

Marriage Equality and Common Law Marriage

Marriage Equality Now!!! Marriage Equality Forever!!!!
(but what about retroactive common law marriages???)

Presented By: Autumn and Todd Scardina

Scardina Family Law, LLC

- www.ScardinaFamilyLaw.com
- Autumn@ScardinaFamilyLaw.com
- Todd@ScardinaFamilyLaw.com
 - Phone - 720-420-9068

Goal of Presentation:

- Explore the retroactive application of Marriage Equality decisions to Colorado's common law marriage jurisprudence.
- DISCLAIMERS:
 - I am a member of the LGBT community and inherently biased.
 - Todd is my brother and strong supporter of the LGBT community and is inherently biased.
 - Issue is incredibly new and still developing.
 - We do not know the answer.

How did we get here?

A brief history of marriage equality in Colorado:

- **1993** – Supreme Court of Hawaii rules in *Baehr v. Lewin* that the state's prohibition against same-sex marriage is unconstitutional.
- **1996** – Congress passes the Defense of Marriage Act; the Colorado General Assembly passed a bill banning same-sex marriage, but it was vetoed by Gov. Roy Romer.
- **1997** - the Colorado General Assembly again passed a bill banning same-sex marriage, but it was again vetoed by Gov. Roy Romer.
- **2000** - Gov. Bill Owens signed into law a bill banning same-sex marriage.
 - “14-2-104(1) ...a marriage is valid in this state if:
 - (b) it is only between one man and one woman”

A brief history of marriage equality in Colorado:

- **2006** - Amendment 43 was approved in a referendum that added a new section to Article II of the Colorado Constitution to define marriage in Colorado as only a union between one man and one woman. It passed with 56% of the vote.
 - “Section 31. MARRIAGES - VALID OR RECOGNIZED: Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”

A brief history of marriage equality in Colorado:

- **2009** - Colorado approved the Designated Beneficiary Agreements Act of 2009, allowing same-sex couples to access some of the benefits that marriage affords.
- **March 2013** - Gov. John Hickenlooper signed a bill into law to allow same-sex couples to join together in civil union. The law took effect on May 1, 2013.

A brief history of marriage equality in Colorado

- **June 26, 2013** - The U.S. Supreme Court rules in *U.S. v. Windsor*, finding Section 3 of Defense of Marriage Act to be unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment".
- **July 9, 2014** - Adams County District Court Judge C. Scott Crabtree struck down Colorado's ban on marriage for same-sex couples in two consolidated state court cases seeking the freedom to marry and respect for marriages legally performed in other states. The ruling was stayed pending the U.S. Supreme Court's decision in a separate case, filed in federal court.

A brief history of marriage equality in Colorado

- **July 23, 2014** - U.S. District Court Judge Raymond P. Moore struck down Colorado's ban on marriage for same-sex couples in *Burns v. Hickenlooper*. The decision was stayed pending an appeal to the 10th Circuit, and stayed further pending action from the U.S. Supreme Court.
- **October 6, 2014** - the U.S. Supreme Court denied review of two federal legal cases (*Kitchen v. Herbert* and *Bishop v. Smith*) in which the U.S. Court of Appeals for the 10th Circuit ruled that denying same-sex couples the freedom to marry in Utah and Oklahoma is unconstitutional. Because Colorado is also in the 10th Circuit, the ruling created a binding precedent in Colorado. Following the Supreme Court's decision to deny review, all parties agreed that a stay in a separate federal marriage ruling in Colorado – which also declared the state's ban unconstitutional – should be lifted.

A brief history of marriage equality in Colorado

- **June 26, 2015** - the U.S. Supreme Court ruled in *Obergefell v. Hodges*, requiring all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions.

United States v. Windsor

FACTS:

- Edith Windsor and Thea Spyer were a same-sex couple residing in New York.
- In 2007, the couple was lawfully married in Ontario, Canada.
- In 2009, Spyer died and left her entire estate to Windsor.
- Windsor wanted to claim the federal estate tax exemption for surviving spouses.
- She was barred from doing so by Section 3 of DOMA.
 - “the term "spouse" only applied to marriages between a man and woman.”

United States v. Windsor

District Court:

- Ruled that a rational basis review of Section 3 of DOMA showed it to be unconstitutional, as it violated plaintiff's rights under the equal protection guarantees of the Fifth Amendment, and ordered that Windsor receive the tax refund due to her.

Court of Appeals:

- Second Circuit Court of Appeals upheld the lower court's ruling that Section 3 of DOMA is unconstitutional.
- The majority opinion applied intermediate scrutiny
 - Found that the history or discrimination against homosexuals made them a “quasi-suspect class”
 - Because DOMA could not pass that test, it is unconstitutional under the equal protection guarantees of the Fifth Amendment.

United States v. Windsor

U.S. Supreme Court:

- In a 5–4 decision, ruled that Section 3 of DOMA is unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment."
- Held that the Constitution prevented the federal government from treating state-sanctioned heterosexual marriages differently from state-sanctioned same-sex marriages, and that such differentiation "demean[ed] the couple, whose moral and sexual choices the Constitution protects".
- Standard applied is unclear
 - Federalism?
 - Due Process?
 - Equal Protection?

United States v. Windsor

Majority opinion (Kennedy)

- Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage.

United States v. Windsor

Majority opinion (Kennedy)

- “The differentiation demeans the couple, whose moral and sexual choices the Constitution protects,... and it humiliates tens of thousands of children now being raised by same-sex couples.”
- “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”

Obergefell v. Hodges

FACTS:

- Petitioners are 14 same-sex couples and **2 men whose same-sex partner's are deceased.**
 - James Obergefell and John Arthur
 - Same sex couple for over two decades
 - 2011, Arthur diagnosed with ALS, a debilitating disease with no known cure
 - 2013, couple travel from Ohio to Maryland to get married
 - Arthur is so sick he cannot move and couple was married in a medical transport plane as it remained on the tarmac in Baltimore.
 - Three months later Arthur dies.
 - Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate

Obergefell v. Hodges

FACTS:

- Respondents are Michigan, Kentucky, Ohio and Tennessee
 - Define marriage as a union between “one man and one woman”.
- “Petitioners claim the respondents violate the 14th Amendment by denying them the right to marry or to have their marriages, lawfully performed in another state, given full recognition.”

Obergefell v. Hodges

District Courts:

- All sided with Petitioners and rule in favor of marriage equality.

6th Circuit Court of Appeals:

- Consolidated the cases and reversed the District Court opinions.
- Held that the “a state has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of state.”

Obergefell v. Hodges

United States Supreme Court:

- Rules in a 5-4 decision that: “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.”

Majority Opinion written by Justice Kennedy:

- Recites the history of marriage
- Notes its evolution
 - When the nation was founded it was a voluntary contract between a man and a woman
 - Women’s rights changed the understanding of marriage (ie coverture no longer the law)
- Recites the LGBT rights movement and evolution of criminal and civil laws affecting them.
- Recites marriage equality movement’s history

Obergefell v. Hodges

United States Supreme Court:

- Due Process Analysis:
 - Fundamental liberties “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”
 - “When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”

Obergefell v. Hodges

Due Process Analysis:

- Right to marry is a fundamental right protected by the due process clause and extends to same-sex couples.
 - Right to personal choice regarding marriage is inherent to the concept of individual autonomy.
 - Two-person union unlike any other in its importance to the committed individuals.
 - “The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other’”
 - Safeguards children and families.
 - Marriage is the keystone of our social order and “the basis for an expanding list of governmental rights, benefits, and responsibilities...include[ing] 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.”

Obergefell v. Hodges

- Due Process Analysis:
 - “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.”

Obergefell v. Hodges

- Equal protection analysis:
 - “Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, 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.”
 - “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. “

Obergefell v. Hodges

- Concludes:
 - “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.”

Once unconstitutional, always unconstitutional

Void ab initio:

- It is a general rule of statutory interpretation that an unconstitutional statute is *void ab initio*. This principle is stated in 16 Am.Jur.2d, Constitutional Law, § 177, pp. 402-403, as follows:
 - "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed."
- *See Norton v. Shelby Co.*, 118 U.S. 425, 442 (1886), holding that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
- See also *People v. District Court*, 834 P.2d 181, 210 (Colo. 1992), holding that "an unconstitutional law is void, and is as no law."

Or maybe not...

Lemon v. Kurtzman, 411 U.S. 192 (1973):

- Frequently cited for the proposition that an unconstitutional statute is not necessarily void ab initio.
- Lemon involved the question whether the State of Pennsylvania was permitted to reimburse nonpublic sectarian schools for services rendered after a statute was enacted authorizing such reimbursement but before the statute was declared unconstitutional.
- In Lemon, Chief Justice Burger observed that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct."

Or maybe not...

- **Dearborn Fire Fighters Union Local No. 412, IAFF v. Dearborn**, 394 Mich. 229 (1975), Justice Levin, citing *Lemon v. Kurtzman*, supra, wrote that "Decisions holding legislative acts unconstitutional have, on occasion, been given limited retroactivity in recognition of the necessities of governmental administration".
- Dearborn Fire Fighters involved a constitutional challenge of the validity of 1969, which provides for compulsory arbitration of police and fire department labor disputes. In an opinion joined by Chief Justice T. G. Kavanagh, Justice Levin wrote:
 - "In addition to the almost insurmountable administrative, political, and judicial problems that would be created by any attempt to unravel and renegotiate the 'contracts' imposed by police and fire department arbitration panels, application of this decision retroactively would cause hardship on employees and employers and would not be constructive. Michigan labor organizations, their members and municipalities have justifiably relied on a presumptively valid statute."

Void ab initio: common law v. statutes

People v. Gersch 135 Ill.2d 384 (Ill. 1990):

- Defendant was indicted for the murder of his wife
- Prior to trial, defendant expressly waived his right to a jury and requested a bench trial.
- The State opposed defendant's request and asserted its statutory right to a jury trial.
- The trial court granted the State's motion for a trial by jury. Following the trial in the circuit court of Cook County, the jury found defendant guilty of murder and guilty of concealing a homicidal death.
- While defendant's case was pending on review, the state's statutory right to a jury trial was ruled unconstitutional.

People v. Gersch 135 Ill.2d 384 (Ill. 1990):

- The defendant appealed and argues he was denied his constitutional right to a bench trial.
- The issue before the court was whether we should retroactively apply the decision which provided the states' right to a jury trial unconstitutional, to defendant's convictions.
- “This distinction between a judicial decision which changes established principles of common law and a judicial decision which declares a statute unconstitutional is the key to understanding why we are compelled to give Joyce retroactive application.”

People v. Gersch 135 Ill.2d 384 (Ill. 1990):

- “The very nature of legislative actions makes retroactivity the proper course when a statute is declared unconstitutional...Except for constitutional provisions, statutes have been generally treated as the supreme source of law in this country, giving the legislature preeminence in lawmaking power. ...The executive can only implement and enforce these statutes...while the courts are empowered only to interpret and apply them to specific cases and controversies.”
- We contrast this pervasive power of the legislature to alter the common law with the historical view of judicial decisions that establish or alter common law principles.
- Where this court establishes a rule of law, other courts in the State must follow it unless it can be shown that it will cause serious detriment or be prejudicial to public interests. ...This principle, known as stare decisis ...causes both the people and the bar of Illinois to rely on the decisions of this court without fear that the rules of law will suddenly change. ...Only on rare occasions will courts determine that a change in the common law is needed to reflect societal changes or vindicate public interests.

People v. Gersch 135 Ill.2d 384 (Ill. 1990):

- The distinct and separate roles which the judiciary and legislature perform in determining what the common law is, and the different degree of reliance the public may place on a judicially, as opposed to a legislatively, created rule of law, are what mandate a strict adherence to the rule that unconstitutional statutes are void ab initio. The legislature has the inherent power to alter the common law at any time. Statutes, therefore, may sharply alter the polity and create new and unexpected rights and duties.
- The very "suddenness" of statutory law generally makes it unfair to apply it retrospectively, and this same "suddenness" ought to bear the corresponding characteristic that, if the statute fails to pass constitutional muster, it dies as of its inception, rather than being void only as of the date of adjudication.
- Judicial decisions, on the other hand, are declarations of what the law already was, or are incremental adjustments of the law to meet changing conditions--the evolutionary nature that is the genius of the common law. This allows us to consider the policy factors already discussed in determining whether the law, as announced in a new decision, was already clear enough to those who rely on the common law to make retroactive application of the rule equitable.
- The opposite is true when a statute violates the Constitution. A constitutionally repugnant enactment suddenly cuts off rights that are guaranteed to every citizen, and instantaneously perverts the duties owed to those citizens. To hold that a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right. This would clearly offend all sense of due process under both the Federal and State Constitutions.

Void ab initio doctrine strongest when applied to fundamental rights

FELZAK v. HRUBY - Court of Appeals of Illinois, Second District (2006)

- Although the *ab initio* doctrine has recently been applied with qualifications to procedural matters, where a party's constitutional rights are in need of vindication, strict application of the void *ab initio* doctrine is appropriate. *Yakubinis v. Yamaha Motor Corp, U.S.A.*, 365 Ill.App.3d 128, 134 (2006). Because sections 607(b)(1) and (b)(3) affected substantive rights, and were declared unconstitutional for violating parents' constitutional liberty interests (*Wickham*, 199 Ill.2d at 320), the *ab initio* doctrine strictly applies.”

Common Law Marriage in Colorado

- **Common-Law Marriage**

- “Common-law marriage is a term used to describe a marriage that has not complied with the statutory requirements most states have enacted as necessary for a ceremonial marriage. The name came from the fact that these marriages were recognized as valid under the common law of England.
- In 1877, the United States Supreme Court stated, in an action that questioned the validity of a nonceremonial marriage, that marriages that were valid under common law were still valid unless the state passed a statute specifically forbidding them. *Meisher v. Moore*, 96 U.S. 76 (1877).
- Since the Colorado legislature has never enacted such a statute, Colorado is part of the minority of states that recognize the validity of common-law marriages.
 - Note – 14-2-104(3) – “Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman:”

http://www.coloradoattorneygeneral.gov/initiatives/consumer_resource_guide/common_legal_questions#common_law

STATES THAT RECOGNIZE COMMON LAW MARRIAGE

State	Restrictions
Alabama	None
Colorado	None
District of Columbia	None
Georgia	Only common law marriages formed before 1/1/1997
Idaho	Only common law marriages formed before 1/1/1996
Iowa	None
Kansas	Partners must be at least age 18
Montana	None
New Hampshire	Common law marriages are recognized only after the death of one partner
Ohio	Only common law marriages formed before 10/10/1991
Oklahoma	Only common law marriages formed before 11/1/1998
Pennsylvania	Only common law marriages formed on or before 1/1/2005
Rhode Island	None
South Carolina	None
Texas	Partners must satisfy 2-prong test and show that they are legally entitled to marry and have registered the marriage at the county courthouse. If no longer together, they must rebut the legal presumption that there was no marriage (unless they file a lawsuit for proof of marriage within two years of the date they separated or ceased living together).
Utah	By administrative order: marriage arises out of a contract between two consenting parties who are legally permitted to enter into a contract or have their marriage solemnized and satisfy the two-prong test above. The determination of marriage formation must occur during the relationship or within one year following its termination.

ELEMENTS OF A COMMON LAW MARRIAGE

- THE ATTORNEY GENERAL SAYS:
- “A common-law marriage in Colorado is valid for all purposes, the same as a ceremonial marriage. Only death or divorce can terminate it. The common-law elements of a valid marriage are that the couples:
 - (1) Are free to contract a valid ceremonial marriage, i.e., they are not already married to someone else;
 - (2) Hold themselves out as husband and wife;
 - (3) Consent to the marriage;
 - (4) Live together; and
 - (5) Have the reputation in the community as being married.
- The single most important element under the common law was the mutual consent of a couple presently to be husband and wife. All the rest were considered evidence of this consent or exchange of promises. No time requirement exists other than the time necessary to establish these circumstances. When proof of common law marriage is required, such as by an insurance company, a signed affidavit can be presented.”

http://www.coloradoattorneygeneral.gov/initiatives/consumer_resource_guide/common_legal_questions#common_law

IMPORTANT CASES ON COMMON LAW MARRIAGE

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

FACTS:

- Lucero, was convicted of attempted robbery of the elderly and conspiracy to commit robbery of the elderly.
- He appealed, contending that the trial court had erred in receiving the testimony of Rosemary Trujillo, who claimed to be the defendant's common law wife. The defendant based his objection to the admission of such evidence upon the spousal testimony privilege in section 13-90-107(1)(a).
- The Colorado Court of Appeals held that, contrary to the trial court's ruling, the evidence established a common law marriage and that admission of Trujillo's testimony violated and was reversible error.
- The Colorado Supreme Court concluded that the trial court's ruling lacks sufficient detail to enable us to determine whether that court applied the correct standards in determining the existence of a common law marriage, and that the court of appeals erred in determining this issue as a matter of law on appeal.

The PEOPLE of the State of Colorado, Petitioner,

v.

Emilio J. LUCERO, Respondent.

747 P.2d 660 (1987)

THE OFFER OF PROOF:

- The offer of proof of the existence of a common law marriage consisted solely of the testimony of Rosemary Trujillo. She testified that she considered herself married to Lucero, and that the two of them held themselves out to friends as being married.
- She answered, "yes," to the question, "[a]nd do you know if [Lucero] agreed with your analysis that the two of you were married?"
- Trujillo also she and the defendant had lived together for about five years, from 1976 to 1981, and that one child, Emilio Trujillo, had been born to them.

The PEOPLE of the State of Colorado, Petitioner,

v.

Emilio J. LUCERO, Respondent.

747 P.2d 660 (1987)

TRIAL COURT RULING:

- The trial court denied the objection to the admission of Trujillo's testimony, finding that there was insufficient proof of a marital relationship.
- The defendant was subsequently convicted of attempted robbery of the elderly.

COLORADO COURT OF APPEALS:

- The court of appeals reversed the convictions and remanded the case for a new trial, holding that the uncontracted evidence established, as a matter of law, the existence of a common law marriage between Lucero and Trujillo.

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

COLORADO SUPREME COURT:

- “A common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship.”
- “Although language in some of our cases could be read as suggesting that mutual consent or agreement is the only essential element of a common law marriage, we have almost uniformly required that such consent or agreement be manifested by conduct that gives evidence of the mutual understanding of the parties.”
- “We affirm today that such conduct in a form of mutual public acknowledgment of the marital relationship is not only important evidence of the existence of mutual agreement but is essential to the establishment of a common law marriage.”
- “The reason for this requirement is to guard against fraudulent claims of common law marriage.”

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

COLORADO SUPREME COURT:

- “The very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist. The parties' understanding may be only tacitly expressed, and the difficulty of proof is readily apparent.”
- “We have recognized that "the agreement need not have been in words," ... and the issue then becomes what sort of evidence is sufficient to prove the agreement. We have stated that if the agreement is denied or cannot be shown, its existence may be inferred from evidence of cohabitation and general repute... In such cases, the conduct of the parties provides the truly reliable evidence of the nature of their understanding or agreement.”

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

COLORADO SUPREME COURT:

- “Our formulations of the requirement of conduct manifesting or confirming the parties' understanding or agreement have taken many forms.
 - See, e.g., *Graham v. Graham*, 130 Colo. at 227, 274 P.2d at 606 (to establish the agreement there must be evidence both of cohabitation and reputation);
 - *In re Estate of Danikas*, 76 Colo. 191, 194, 230 P. 608, 610 (1924) (illicit cohabitation will not support reputation as proof of marriage; reputation alone is not enough);
 - *Smith v. People*, 64 Colo. at 294, 170 P. at 960 (consent may be inferred from cohabitation and repute; cohabitation is "holding forth to the world by the manner of daily life, by conduct, demeanor, and habits, that the man and woman have agreed to take each other in marriage and to stand in the mutual relation of husband and wife.");
 - See *Taylor v. Taylor*, 10 Colo. App. at 305, 50 P. at 1049 (1897) (agreement may be presumed from evidence of cohabitation and repute; general reputation or repute means "the understanding among the neighbors and acquaintances with whom the parties associate in their daily life, that they are living together as husband and wife....")”

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

COLORADO SUPREME COURT:

- “The two factors that most clearly show an intention to be married are **cohabitation** and a general understanding **or reputation among persons in the community** in which the couple lives that the parties hold themselves out as husband and wife. (emphasis added)”
- “Specific behavior that may be considered includes:
 - Maintenance of joint banking and credit accounts;
 - Purchase and joint ownership of property;
 - The use of the man's surname by the woman;
 - The use of the man's surname by children born to the parties; and
 - The filing of joint tax returns.”

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

COLORADO SUPREME COURT:

- “However, there is no single form that any such evidence must take. Rather, any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred.”
- “A determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the trial court's discretion.”

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

IMPORTANT FOOTNOTES:

• ABSENCE OF HABIT AND REPUTE:

- [Footnote \[4\]](#) In *Peters v. Peters*, 73 Colo. 271, 215 P. 128 (1923), the court suggested that if there was evidence to support the marriage agreement or contract, evidence of habit and repute was not necessary. The decision stated, "[t]he habit and repute of marriage are not an essential of the legality of the relationship but merely evidence of an essential, i.e., consent." 73 Colo. at 274, 215 P. at 129. However, even in that case, we made reference to the requirements of *Taylor v. Taylor*, 10 Colo.App. at 305, 50 P. at 1049, that there be both a contract and consummation of that contract by cohabitation as husband and wife when we stated, "[a]dmitting the existence of the contract and its consummation, and the absence of habit and repute, the law will uphold the marriage relation." 73 Colo. at 274, 215 P. at 129. *See also Moffat Coal Co. v. Industrial Comm'n*, 108 Colo. 388, 118 P.2d 769 (1941) (relying on *Peters v. Peters* for the statement that habit and repute of marriage are not essential to the legality of the relationship); *Thimgan v. Mathews*, 74 Colo. 93, 219 P. 211 (1923) (citing *Peters v. Peters* for the proposition that proof of habit and repute is not needed if the contract is otherwise proved).

The PEOPLE of the State of Colorado, Petitioner,
v.
Emilio J. LUCERO, Respondent.
747 P.2d 660 (1987)

IMPORTANT FOOTNOTES:

- **BURDEN OF PROOF:**

- Footnote 6 “In Employer's Mutual Liability Insurance Co. of Wisconsin v. Industrial Comm'n, 124 Colo. 68, 73, 234 P.2d 901, 903 (1951), we noted that evidence concerning a common law marriage "should be clear, consistent and convincing." See also Peery v. Peery, 27 Colo.App. 533, 150 P. 329 (1915). This language was not chosen in order to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must present more than vague claims unsupported by competent evidence”

In re the MARRIAGE OF J.M.H.
143 P.3d 1116 (Colo.App. Div. 3 2006)

FACTS:

- In April 2002, Rouse and J.M.H. began living together.
- In April 2003, when J.M.H. was fifteen years old, they applied for a marriage license in Adams County with J.M.H.'s mother's consent.
- In February 2004, the Department filed a petition to declare the marriage invalid, asserting that J.M.H. was fifteen, that the application was not approved by a parent, that the Department had custody of J.M.H., and that Rouse was incarcerated and awaiting trial on a charge of sexual assault on a child, and that he was serving a sentence for escape and parole violation.
- Rouse responded by asserting that he and J.M.H. were legally married at common law and, in the alternative, that they had a valid ceremonial marriage because they had obtained a marriage license in Adams County.

In re the MARRIAGE OF J.M.H.
143 P.3d 1116 (Colo.App. Div. 3 2006)

- The trial court held that a person under the age of sixteen must obtain judicial approval for a valid common law or ceremonial marriage.
- Rouse appeals claiming that the trial court erred in holding that a person under the age of sixteen must seek judicial approval to be married, even if that marriage is at common law.
- Court of appeals agrees.

In re the MARRIAGE OF J.M.H.
143 P.3d 1116 (Colo.App. Div. 3 2006)

Court of Appeals holds:

- The Uniform Marriage Act (UMA), § 14-2-101, et seq., C.R.S. 2005, sets forth the rules and requirements for ceremonial marriages in Colorado.
- The UMA provides that "[n]othing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman." Section 14-2-104(3), C.R.S. 2005.
- Common law, not the UMA, governs the existence of a common law marriage. See *People v. Lucero*, 747 P.2d 660 (Colo. 1987); *In re Marriage of Phelps*, 74 P.3d 506 (Colo.App.2003).

In re the MARRIAGE OF J.M.H.
143 P.3d 1116 (Colo.App. Div. 3 2006)

Court of Appeals holds:

- Colorado appellate courts have not determined the age of consent for a valid common law marriage. Thus, for guidance, we look to the origins of common law in Colorado and decisions from other jurisdictions discussing the age of consent for common law marriage.
- Although courts acknowledge and respect the General Assembly's authority to modify or abrogate common law, such changes will not be recognized unless they are clearly expressed... Therefore, absent clear legislative intent, the common law prevails in any conflict with statutory law.
- Thus, in the absence of a statutory provision to the contrary, it appears that Colorado has adopted the common law age of consent for marriage as fourteen for a male and twelve for a female, which existed under English common law. Nevertheless, we need only hold here that a fifteen-year-old female may enter into a valid common law marriage.

Carter v. Firemen's Pension Fund of the City and County of Denver
634 P.2d 410 (Colo. 1981)

FACTS:

- Shirley A. Carter applied to the Firemen's Pension Fund for widow's benefits following the death of her common-law husband, fireman Merlin Carter.
- The parties stipulated that a valid common-law marriage existed.
- Carter's application was denied on the ground that their marriage was not "legally performed by a duly authorized person" as required by section 31-30-509, C.R.S.1973.
- Carter challenged the denial of pension benefits and the trial court rules that the statute is unconstitutional in that it distinguishes between common-law and statutory marriages.

Carter v. Firemen's Pension Fund of the City and County of Denver
634 P.2d 410 (Colo. 1981)

Colorado Supreme Court:

- The sole issue before this court is whether this provision of the firemen's pension statute is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
- Finds that the statute treats common-law spouses differently than spouses whose marriages have been solemnized.
- Applies rational basis test

Carter v. Firemen's Pension Fund of the City and County of Denver
634 P.2d 410 (Colo. 1981)

Colorado Supreme Court:

- The Fund asserts two legitimate state interests justify the distinction between common law and solemnized marriages:
 - It is easier to prove the existence of a marriage "legally performed by a duly authorized person" than it is to prove the existence of a common-law marriage thus the distinction serves the legitimate state interest of reducing the number of fraudulent claims which may be filed.
 - It protects a fireman's minor children by a prior marriage from a claim by a common-law spouse because the fireman must take the affirmative step of participating in a statutory marriage in order to divest his minor children by a prior marriage of their contingent interest in his pension.

Carter v. Firemen's Pension Fund of the City and County of Denver
634 P.2d 410 (Colo. 1981)

Colorado Supreme Court:

- Neither of the Fund's asserted justifications for the validity of this statutory requirement satisfies the rational basis test.
 - Administrative convenience alone cannot be deemed a sufficient rational basis to support an otherwise irrational distinction.
 - “The fact that a marriage created in one manner is easier to prove than a marriage created in another manner cannot alone justify the distinction contained in the statute. Because there are reasonable alternative means for determining the validity of a common-law marriage, administrative convenience alone cannot provide a rational basis for a statute which deprives a common-law spouse of pension benefits in all cases.”

Carter v. Firemen's Pension Fund of the City and County of Denver
634 P.2d 410 (Colo. 1981)

Colorado Supreme Court:

- “The Fund's contention that section 31-30-509, C.R.S.1973 (1980 Supp. to 1977 Repl. Vol. 12), protects the contingent rights of a fireman's minor children to the fireman's pension because it requires that a fireman take an affirmative step, i. e., participate in a statutory marriage, before the fireman may divest those minor children of their contingent right in the pension, misapprehends the nature of a common-law marriage.”
- “By the statutes of Colorado, marriage is declared to be a civil contract, and there is only one essential requirement to its validity between parties capable of contracting, viz., consent of the parties. * * * It follows, therefore, that a marriage contract between parties of contracting capacity, which possesses the one essential prerequisite, may be valid, although no provision of the statute as to its solemnization may have been followed or attempted. In other words, in this state a marriage simply by agreement of the parties, followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, may be valid and binding.' ”

What did the Common Law say about same-sex marriage?

DE SANTO v. BARNESLEY.

328 Pa.Super. 181 (Pa.Super. 1984)

Superior Court of Pennsylvania.

- “This case presents the novel issue of whether two persons of the same sex can contract a common law marriage. We hold that they cannot, as a matter of law.”
- “The issue of whether two persons of the same sex may contract a common law marriage has not been addressed in Pennsylvania, nor, to our knowledge, in any other jurisdiction.”
- “Other jurisdictions have considered whether statutory or ceremonial marriage can be entered into by same-sex couples, and have uniformly held that it cannot be.”
- “Marriage” presumably has the same meaning whether it is preceded by “common law” or “statutory”. Moreover, as will appear, the limits of common law marriage must be defined in light of the limits of statutory marriage.”
- Common law marriage cases speak in terms of establishing the “relationship of husband and wife.”
- We therefore conclude that up until now common law marriage has been regarded as a relationship that can be established only between two persons of opposite sex.

Common Law Marriage Post Marriage Equality

In Re: Estate of Kimberly M. Underwood, case number 2014-E0681-29,
in the Court of Common Pleas of Bucks County, Pennsylvania:

- Petitioner sought declaration that her nearly two-decade relationship with her deceased spouse constituted a common-law marriage in Pennsylvania.
- Despite being legally unable to marry, the two held a commitment ceremony in New Jersey in 2001 before nearly a hundred of their friends and relatives.
- They moved together to Bucks County and considered themselves to be a married couple in every way.
- Those familiar with Ms. Maurer and Ms. Underwood's relationship, including their family and friends, considered them to be married.

Common Law Marriage Post Marriage Equality

- In Re: Estate of Kimberly M. Underwood, case number 2014-E0681-29, in the Court of Common Pleas of Bucks County, Pennsylvania:
 - In November 2013, Ms. Underwood passed away after a long battle with congenital heart disease.
 - Since her death, several third parties refused to recognize the petitioner as Underwood's spouse. As a result, she was denied spousal benefits and required to pay inheritance taxes to the state.
 - Pennsylvania judge ruled on July 29, 2015, that a same-sex couple could be declared married under common law despite the fact that one of the partners died prior to a 2014 federal court ruling that struck down the state's ban on gay marriage.

In Re: Estate of Kimberly M. Underwood, case number 2014-E0681-29,
in the Court of Common Pleas of Bucks County, Pennsylvania:

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE: ESTATE OF KIMBERLY M. UNDERWOOD
: No. 2014-E0681-29

DECLARATION OF THE VALIDITY OF MARRIAGE

AND NOW, this 29th day of July, 2015, upon consideration of the Verified Declaratory Judgment Complaint and Amended Petition for Declaration of Common Law Marriage filed in this matter, the supporting affidavits filed therewith, and Petitioner's Motion to Grant Relief Requested outlining notice to all interested parties and representing that no objections or oppositions have been filed by the interested parties so served, it is DECLARED and DECREED that the relief requested in the Petition is GRANTED. This Court hereby declares that Sabrina L. Maurer and Kimberly M. Underwood entered into a valid and enforceable marriage, under Pennsylvania common law, on September 2, 2001 and remained married under the laws of the Commonwealth of Pennsylvania until the time of Kimberly M. Underwood's death on November 20, 2013. Their marriage is valid and enforceable, and they are entitled to all rights and privileges of validly licensed, married spouses in all respects under the laws of the Commonwealth of Pennsylvania.

BY THE COURT,



You be the Judge

- In Re Estate of Stella Marie Powell
 - Texas case
 - Ms. Powell died intestate in June 2014
 - Siblings filed heirship proceeding
 - Sonemaly Phrasavath contested the application for heirship claiming she was Ms. Powell's Common Law wife from 2008
 - Cross motions for summary judgment filed 8/25/15
 - State of Texas intervened and filed it's own MSJ

In Re Estate of Stella Marie Powell Siblings' Motion for Summary Judgment

- Siblings Argument:
 - Cannot establish the “holding out” element of common law marriage
 - Claim “holding out” is essential element to Common Law Marriage
 - “A couple cannot have a reputation in the community as being married when, at that time, that public status is not legally available to them or acknowledged”
 - Claim “she never attempted to enter a legally binding marriage during her lifetime”
 - Recognizing the common law marriage would “drastically alter the substantive rights of the parties involved”
 - Claim “there was no manifest intent to seek legal recognition of their marriage”
 - “Patently unfair to apply a property regime to decedent’s estate that the decedent, while alive could not have fathomed would apply to her”

In Re Estate of Stella Marie Powell Siblings' Motion for Summary Judgment

- Siblings Argument (Con't):
 - Allowing retroactive common law marriages would lead to unintended consequences in probate
 - Decedent's intent is the most important factor
 - "retroactively recognized common law marriage which was legally impossible while the decedent was alive does not look to the decedent's intent."
 - "If one of the parties was not alive when same-sex marriage was legally recognized in Texas, it would be impossible to hold the parties to their true intent after the fact"

In Re Estate of Stella Marie Powell Sonemaly Prasavath's Motion

- Sonemaly Argument:
 - Couple met in 2006.
 - In April 2007, traveled to Hawaii and Sonemaly proposed.
 - In May 2007, couple hosted an engagement party with family and friends.
 - Shortly thereafter began living together in Austin.
 - In March 2008, couple has marriage ceremony at Chapel Delciea in Driftwood Texas.
 - Zen Priest officiated the marriage
 - Attended by small group of friends and family

In Re Estate of Stella Marie Powell

Sonemaly Prasavath's Motion

- Sonemaly Argument (con't):
 - In March 2008, couple signed declarations of domestic partnership declaring:
 - Living in intimate and committed relationship
 - Residing together
 - Jointly financially responsible for each other's basic living expenses
 - In October 2013, Ms. Powell was diagnosed with cancer
 - Sonemaly acted as medical power of attorney
 - Cared for her at their home
 - Accompanied her to treatments
 - In June 2014, Ms. Powell dies.

In Re Estate of Stella Marie Powell

Sonemaly Prasavath's Motion

- Sonemaly Argument (con't):
 - Common law marriage in Texas requires:
 - An agreement between the parties to be married;
 - The parties live together as spouses; and
 - The parties represented to others that they were married
 - Clear from facts that elements met = common law marriage

- Discuss