resolve this case are undisputed. The record shows that in 1950, decedent Harold Smart was married to Marie. On October 21, 1950, decedent a resident of California and appellee, Gwendolyn Smart, participated in a ceremonial marriage service in Yuma, Arizona. At that time decedent was still married to Marie. Decedent and Marie were divorced in California on September 29, 1952.

Decedent and appellee lived together in California from the time of their "ceremonial marriage" in Yuma, Arizona, until decedent died on March 12, 1981.

Decedent died testate and a resident of California. His will and two codicils were admitted to probate in California. The executor, decedent's son, filed the will and codicils for ancillary probate in Jefferson County, Oklahoma, where decedent owned real and personal property.

Under the terms of decedent's will and codicils appellee was not to inherit any interest in the Oklahoma property. She therefore filed her election to take against the will pursuant to 84 O.S.1981 § 44. The trial court found appellee was entitled to do so and appellants now appeal.

Appellants argue that the trial court erred in finding appellee was the wife and surviving spouse of decedent and was therefore entitled to take against the will. We agree with the trial court and affirm.

The basis for appellant's argument is that decedent and appellee were, at all time they lived together, residents and domiciliaries of the State of California and that California does not recognize common law marriage. The simple answer to this assertion is that California does not recognize common law marriages created within its own boundaries. However, California does recognize marriages validly created elsewhere, including common law marriages of California domiciliaries. *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957)(*citing Estate of McKanna*, 106 Cal. App. 2d 126, 234 P.2d 672 (1951).

Therefore, if decedent and appellee entered into a common law marriage after decedent's divorce from Marie in 1952, appellee would be considered decedent's wife and surviving spouse.

The next logical step is to determine whether decedent and appellee created a common law marriage outside the boundaries of California. We find they did establish a common law marriage while in Oklahoma.

The record in the present case contains an abundance of evidence that decedent and appellee considered themselves married to each other. For example, in his will decedent refers to appellee as his wife. They lived together as man and wife for 20 years and during that time held themselves out as such.

In *Gilmore, Gardner & Kirk Oil Co. v. Harvel*, 208 Okl. 664, 258 P.2d 632 (1953), the supreme court said it its syllabus:

> A common-law marriage may exist in this state, and when parties capable of entering into the marriage relation agree to be and become husband and wife, and in pursuance of such agreement enter into and thereafter maintain the marriage relation, a common-law marriage exists.

It is not required that the parties to a common law marriage created in Oklahoma be residents or domiciliaries of Oklahoma, nor do they have to cohabit or maintain the common law relationship for any magical length of time to make it valid.

In the present case decedent and appellee for a period of 16 years, traveled to Oklahoma two to three times a year. They would stay two to five weeks at a time in Jefferson County, Oklahoma, where decedent's real property was located, holding themselves out as man and wife, not only to their family, but to the whole world. Under these circumstances we conclude that the trial court correctly held appellee was the wife and surviving spouse of decedent and was therefore entitled to elect to take against the will and codicil.

Affirmed.

BOYDSTON and MEANS, JJ., concur.

Notes & Questions: Common Law Marriages in the Conflict of Laws

1. The Court of Civil Appeals may have been incorrect when it found that California would recognize this common law marriage. Neither the court nor the attorneys cited *Etienne v. DKM Enterprises*, 186 Cal. Rptr 321 (Cal. Ct. App. 1982). In that case, Plaintiff's complaint for loss of consortium was dismissed for failure to state a cause of action on the ground of lack of marriage to the victim. Plaintiff and the man she lived with for more than eight years visited Texas twice, one time for eight days. During those visits they held themselves out as husband and wife and, according to Plaintiff, cohabited. The court held this to be insufficient to establish a common law marriage in Texas. First, the court held that sharing the same room was not proof of cohabitation in Texas. Secondly, the court said there was no intent on the part of plaintiff and the person she lived with to establish a Texas domicile. Is that necessary for a common law marriage? Should the Oklahoma court decide this case based on how California would decide this case? If California would not recognize the common law marriage, is it nonetheless appropriate for Oklahoma to recognize it for purposes of ancillary probate of land located in this state?

2. In *Wharton v. Wharton*, 639 P.2d 652 (Or. Ct. App. 1982), the parties were Oregon domiciliaries. Plaintiff contended that she and Defendant established a common law marriage pursuant to Idaho law. The evidence indicated that over a 10-year period the couple spent an average of ten days each year in Idaho and represented themselves there as a married couple. Their relatives as well as business and social contacts in both states considered the couple married. The Oregon court held that the parties' contacts with Idaho were that of mere visitors. "Although there were a great number of trips by the parties to Ida-