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Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage

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UNTYING THE KNOT: THE PROPRIETY OF SOUTH CAROLINA'S RECOGNITION OF COMMON LAW MARRIAGE

I. INTRODUCTION

The recognition of marriage is a threshold determination in a variety of legal contexts.[1] A court cannot address an alleged spouse's claim for property distribution in divorce or probate proceedings without first determining whether a marriage exists. Nor can the Workers' Compensation Commission or Social Security Administration address the substantive issues of awarding spousal benefits without a preliminary showing of marriage. Seemingly, this threshold determination would be a simple barrier to overcome since a claimant need only produce a marriage certificate to resolve the issue. However, in jurisdictions that recognize the validity of a marriage despite a couple's noncompliance with statutory ceremony and license requirements, the inquiry is more complicated. These jurisdictions allow claimants the opportunity to convince the trier of fact that a common law marriage exists, thereby interjecting an intensely factual dispute into situations where the determination of marital status would otherwise seem perfunctory. The contested issue of marital status can lead to litigation in contexts such as probate proceedings or administrative determinations.

South Carolina is among a dwindling minority of jurisdictions that recognize common law marriage.[2] During the 2005 to 2006 South Carolina General Assembly session, several representatives sponsored the introduction of House Bill 3588, which proposed the abolition of common law marriage in South Carolina.[3] The bill passed in the House of Representatives but was never voted on in the Senate.[4] Within the past ten years, similar bills have been introduced in the South Carolina House of Representatives on seven different

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1. John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 399 (1999).

2. Currently, eleven states (Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, and Utah) and the District of Columbia recognize common law marriage. *See* TEX. FAM. CODE ANN. § 2.401(a) (Vernon 2006); UTAH CODE ANN. § 30-1-4.5 (1998 & Supp. 2006); Dixon v. Certainteed Corp., 915 F. Supp. 1158, 1160 (D. Kan. 1996); Stringer v. Stringer, 689 So. 2d 194, 195 (Ala. Civ. App. 1997); *In re* Marriage of Cargill & Rollins, 843 P.2d 1335, 1339 (Colo. 1993); Coates v. Watts, 622 A.2d 25, 29 (D.C. 1993); Conklin v. MacMillan Oil Co., 557 N.W.2d 102, 105 (Iowa Ct. App. 1996); *In re* Estate of Alcorn, 868 P.2d 629, 630 (Mont. 1994); *In re* Estate of Buttrick, 597 A.2d 74, 76 (N.H. 1991) (recognizing common law marriage for inheritance purposes only); *In re* Estate of Carroll, 749 P.2d 571, 574 (Okla. Civ. App. 1987); Petrarca v. Castrovillari, 448 A.2d 1286, 1289 (R.I. 1982); Barker v. Baker, 330 S.C. 361, 367, 499 S.E.2d 503, 506 (Ct. App. 1998).

3. H.B. 3588, 116th Gen. Assem., I House Journal 1057 (S.C. 2005).

4. H.B. 3588, 116th Gen. Assem., III House Journal 2738–41 (S.C. 2005); H.B. 3588, South Carolina Legislature Online, http://www.scstatehouse.net.

occasions.[5] Thus, it is likely that the General Assembly will continue the common law marriage debate.

Acknowledging the increase in cohabitation rates throughout the United States[6] and the historical circumstances originally addressed by recognizing common law marriage, the question arises whether South Carolina should continue to recognize the doctrine in contemporary society. The answer requires a cost-benefit analysis, weighing the interests of those protected by the common law marriage doctrine against the impact of the doctrine on couples' expectation interests, on judicial economy, and on third party reliance on the certainty of marriage formalities. This Comment assesses these factors in determining whether South Carolina should indeed abandon the doctrine of common law marriage. Part II identifies the elements necessary to establish a common law marriage in South Carolina. Part III summarizes the historical development of common law marriage in England, the United States, and South Carolina. Part IV explores why most states have abolished the doctrine and addresses the impact this abolition has had on couples traditionally protected by common law marriage. Part V assesses the various alternatives to common law marriage, and Part VI examines other areas of law where legal relationships are imposed despite a failure to follow legal formalities. Part VII suggests that South Carolina should abrogate the common law marriage doctrine to protect expectation interests, promote judicial economy, and provide a bright-line rule for unmarried cohabitants and third parties regarding their legal rights.

II. ELEMENTS OF COMMON LAW MARRIAGE IN SOUTH CAROLINA

South Carolina generally requires couples to obtain a marriage license for their marriage to be valid.[7] However, South Carolina has codified the common law marriage doctrine in section 20-1-360 of the South Carolina Code, which states that the failure to obtain a marriage license would not render a marriage illegal.[8] South Carolina courts set forth two elements of common law marriage.[9]

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5. *See* H.B. 4597, 115th Gen. Assem., I House Journal 670 (S.C. 2004); H.B. 3625, 115th Gen. Assem., I House Journal 924–25 (S.C. 2003); H.B. 3774, 114th Gen. Assem., II House Journal 1670–71 (S.C. 2001); H.B. 3452, 114th Gen. Assem., I House Journal 677–78 (S.C. 2001); H.B. 3668, 113th Gen. Assem., I House Journal 986 (S.C. 1999); H.B. 3656, 113th Gen. Assem., I House Journal 953–54 (S.C. 1999); H.B. 4410, 113th Gen. Assem., I House Journal 105 (S.C. 1998). Each bill proposed to abolish common law marriage in South Carolina; however, each bill was not enacted.

6. The 2000 Census identified 5.5 million couples in the United States who lived together but were not married. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. This figure was an increase from the 3.2 million unmarried couples living together in 1990. *Id.* In South Carolina, 8.3% of couple-households were unmarried cohabitants. *Id.* at 4.

7. S.C. CODE ANN. § 20-1-210 (1976 & Supp. 2006) ("It shall be unlawful for any persons to contract matrimony within this State without first procuring a license . . . .").

8. S.C. CODE ANN. § 20-1-360 (1976 & Supp. 2006) ("Nothing contained in this article shall render illegal any marriage contracted without the issuance of a license.").

9. *See* Kirby v. Kirby, 270 S.C. 137, 140–42, 241 S.E.2d 415, 416–17 (1978).

First, the parties must have the capacity to marry,[10] and second, the facts and circumstances must show an intention on the part of both parties to enter into a marriage contract.[11] This intention may be "evidenced by a public and unequivocal declaration of the parties," or may be inferred from the parties having lived together as husband and wife and having acquired a general reputation as a married couple.[12] Most common law marriage jurisdictions impose a third requirement on those seeking to establish a common law marriage: the couple must "hold themselves out" to the community as husband and wife.[13] South Carolina case law, however, does not require couples to hold themselves out as a married couple as a separate third requirement, but instead permits claimants to use community recognition and reputation to show the intent to be married.[14] In addition, the party asserting common law marriage in South Carolina must prove the existence of the marriage by a preponderance of the evidence.[15]

Like any marriage, common law marriage may exist only between parties with the capacity to enter into a marital contract.[16] Thus, even if the parties mutually intend to be married, an impediment to the marriage prevents the formation of a common law marriage.[17] South Carolina statutorily imposes certain capacity requirements by preventing mentally incompetent persons,[18] persons of the same sex,[19] and persons under the age of sixteen from contracting to marry.[20] If a party enters into a common law marriage while an impediment to marriage exists and later that impediment is removed, capacity to marry is reinstated; however, the relationship does not automatically become a common law marriage.[21] Rather, the relationship remains non-marital until the parties enter into a new mutual agreement.[22] They can form this new agreement through

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10. *See* Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005); *see also* Johns v. Johns, 309 S.C. 199, 201–02, 420 S.E.2d 856, 858 (Ct. App. 1992) (finding a common law marriage void at its inception because the parties were incapable of marrying due to an impediment).

11. *See Callen*, 365 S.C. at 624, 620 S.E.2d at 62 ("The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent.").

12. *See Kirby*, 270 S.C. at 140, 241 S.E.2d at 416.

13. The majority of jurisdictions recognizing common law marriage in the United States require three elements: "(1) capacity to marry; (2) a present marriage agreement; and (3) a holding out of each other as husband and wife to the public." Mary D. Feighny, *Common Law Marriage: Civil Contract or "Carnal Commerce,"* J. KAN. B. ASS'N, April 2001, at 20, 21 (quoting *In re* Pace, 989 P.2d 297, 298 (Kan. Ct. App. 1999)).

14. *See* Barker v. Baker, 330 S.C. 361, 368, 499 S.E.2d 503, 507 (Ct. App. 1998).

15. *See Kirby*, 270 S.C. at 140, 241 S.E.2d at 416 (citing *Ex parte* Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937) (circuit order)).

16. *See Callen*, 365 S.C. at 624, 620 S.E.2d at 62.

17. *Id.*

18. S.C. CODE ANN. § 20-1-10 (1976 & Supp. 2006).

19. S.C. CODE ANN. § 20-1-15 (Supp. 2006).

20. S.C. CODE ANN. § 20-1-100 (Supp. 2006).

21. *Callen*, 365 S.C. at 624, 620 S.E.2d at 62.

22. *Id.* (quoting Kirby v. Kirby, 270 S.C. 137, 141, 241 S.E.2d 415, 416 (1978)).

civil ceremony or by recognizing their illicit relation and entering into a new marital agreement.[23]

If the parties have the capacity to enter into a marriage, South Carolina courts have unanimously held that a common law marriage is formed when the "two parties have a present intent to enter into a marriage contract."[24] In *Kirby*, the South Carolina Supreme Court noted, "The difference between marriage and concubinage . . . rests in the intent of the cohabiting parties; the physical and temporal accompaniments of the cohabitation may be the same in both cases, but the intent in the two cases is widely apart always."[25] The court identified two ways to demonstrate this intent: the parties can make a public and unequivocal declaration of their intent to be married, or they can show evidence of the circumstances surrounding their situation.[26] Yet because a party's intent is rarely formally and publicly declared, direct evidence of this intent is generally not available.[27] Therefore, South Carolina allows circumstantial evidence of a couple's intent to provide a rebuttable presumption of common law marriage.[28] The typical circumstantial evidence parties rely upon to establish a common law marriage includes evidence showing the parties have cohabited for an extended period of time and have held themselves out to the public as husband and wife.[29] Therefore, if a claimant "presents proof of apparently matrimonial cohabitation and long-term social acceptance of the couple as married, a presumption arises that the couple entered into a common-law marriage."[30] If such facts are proven

23. *Id.* (quoting *Kirby*, 270 S.C. at 141, 241 S.E.2d at 416).

24. Tarnowski v. Lieberman, 348 S.C. 616, 619, 560 S.E.2d 438, 440 (Ct. App. 2002) (citing Barker v. Baker, 330 S.C. 361, 370, 499 S.E.2d 503, 208 (Ct. App. 1998)); *see also* Johnson v. Johnson, 235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960) ("It is essential to a common law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife. Cohabitation without such an agreement does not constitute marriage."); Rodgers v. Herron, 226 S.C. 317, 335, 85 S.E.2d 104, 113 (1954) (citing Tedder v. Tedder, 108 S.C. 271, 276, 94 S.E. 19, 20 (1917)) (indicating a common law marriage "depends upon facts and circumstances evidencing a mutual agreement to live together as husband and wife, and not in concubinage").

25. *Kirby*, 270 S.C. at 140, 241 S.E.2d at 416.

26. *See id.*

27. *Barker*, 330 S.C. at 367, 499 S.E.2d at 507.

28. *Id.* at 368–69, 499 S.E.2d at 507.

29. *Id.* at 368, 499 S.E.2d at 507; *see, e.g.*, *Kirby*, 270 S.C. at 141, 241 S.E.2d at 417 (1978) (finding a common law marriage where the community recognized the parties as husband and wife, the parties appeared as husband and wife on their children's birth certificates, and the parties filed joint tax returns); Campbell v. Christian, 235 S.C. 102, 108, 110 S.E.2d 1, 4 (1959) (finding a common law marriage where the parties resided together for twenty-four years, the community recognized the couple as husband and wife, and the public authority declared the children born to the parties during this time were in wedlock); *cf.* Cathcart v. Cathcart, 307 S.C. 322, 324, 414 S.E.2d 811, 812 (Ct. App. 1992) (finding no common law marriage where the parties testified they did not intend to be married, "did not refer to each other as husband and wife," "did not file joint tax returns," and did not have the same mailing address).

30. *Barker*, 330 S.C. at 368–69, 499 S.E.2d at 507.

by a preponderance of the evidence, South Carolina courts will recognize a valid common law marriage.[31]

III. HISTORY OF COMMON LAW MARRIAGE

A. The European and English Origins

Common law marriage enjoys a deep, rich tradition developed "in the informal forms of marriage common in Europe prior to the Reformation."[32] Marriage was initially treated as a private matter between families; it was not a matter for state involvement.[33] Thus, while noble or wealthy families relied on formal marriage in order to protect their economic interests, the majority of the population relied on informal unions.[34] Generally, two persons would do little more than indicate their intention to be married and then begin to live together as husband and wife.[35]

The early Roman Catholic Church accepted the idea that a man and woman could form their own agreement to be married.[36] However, in 1563, the Council of Trent passed a decree requiring marriages to be performed in the presence of a priest and other witnesses.[37] Despite this change in Roman Catholic canon law, England continued to recognize informal marriages until 1753 when Parliament passed Lord Hardwicke's Act.[38] The Act abolished common law marriage and instituted a requirement that Church of England clergy perform marriage cermonies in order for them to be valid.[39]

B. Common Law Marriage in the Early American Settlements

Early American colonists brought the English common law to the colonies, but from the beginning, the recognition of common law marriage was mixed.[40] Some colonies enacted legislation regulating marriage and interpreted the legislation as an abrogation of common law marriage.[41] Others recognized common law marriage as valid, having brought the tradition to the American settlements prior to Lord Hardwicke's Act.[42] In 1809, a New York court was the

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31. *Id.* at 369, 499 S.E.2d at 507 (citing *Kirby*, 270 S.C. at 141, 241 S.E.2d at 416; Yarbrough v. Yarbrough, 280 S.C. 546, 551, 314 S.E.2d 16, 18–19 (Ct. App. 1984)).

32. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 718 (1996).

33. *Id.*

34. *Id.*

35. *Id.*

36. Crawley, *supra* note 1, at 401.

37. Bowman, *supra* note 32, at 718–19.

38. Note, *Common Law Marriage—A Legal Anachronism*, 32 IND. L.J. 99, 100 (1956).

39. Bowman, *supra* note 32, at 719.

40. *Id.*

41. *Id.*

42. *Id.* at 719–20.

first in the country to affirm common law marriage in *Fenton v. Reed*,[43] where the court held that formal marriage requirements were unnecessary to create a valid marriage and that a present intent to be married established a valid marriage just as it had under the English common law.[44] Thus, even early in American history, parties could enter into marriage either by adherence to statutory regulations or through common law marriage.[45]

After the initial recognition of common law marriage in the American colonies, the doctrine spread throughout the territories for various reasons. The simplest explanation is based on the notion of America as an expanding frontier society where "[t]he sparse settlements, the long distance to places of record, bad roads, difficulties of travel, made access to officers or ministers difficult."[46] During this time, "marriage was a necessity as few women had independent means of support, and the physical hardships of frontier life made survival easier for married couples than for single persons."[47] Thus, the difficulty of entering into a formal marriage solemnization and the benefits that married life provided in the rough frontier promoted common law marriages during the early settlement of the United States.[48]

While the common law marriage tradition was well suited to the frontier conditions, other factors also contributed to its recognition in early America. Most notable was the desire to protect women, and the family unit in general, by allowing financially dependent women to look to the family for financial support rather than to burden the towns.[49] Common law marriage also legitimized the children of such marriages and promoted marriage by converting what could be deemed "subversive relationships" into marriages that satisfied societal norms.[50] In an early South Carolina appellate case dealing with a claim of common law marriage, the court noted that "in cases of this character the Court will, if possible, give such a construction to the acts of the parties as will save the reputation of the woman and free the children from the brand of bastardy."[51] In addition, "the American resistance to mandatory marriage formalities [could also

43. 4 Johns. 52 (N.Y. 1809).

44. *Id.* at 53–54. The United States Supreme Court confirmed *Fenton*'s reasoning nearly seventy years later in *Meister v. Moore* and noted that state marriage regulations were "merely directory" unless the state's legislature expressly indicated that all marriages not meeting the proscribed statutory requirements were invalid. Meister v. Moore, 96 U.S. 76, 78–79 (1877).

45. Bowman, *supra* note 32, at 721–22.

46. McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934).

47. Note, *supra* note 38, at 101–02.

48. Bowman, *supra* note 32, at 722–23.

49. *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 968–69 (2000).

50. *Id.* at 969.

51. Lucken v. Wichman, 5 S.C. 411, 414 (1874).

be seen] as a manifestation of our individualist ethic and notions of privacy."[52]

C. *Origins of Common Law Marriage in South Carolina*

As one of the original colonies, South Carolina adopted common law marriage based upon a combination of the English common law,[53] and an interpretation of its own marriage statute as merely directory.[54] *Fryer v. Fryer*[55] appears to be one of the first South Carolina cases of record addressing the issue of common law marriage. As the court in *Fryer* noted,

> Marriage [in South Carolina], so far as the law is concerned, has ever been regarded as a mere civil contract. Our law prescribes no ceremony. It requires nothing but the agreement of the parties, with an intention that *that agreement* shall, *per se*, constitute the marriage. They may express the agreement by parol, they may signify it by whatever ceremony their whim, or their taste, or their religious belief, may select: it is the agreement itself, and not the form in which it is couched, which constitutes the contract.[56]

More than one hundred years later, in *State v. Ward*,[57] the supreme court agreed that statutes prescribing license and ceremonial requirements for the solemnization of marriage are merely directory, and failure to adhere to statutory marriage requirements does "not render invalid a marriage entered into according to the common law."[58]

South Carolina courts have since applied the common law marriage doctrine in a variety of contexts, including probate claims,[59] divorce claims,[60] and claims

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52. Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1848 (1987) (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 69–78 (1985)).

53. *See* Fenton v. Reed, 4 Johns. 52 (N.Y. 1809).

54. Bowman, *supra* note 32, at 722.

55. 9 S.C. Eq. (Rich. Cas.) 85 (1832).

56. *Id.* at 92 (holding the widow of decedent had not previously entered into a common law marriage, thus her marriage to decedent was valid and the inheritance rights set forth in decedent's will could not be contested by children from decedent's prior marriage).

57. 204 S.C. 210, 28 S.E.2d 785 (1944).

58. *Id.* at 214–15, 28 S.E.2d at 786–87.

59. *See In re* Estate of Greenfield, 245 S.C. 595, 604, 141 S.E.2d 916, 920 (1965) (appointing decedent's alleged widow as the administratrix of his estate after finding a common law marriage existed between the couple); Campbell v. Christian, 235 S.C. 102, 109, 110 S.E.2d 1, 5 (1959) (finding decedent had previously entered a common law marriage and thus his subsequent marriage to the claimant was invalid).

60. *See* Bochette v. Bochette, 300 S.C. 109, 110, 386 S.E.2d 475, 476 (Ct. App. 1989) (determining a common law marriage existed between the parties and upholding the lower court's contempt order for husband's failure to pay alimony); Kirby v. Kirby, 270 S.C. 137, 142, 241 S.E.2d 415, 417 (1978) (finding a common law marriage existed between the parties and thus denying

for government benefits.[61] In *Jeanes v. Jeanes*,[62] Justice Littlejohn noted in his concurring opinion that the reasoning behind South Carolina's recognition of common law marriage was "to legitimat[e] innocent children and adjust property rights between the parties who treated each other the same as husband and wife."[63] In addition, South Carolina's decision to grant a presumption in favor of marriage when cohabitation appears to be matrimonial[64] indicates the state's desire to promote legitimate, rather than "subversive," relationships.[65]

IV. THE ABOLITION OF COMMON LAW MARRIAGE IN MOST U.S. JURISDICTIONS

Beginning in the late nineteenth century, many jurisdictions that previously recognized common law marriage began to abolish the doctrine.[66] This rejection of common law marriage occurred for a number of reasons, including socioeconomic trends related to urbanization and industrialization,[67] concerns about fraud[68] and the accuracy of land titles,[69] protection of family and the institution of marriage,[70] racism,[71] and concerns about government benefits.[72]

From the late nineteenth to the mid-twentieth century, the United States experienced population growth and increased urbanization.[73] The previously agrarian economy experienced a dramatic transformation with the arrival of the industrial age.[74] This growth and development obviated the frontier conditions that originally made common law marriage necessary in many jurisdictions.[75]

In addition, the new American economy resulted in an accumulation of wealth in private hands and likely "exacerbated the concern of influential people with the protection of inheritance within the family and the transmission of wealth to legitimate heirs."[76] Legislatures and judiciaries were motivated by the

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respondent's request for an equitable interest in the appellant's property).

61. *See* Mincey v. Celebrezze, 249 F. Supp. 421, 422–23 (D.S.C. 1966) (holding that claimant was entitled to social security benefits on the basis of the decedent's earnings because a common law marriage existed between the couple); Byers v. Mount Vernon Mills, Inc., 268 S.C. 68, 70–71, 231 S.E.2d 699, 700–01 (1977) (finding appellant was not entitled to workers' compensation benefits where no proof of a common law marriage existed between the appellant and deceased employee).

62. 255 S.C. 161, 177 S.E.2d 537 (1970).

63. *Id.* at 168–69, 177 S.E.2d 540–41 (Littlejohn, J., concurring).

64. *Id.* at 166, 177 S.E.2d at 539.

65. *See* Lucken v. Wichman, 5 S.C. 411, 414 (1873) (noting how the court will, if possible, find a common law marriage in order to save the reputation of the woman and her children).

66. *See* Bowman, *supra* note 32, at 731.

67. *Id.* at 731–32.

68. *Id.* at 733.

69. *Id.* at 735.

70. *Id.* at 736.

71. *Id.* at 738.

72. *Id.* at 741.

73. *Id.* at 732.

74. *Id.*

75. *Id.*

76. *Id.* at 733.

fear of fraudulent claims to abolish common law marriage; they saw the doctrine as encouraging perjury and fraud by unmarried cohabitants who hoped to gain the financial benefits of marriage.[77]

Concern also grew over the perception that "[l]and titles [we]re jeopardized by unrecorded marriages about which the owner could not know."[78] For example, real estate investors feared that land titles could be called into question if "an unknown and unrecorded alliance," such as that allowed by common law marriage, could be asserted.[79] Thus, fear that title to property might be subject to a judicial determination of whether a claimant's ancestor's marriage was valid also weighed in favor of abolishing the common law marriage doctrine.[80]

Another factor influencing the abolition of common law marriage was the importance of protecting the traditional notions of marriage and family.[81] Some courts and legislatures felt the doctrine weakened "the institution of formal marriage by attacking its sanctity and lending some of its benefits to those who cohabited without the approval of the state."[82] A cultural shift toward sexual liberation in the 1920s caused a perception that the marital institution might be vulnerable; this perception was revitalized in the 1960s when young people adopted novel cohabitation practices during the era's sexual revolution.[83] Because of these lifestyle changes, courts and legislatures began to worry that common law marriage was eroding the family structure by providing unmarried cohabitants with the same legal rights enjoyed by partners in a conventional marriage.[84]

Racism also played a role in the abolition of common law marriage.[85] Following emancipation and the adoption of the post-Civil War amendments, many states sought to limit African-Americans' right to marry by preventing interracial marriages.[86] Abolishing common law marriage helped achieve this goal.[87] In addition, sociological and anthropological literature portrayed "informal marriage []as an uncivilized custom, common only among African Americans and lower-class groups."[88] The association of common law marriage in the 1940s and 1950s with segments of the population that were widely perceived as inferior weighed further in favor of the abolition of the doctrine.[89]

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77. *See id.* at 735; Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 98–99 (1960).

78. Note, *supra* note 34, at 108–09.

79. *Id.* at 109 n.44 (citing Fred S. Hall, *Common Law Marriage in New York State*, 30 COLUM. L. REV. 1, 11 (1930)).

80. Bowman, *supra* note 32, at 736.

81. *Id.*

82. *Id.*

83. *Id.* at 743–44.

84. *Id.* at 744.

85. *Id.* at 737.

86. *Id.* at 738–39.

87. *See, e.g., id.*

88. *Id.* at 745.

89. *Id.* at 745–46.

Finally, an effort to prevent fraud and promote efficiency in the administration of government benefit programs, such as social security and workers' compensation, also spurred the abolition of common law marriage.[90] While some felt that new government agencies could adequately apply the state standards for common law marriage to adjudicate administrative cases, others argued that applying state law standards to determine whether a common law marriage existed was unduly burdensome for agencies and advocated for the abolition of the doctrine.[91]

All of these elements, from social factors like urbanization and racism to judicial and administrative concerns about fraud and efficiency, influenced courts and legislatures of the nineteenth and twentieth centuries as they decided whether to retain or abolish the common law marriage doctrine. As of 2006, only eleven states and the District of Columbia recognized common law marriage,[92] indicating that criticism of the doctrine resulted in its widespread abrogation. In order to determine the continued viability of the common law marriage in contemporary society, the South Carolina legislature should analyze the historical circumstances which led to the recognition of common law marriage, as well as the factors that influenced the doctrine's abolition across the country.

Historical circumstances that once promoted common law marriage, such as frontier conditions, no longer exist.[93] The development of a national infrastructure for transportation and communication has essentially eliminated the practical obstacles to fulfilling the statutory requirements for valid formal marriages.[94] Thus, it is logical for those jurisdictions that base their recognition of common law marriage on the frontier rationale to abolish the doctrine.[95] Yet jurisdictions also recognized common law marriage as a safeguard for the role of families, particularly in legitimizing children born from such relationships, and also in providing financial security to women in common law marriages.[96] The abolition of the doctrine indicates that the new concerns over fraud, protection of the institution of formal marriage, and the desire for certainty came to outweigh these familial interests.

Many of the concerns that led to the demise common law marriage may have been based on faulty reasoning or may no longer be relevant in contemporary society. For example, the argument in favor of abolishing common law marriage to protect the traditional notions of marriage and family is insignificant now that cohabitation and alternative family models have become

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90. *Id.* at 746.

91. *Id.* at 746–47.

92. *See supra* note 1.

93. Bowman, *supra* note 32, at 750.

94. *See* Bowman, *supra* note 32, at 750; Graham Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 ST. LOUIS U. L.J. 30, 48 (1960).

95. Bowman, *supra* note 32, at 750.

96. Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 543 (2006); *see* Bowman, *supra* note 32, at 737.

common and acceptable. In fact, some scholars argue that abolishing common law marriage actually harms the institution of formal marriage "by failing to honor the commitments and responsibilities undertaken by the parties."[97] Also, the racist motivations for abolishing common law marriage during the nineteenth and early twentieth centuries are not valid reasons for abrogating the doctrine today.[98] In addition, though the fear of fraudulent claims may have been a legitimate one, and despite the perception that fraud was a widespread problem, there is no record of problems arising from fraud perpetrated on courts applying the common law marriage doctrine.[99] In reality, the high burden of proof imposed on a claimant alleging common law marriage successfully sorted fraudulent claims from legitimate ones.[100] If courts continue to require objective evidence demonstrating the parties intended to be married, then "there is no greater danger of fraud on the court than in the trial of any other question of fact."[101]

The arguments favoring the abolition of common law marriage based on administrative and judicial efficiency were the strongest and remain so today.[102] Essentially, the efficiency argument "can be evaluated only by asking whether these concerns are outweighed by values that may favor the retention of common law marriage despite its costs."[103] Relatively little is known about the costs imposed by common law marriage due to a lack of empirical study on the topic. However, in the past fifty years, South Carolina appellate courts have addressed issues pertaining to the establishment of a common law marriage in at least twenty-seven cases.[104] This number of cases does not include any of the

97. Bowman, *supra* note 32, at 737 (citing HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 59–62 (2d ed. 1998)).

98. *Id.* at 751.

99. *Id.* at 741–42.

100. Crawley, *supra* note 1, at 424.

101. Kandoian, *supra* note 52, at 1851 (citing CLARK, *supra* note 99, at 57–58).

102. Bowman, *supra* note 32, at 752.

103. *Id.* at 753.

104. This number includes all South Carolina state appellate cases of record from 1957 through 2006 that either deal with the issue of whether a common law marriage existed or refer to an earlier determination of common law marriage—regardless of whether the common law marriage is being used to establish a claim of right or is being used as a defense against persons attacking the validity of the marriage. *See* Thomas v. McGriff, 368 S.C. 485, 629 S.E.2d 359 (2006); Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005); Christy v. Christy, 354 S.C. 203, 580 S.E.2d 444 (2003); Kirby v. Kirby, 270 S.C. 137, 241 S.E.2d 415 (1978); Byers v. Mount Vernon Mills, Inc., 268 S.C. 68, 231 S.E.2d 699 (1977); Rogers v. Rogers, 260 S.C. 613, 197 S.E.2d 921 (1973); Jeanes v. Jeanes, 255 S.C. 161, 177 S.E.2d 537 (1970); *In re* Estate of Greenfield, 245 S.C. 595, 141 S.E.2d 916 (1965); Mitchell v. Smyser, 236 S.C. 332, 114 S.E.2d 226 (1960); Johnson v. Johnson, 235 S.C. 542, 112 S.E.2d 647 (1960); Campbell v. Christian, 235 S.C. 102, 110 S.E.2d 1 (1959); Pirri v. Pirri, 369 S.C. 258, 631 S.E.2d 279 (Ct. App. 2006); Lukich v. Lukich, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); Miles v. Miles, 355 S.C. 511, 586 S.E.2d 136 (Ct. App. 2003); Tipton v. Tipton, 351 S.C. 456, 570 S.E.2d 195 (Ct. App. 2002); Tarnowski v. Lieberman, 348 S.C. 616, 560 S.E.2d 438 (Ct. App. 2002); Barker v. Baker, 330 S.C. 361, 499 S.E.2d 503 (Ct. App. 1998); Owens v. Owens, 320 S.C. 543, 466 S.E.2d 373 (Ct. App. 1996); Hallums v. Bowens, 318 S.C. 1, 428 S.E.2d 894 (Ct. App. 1993); Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992); Cathcart v. Cathcart, 307 S.C. 322, 414 S.E.2d 811 (Ct. App. 1992);

claims resolved by administrative boards, family courts, or probate courts, nor does it tell anything about the number of claims brought each year that are settled prior to litigation.

Despite the lack of empirical information regarding the number of common law marriage claims brought in South Carolina each year, it is evident from the number of claims reaching the appellate level that the common law marriage doctrine imposes costs on the South Carolina judicial system. To determine if these costs are justified, they must be balanced against the impact that the abolition of common law marriage would create in the state. Cynthia Grant Bowman argues that the nonrecognition of common law marriage "in fact leaves one party, usually the woman, without important forms of economic protection—pensions, Social Security survivors' benefits, alimony, or other property rights—and may allow the other party, usually the man, to walk away from a committed relationship with the fruits of their common labor."[105] Bowman concludes:

> [T]he impact of abolishing common law marriage falls most heavily on some of the most vulnerable persons in our society: women who have been widowed or abandoned or who have lost their husbands to industrial accidents or other types of accidents; victims of domestic violence; and, most especially, those who are poor and not well educated.[106]

Bowman makes these assertions after looking at the jurisdictions that have abrogated common law marriage and assessing the groups that are impacted by this decision; therefore, one would expect that in a jurisdiction which permits common law marriage claims, the majority of claims would be brought by persons most in need of the institution. Based on this analysis, the majority of common law marriage claims in South Carolina should be brought by economically dependent women seeking inheritance rights, workers' compensation or social security benefits, or a division of property after the termination of a relationship. However, the cases reaching the appellate courts in South Carolina do not necessarily indicate this trend. Of the twenty-seven South Carolina state appellate cases evaluating claims of common law marriage within the past fifty years, women (or children claiming a right derivative from women)

Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Prevatte v. Prevatte, 297 S.C. 345, 377 S.E.2d 114 (Ct. App. 1989); Richland Mem'l Hosp. v. English, 295 S.C. 511, 512, 369 S.E.2d 395 (Ct. App. 1988); Cartee v. Cartee, 295 S.C. 103, 366 S.E.2d 269 (Ct. App. 1988); Weathers v. Bolt, 293 S.C. 486, 361 S.E.2d 773 (Ct. App. 1987); Yarbrough v. Yarbrough, 280 S.C. 546, 314 S.E.2d 16 (Ct. App. 1984).

105. Bowman, *supra* note 32, at 737.

106. *Id.* at 769.

brought fourteen claims,[107] and men (or children claiming a right derivative from men) brought twelve claims.[108] Of those claims brought by women (or their children), four sought inheritance rights,[109] nine sought divorce and property distribution,[110] and one sought receipt of government benefits.[111] On the other hand, of the claims brought by men (or their children), four were seeking inheritance rights,[112] two were seeking divorce and property distribution (or were defending against a divorce claim),[113] none were seeking receipt of government benefits, and six were seeking a termination of alimony payments or defending non-payment of alimony based on an ex-wife's subsequent common law marriage.[114]

Based on this initial analysis, men may be just as likely as women to bring common law marriage claims. However, while men bring some of the same types of inheritance and division of property claims, many of the men's claims are attempts to terminate their alimony requirements by alleging their former spouse has entered into a common law marriage with a cohabitant. On the other hand, women are more likely to bring claims for divorce and property distribution or inheritance. Thus, these cases show a modern trend of men using

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107. *See Callen*, 365 S.C. at 622, 620 S.E.2d at 61; *Kirby*, 270 S.C. at 139, 241 S.E.2d at 415; *Byers*, 268 S.C. at 70, 231 S.E.2d at 700; *In re Estate of Greenfield*, 245 S.C. at 597, 141 S.E.2d at 917; *Mitchell*, 236 S.C. at 333, 114 S.E.2d at 226–27; *Campbell*, 235 S.C. at 104, 110 S.E.2d at 2; *Pirri*, 369 S.C. at 262–63, 631 S.E.2d at 282; *Lukich*, 368 S.C. at 50, 627 S.E.2d at 755; *Tarnowski*, 348 S.C. at 618, 560 S.E.2d at 439; *Owens*, 320 S.C. at 544, 466 S.E.2d at 374; *Hallums*, 318 S.C. at 2, 428 S.E.2d at 894; *Johns*, 309 S.C. at 200, 420 S.E.2d at 857; *Bochette*, 300 S.C. at 110, 386 S.E.2d at 476; *Prevatte*, 297 S.C. at 346, 377 S.E.2d at 115.

108. *See Thomas*, 368 S.C. at 486–87, 629 S.E.2d at 359; *Christy*, 354 S.C. at 204, 580 S.E.2d at 445; *Rogers*, 260 S.C. at 614, 197 S.E.2d at 922; *Jeanes*, 255 S.C. at 163, 177 S.E.2d at 538; *Johnson*, 235 S.C. at 545, 112 S.E.2d at 648; *Miles*, 355 S.C. at 515, 586 S.E.2d at 138; *Tipton*, 351 S.C. at 457, 570 S.E.2d at 196; *Barker*, 330 S.C. at 363, 499 S.E.2d at 504; *Cathcart*, 307 S.C. at 323–24, 414 S.E.2d at 812; *Cartee*, 295 S.C. at 104, 366 S.E.2d at 269; *Weathers*, 293 S.C. at 487, 361 S.E.2d at 773; *Yarbrough*, 280 S.C. at 548, 314 S.E.2d at 17. The twenty-seventh case, *Richland Memorial Hospital v. English*, was brought by a creditor, rather than a party to the relationship. 295 S.C. at 512, 369 S.E.2d at 395; *see infra* text accompanying note 191.

109. *See In re Estate of Greenfield*, 245 S.C. at 597, 141 S.E.2d at 917; *Mitchell*, 236 S.C. at 333, 114 S.E.2d at 226–27; *Campbell*, 235 S.C. at 104, 110 S.E.2d at 2; *Tarnowski*, 348 S.C. at 619, 560 S.E.2d at 440.

110. *See Callen*, 365 S.C. at 622, 620 S.E.2d at 61; *Kirby*, 270 S.C. at 139, 241 S.E.2d at 415; *Pirri*, 369 S.C. at 262, 631 S.E.2d at 282; *Lukich*, 368 S.C. at 50, 627 S.E.2d at 755–56; *Owens*, 320 S.C. at 544, 466 S.E.2d at 374; *Hallums*, 318 S.C. at 2, 428 S.E.2d at 894; *Johns*, 309 S.C. at 200, 420 S.E.2d at 857; *Bochette*, 300 S.C. at 110, 386 S.E.2d at 476; *Prevatte*, 297 S.C. at 346, 377 S.E.2d at 115.

111. *See Byers*, 268 S.C. at 70, 231 S.E.2d at 700.

112. *See Thomas*, 368 S.C. at 487, 629 S.E.2d at 359; *Johnson*, 235 S.C. at 545, 112 S.E.2d at 648; *Barker*, 330 S.C. at 363, 499 S.E.2d at 504; *Weathers*, 293 S.C. at 487, 361 S.E.2d at 773.

113. *See Tipton*, 351 S.C. at 457, 570 S.E.2d at 195–96; *Yarbrough*, 280 S.C. at 548, 314 S.E.2d at 17.

114. *See* Christy v. Christy, 354 S.C. 203, 204, 580 S.E.2d 444, 445 (2003); Rogers v. Rogers, 260 S.C. 613, 614, 197 S.E.2d 921, 922 (1973); Jeanes v. Jeanes, 255 S.C. 161, 163, 177 S.E.2d 537, 538 (1970); Miles v. Miles, 355 S.C. 511, 515, 586 S.E.2d 136, 138 (Ct. App. 2003); Cathcart v. Cathcart, 307 S.C. 322, 323–24, 414 S.E.2d 811, 812 (Ct. App. 1992); Cartee v. Cartee, 295 S.C. 103, 104, 366 S.E.2d 269, 269 (Ct. App. 1988).

the common law marriage doctrine as a sword, while women use the doctrine as a shield. This analysis supports the assertion that the abolition of the common law marriage doctrine may indeed have a negative impact on economically dependent women in informal marital relationships.

Even if women do bring the majority of common law marriage claims, particularly the claims seeking rights to property or benefits, this does not necessarily lead to the conclusion that women still need the state to protect their dependency interests. From American colonization into the nineteenth century, the common law marriage doctrine's concern for female dependency was based on "a range of socio-cultural assumptions about women's nature and women's roles within the family and the polity."[115] Women were forced into this dependency based on the political and social culture of the time, and thus common law marriage allowed courts to privatize this economic dependency.[116] "By declaring a woman to be a man's wife or widow at common law, courts shielded the public fisc from the potential claims of needy women, effectively deflecting those claims inward to a particular private, family unit."[117]

Yet "[t]he Twentieth Century . . . heralded the legal, social, and economic independence of the American woman."[118] Contemporary American culture espouses equality of the sexes and has largely rejected the gender roles that divided men and women. Women comprise nearly half of the workforce,[119] earn more college degrees than men,[120] and continue to close the wage gap.[121] Therefore, any modern notion of female dependency must be different from the dependency courts and legislators envisioned during early American history. Because of the vast opportunities for women today, the abolition of common law marriage, while perhaps still negatively impacting women, may not lead to the same severe consequences experienced in the past.

Regardless of whether men or women bring common law marriage claims, abolishing the doctrine will likely have the most adverse effects on persons of low socioeconomic status. While persons of all socioeconomic groups engage in unmarried cohabitation and informal unions, these informal unions are more

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115. Dubler, *supra* note 49, at 963.

116. *Id.* at 969.

117. *Id.*

118. Note, *supra* note 38, at 102.

119. *See* Women's Bureau, U.S. Department of Labor, Quick Stats 2005, http://www.dol.gov/wb/stats/main.htm (last visited Mar. 3, 2007) (noting that as of 2005, "women represented 46 percent of the total U.S. labor force").

120. Jeff Grabmeier, *Better Grades and Greater Incentives Help Explain Why Women Outpace Men in College Degrees*, OHIO ST. RES. NEWS, http://researchnews.osu.edu/archive/womcolge.htm (last visited Mar. 3, 2007) ("In 2004, women received 58 percent of all bachelor's degrees in the United States . . . .").

121. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2005), *available at* http:www.bls.gov/cps/wlf-databook-2005.pdf (finding that from 1979 to 2004, the ratio of women's earnings relative to men's earnings has increased from 62% to 80%).

prevalent among low income groups than any others.[122] In addition, it is the poor and uneducated who often believe that their informal relationships qualify as valid marriages, even in states where common law marriage has been abolished.[123] Based on this belief, these persons expect to receive the benefits that flow from marriage, such as inheritance rights, social security survivors' benefits and workers' compensation death benefits, the right to support, alimony, and property division upon dissolution of the relationship, and even potential tax benefits. A state's abolition of common law marriage thus may have the greatest impact upon those members of society who can least afford to give up any part of the limited protections the common law marriage doctrine affords them.[124]

While it seems as though the abolition of common law marriage would have some negative impact on economically dependent persons, the full cost of this impact cannot be determined without analyzing the other remedies available to unmarried cohabitants relying on their common law marriage. If these remedies can decrease the burden on the disparately impacted groups, the benefits of judicial and administrative efficiency and certainty may tip the scales toward abolishing the common law marriage doctrine in South Carolina.

V. ALTERNATIVES TO COMMON LAW MARRIAGE

Although most states abolished the common law marriage doctrine during the last century, these states still faced the problem of determining how to protect the expectation and dependency interests of unmarried cohabitating partners when the relationship dissolved. Even in those states where the common law marriage doctrine continues to exist, the dependency problems remain for those cohabitants who cannot meet the high evidentiary standards required to prove a common law marriage, and for those cohabitants who live together with no immediate plans for marriage. To combat these issues, some states now permit unmarried cohabitants to retain certain property rights following the death of a partner or dissolution of the relationship.[125] States may provide these remedies "[a]s an alternative to recognizing common-law marriage, or in addition to recognizing the doctrine . . . ."[126] The various remedies states provide for unmarried cohabitants include contractual and quasi-contractual remedies,[127] equitable remedies such as unjust enrichment and estoppel,[128] "all-or-nothing"

122. *See, e.g.*, Bowman, *supra* note 32, at 766 (citations omitted) (observing that informal unions are most common among the lower socioeconomic and educational levels); JOHN SIRJAMAKI, THE AMERICAN FAMILY IN THE TWENTIETH CENTURY 69 (1953) (observing that common law marriage is common among lower socioeconomic classes).

123. Bowman, *supra* note 32, at 766.

124. *See id.* at 769.

125. Crawley, *supra* note 1, at 410.

126. *Id.*

127. Bowman, *supra* note 32, at 772–74.

128. *Id.* at 771–74.

approaches based on statutory marital status,[129] and piecemeal approaches based on state-determined escape routes.[130] While each remedy offers its own advantages and disadvantages, state legislatures have a wide array of options based on various policy considerations that can help protect unmarried cohabitants.

A. Contractual and Quasi-Contractual Remedies

Several jurisdictions recognize contract-based remedies with regard to property division for cohabiting couples who fail to meet their state's statutory marriage requirements.[131] Some of the jurisdictions recognize these claims only if they are based on express contract,[132] while others allow recovery under express and implied contracts.[133] The famous California case of *Marvin v. Marvin*[134] addressed the issue of contract-based remedies and held that express contracts between nonmarried partners should be enforced unless consideration is based on sexual services and therefore contrary to public policy.[135] In addition, the court held that if the parties do not have an express contract, the court should evaluate the parties' conduct to determine if an implied contract exists.[136]

Despite offering one avenue to protect the interests of couples outside the realm of formal marriage, the express and implied contract-based remedies do not offer a complete solution.[137] First, it is unlikely that most cohabitating couples will enter into an express agreement regarding the rights of the parties upon dissolution of the relationship. Thus, "[c]ouples who enter into a relationship assuming that they will share their labor, resources, and accumulated capital are without remedy if they do not examine these assumptions consciously enough to trigger the obligations we call 'contract.'"[138] *Marvin*'s implied contract framework poses the same issues of intent that arise in common law marriage cases,[139] therefore, the adjudication of any claim remains an intensely factual dispute. Also, while contract-based theories may work for property division and support obligations, it does not apply to

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129. *Crawley*, *supra* note 1, at 413–15.

130. Bowman, *supra* note 32, at 774–76.

131. Crawley, *supra* note 1, at 412.

132. *Id.* These jurisdictions include Maryland, Massachusetts, New Hampshire, New Mexico, and New York. *Id.*

133. *Id.* Jurisdictions that have recognized express agreements, without speaking to implied agreements, include Massachusetts, Nebraska, and Wyoming. *Id.* Florida, Minnesota, and North Dakota allow recovery if the express agreement is in writing. *Id.*

134. 557 P.2d 106 (Cal. 1976) (en banc).

135. *Id.* at 116.

136. *Id.* at 122.

137. *See* Bowman, *supra* note 32, at 774.

138. *Id.*

139. Crawley, *supra* note 1, at 415.

government benefits.[140] Thus, *Marvin*-type remedies offer some protection for parties after the dissolution of a nonmarital relationship; however, the protection is limited.[141]

B. Equitable Remedies

Other alternatives to common law marriage that seek to protect the interests of unmarried cohabitants are the equitable remedies of unjust enrichment and estoppel. Several courts have recognized restitution claims between former cohabitants based on the theory of unjust enrichment.[142] These courts allow claimants to recover by imposing a resulting or constructive trust in property accumulated during the time of cohabitation.[143] In fact, the *Restatement (Third) of Restitution and Unjust Enrichment* specifically provides for this type of relief if one former cohabitant "owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services."[144] Under the *Restatement*, "the person making such contributions has a claim in restitution against the owner of the asset as necessary to prevent unjust enrichment."[145]

In addition to unjust enrichment, Tennessee employs the equitable doctrine of estoppel to protect the expectation interests of unmarried cohabitants and third parties when the cohabitants have held themselves out as married.[146] Notably, the Tennessee estoppel doctrine, which is a variant of common law marriage, prevents a man who has held himself out to be a woman's husband from denying "his liability for any contracts made by the woman in the position

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140. Bowman, *supra* note 32, at 774; Garza, *supra* note 96, at 549.

141. Bowman, *supra* note 32, at 774.

142. *See, e.g.*, Padilla v. Padilla, 100 P.2d 1093, 1093–94 (Cal. Dist. Ct. App. 1940) (affirming a judgment declaring and enforcing a resulting trust between unmarried cohabitants); Evans v. Wall, 542 So. 2d 1055, 1056–57 (Fla. Dist. Ct. App. 1989) (holding the female cohabitant maintained a constructive trust interest in certain property in which she invested in improvements during the period of cohabitation because her investments of time and money would have otherwise unjustly enriched her cohabiting partner); Sullivan v. Rooney, 533 N.E.2d 1372, 1374–75 (Mass. 1989) (finding a female cohabitant who gave up her career and maintained a home for herself and the male cohabitant would be entitled to a one-half interest in the property by way of constructive trust); Hughes v. Bailey, 195 A.2d 281, 283, 285, 286 (Pa. 1963) (finding a resulting trust where the plaintiff paid one-half of the purchase price of the property).

143. *See supra* note 142.

144. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28, at 24 (Tentative Draft No. 3, 2004).

145. *Id.*

146. *See* Guzman v. Alvares, 205 S.W.3d 375, 380 (Tenn. 2006) (noting that marriage by estoppel "is applicable only in exceptional circumstances" and then "the marriage is presumed to be valid even though it is not technically lawful"); Robert E. Kendrick, Note, *Informal Marriages in Tennessee—Marriage by Estoppel, by Prescription, and by Ratification*, 3 VAND. L. REV. 610, 614–15 (1950) (explaining Tennessee's use of estoppel to "hold parties to an informal marriage to obligations normally incidental to statutory marriages"); *see also* Bowman, *supra* note 32, at 771–72 (arguing the estoppel doctrine could be used on a larger scale to cure many of the problems surrounding nonrecognition of common law marriage).

of a common law wife, on the theory that he should not be allowed to claim any right or exemption on account of his own crime."[147] Tennessee has also allowed this estoppel argument in claims of widows against an estate,[148] and in suits for child support.[149]

Marsha Garrison argues that the doctrine of equitable estoppel could easily be used as a remedy for protecting the rights of couples not adhering to state marriage requirements, but who have held themselves out to be married.[150] Garrison concludes that the estoppel doctrine would prevent a couple that portrayed themselves as married from denying the marriage to a partner or third party who relied on the representation.[151] In fact, Garrison argues that the estoppel doctrine is more advantageous than the common law marriage doctrine because it does not focus on subjective intent, but instead looks at objective actions such as using the same last name, maintaining joint bank accounts, or filing joint tax returns.[152] These concrete actions would "justifiably lead each partner [and third parties] to assume a marital agreement" exists.[153] Based on this analysis, the equitable estoppel principle could effectively serve as an alternative remedy to the common law marriage doctrine, especially in those situations where courts are concerned about protecting dependent spouses who have relied upon their partners' representations.

Despite the advantages offered by the equitable remedies of unjust enrichment and estoppel, these doctrines are fraught with complications for the unmarried cohabitant. The comments to the *Restatement* recognize that the outcome of an inquiry into unjust enrichment between unmarried cohabitants cannot be predicted due to the fact-intensive nature of each particular case.[154] Thus, with these types of equitable claims, "[p]arties do not know where they stand in advance, and when disputes arise, there is no framework for compromise. This . . . imposes costs on the legal system."[155] In addition, these equitable remedies, like the contract-based remedies, only address the issue of property distribution between the parties and fail to address situations involving claims for government benefits.[156] Although the doctrine of estoppel "could

147. Bowman, *supra* note 32, at 771.

148. *See* Smith v. N. Memphis Sav. Bank, 89 S.W. 392, 397–08 (Tenn. 1905) (establishing the theory of marriage by estoppel by finding the estate of a man, who lived with the claimant for more than twenty-five years and held her out to the world as his wife, was estopped from contesting her claim as his widow).

149. Allen v. Allen, 8 Tenn. App. 48, 51 (1928) (applying the doctrine of marriage by estoppel in suit for child support to estop a man from denying a marriage and thus the legitimacy of his children).

150. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 886 (2005).

151. *Id.* at 886–87.

152. *Id.* at 887.

153. *Id.*

154. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. c, at 29 (Tentative Draft No. 3, 2004).

155. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 735 (2006).

156. Bowman, *supra* note 32, at 774.

theoretically be used to address many of the problems raised by the nonrecognition of common law marriage," it "exists in only one state, and the courts of that state have in fact pulled back from applying the doctrine in many cases."[157]

C. *The All-or-Nothing Approach*

Another possible remedy for dealing with the rights of unmarried cohabitants is essentially an all-or-nothing approach based on statutory marital status. Illinois adheres to this approach, as illustrated by the case of *Hewitt v. Hewitt*.[158] Victoria Hewitt and Robert Hewitt began their relationship as college students in 1960.[159] The couple told their parents they were married after discovering Victoria was pregnant.[160] Thereafter, the couple held themselves out to the community as a married couple and raised three children together.[161] Victoria alleged that during this time, she helped pay for Robert's education and assisted him in his lucrative medical practice.[162] After their relationship dissolved, Victoria brought a claim against Robert alleging that they had an express or implied contract to share the property accumulated during their relationship and that Robert had been unjustly enriched.[163]

The Illinois Supreme Court held that all of Victoria's claims were unenforceable because the statutory scheme imposed by the Illinois Marriage and Dissolution Act disfavored "the grant of mutually enforceable property rights to knowingly unmarried cohabitants."[164] In deciding whether to recognize the claims, the court stated,

> The issue of unmarried cohabitants' mutual property rights . . . cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties to such relationships. . . . Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage.[165]

As demonstrated by the facts of the case, the holding in *Hewitt* may impose harsh results, but parties in Illinois can rely on the certainty of marital status in adjudicating claims based on traditional marital rights. While this approach

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157. *Id.* at 772.
158. 394 N.E.2d 1204, 1211 (Ill. 1979).
159. *Id.* at 1205.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 1211.
165. *Id.* at 1207.

would not alleviate the negative impact imposed by the abolition of common law marriage in South Carolina, the all-or-nothing model promotes the highest level of judicial efficiency and certainty by disallowing unmarried parties' claims.

D. The Piecemeal Approach

Some states have adopted a piecemeal approach in dealing with the issues of unmarried cohabitants; they attempt to deal with each legal area affecting unmarried cohabitants on an individual basis.[166] To do this, states may draft the relevant statutes to include unmarried cohabitants or apply the statutes to those situations previously addressed by common law marriage.[167] For example, if South Carolina abolished common law marriage but wanted to protect parties previously covered by the doctrine in connection with workers' compensation benefits, the state could statutorily redefine the class entitled to workers' compensation death benefits.[168] Likewise, the Social Security statute could be changed to accomplish the same outcome.[169] South Carolina could also statutorily recognize common law marriage solely for specific purposes, such as inheritance rights.[170] New Hampshire, for example, does not recognize common law marriage but statutorily creates a limited recognition of the doctrine upon the death of a common law spouse.[171] If persons in the state have lived together for at least three years and have acknowledged each other as husband and wife, the New Hampshire statute treats these cohabitants as married for purposes of inheritance and government death benefits.[172]

There are several disadvantages to the piecemeal approach.[173] First, this remedy is not likely to offer comprehensive protection for unmarried cohabitants or others impacted by the abolition of common law marriage because states may only choose to address specific legal areas rather than every potential legal issue.[174] In addition, the piecemeal approach is a time consuming and politically difficult process because it requires legislators "to identify and change definitions in every relevant [state] statute . . . , as well as the applicable federal statutes."[175] Thus, while the piecemeal approach allows states to make specific policy choices regarding the rights of unmarried cohabitants and grant these

166. Bowman, *supra* note 32, at 774–75.

167. *Id.* at 775.

168. *See id.* The Indiana workers' compensation statute has this effect by using the term "dependent" rather than "wife." *Id.* (citing Ind. Code Ann. § 22-3-6-1 (LexisNexis 1997 & Supp. 2006)).

169. *Id.*

170. *See id.* at 770–71.

171. *Id.*

172. *Id.*; *see* N.H. REV. STAT. ANN. 457–39 (1992 & Supp. 2006).

173. Bowman, *supra* note 32, at 775.

174. *Id.* at 776.

175. *Id.* at 775–76.

cohabitants protections in certain areas, the remedy still falls short of the full protections afforded by common law marriage.

E. Unmarried Cohabitants' Claims in South Carolina

Based on South Carolina case law, it is unclear whether the state courts permit unmarried cohabitants to bring claims based in contract or equity.[176] Regardless of whether the doctrine of common law marriage is abolished, South Carolina courts will still have to face these types of claims in dealing with unmarried cohabitants who cannot establish a common law marriage. Thus, if judicial efficiency and certainty are the primary reasons for abolishing common law marriage, allowing contract and equitable claims will defeat these goals because the courts will continue to adjudicate some of the same issues. However, based on the various alternatives to common law marriage, the legislature and courts can determine the appropriate path for balancing judicial costs and protecting the expectations of unmarried cohabitants.

VI. OTHER AREAS OF LAW WHICH IMPOSE A TRADITIONAL LEGAL FRAMEWORK ON AN INFORMAL RELATIONSHIP

Common law marriage is not the only area of law that imposes a legal relationship despite the failure to follow statutorily proscribed formalities. Our judicial system is often forced to make choices in various legal settings as to whether a legal relationship should be imposed when the formalities creating that relationship have not been met. These determinations require courts or legislatures to analyze the costs and benefits of imposing a legal relationship and make a decision based on the interests of the parties or groups affected.[177] These choices have been made in the areas of partnership law through the imposition of partnership agreements, property law through adverse possession, and contract law through the statute of frauds.

A partnership may be formed without a written partnership agreement or express oral agreement acknowledging the formation of the partnership.[178] When no partnership agreement exists, courts must determine if the relationship between the parties constitutes an association between two or more persons to

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176. In *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995), the court permitted the mistress of a married man to bring a constructive trust and equitable estoppel claim against the man when he tried to evict her from a mobile home he owned. *Id.* at 66–67, 463 S.E.2d at 98. The court concluded that this type of relationship could form the confidential relationship element required to establish a constructive trust. *Id.* at 68–69, 463 S.E.2d at 99. Thus, it seems likely that South Carolina courts would also permit unmarried cohabitants to bring such a claim based on a similar type of confidential relationship.

177. *See* Bowman, *supra* note 32, at 753–54.

178. *See, e.g.*, Wilder v. Hobson, 398 S.E.2d 625, 627 (N.C. Ct. App. 1990) (citing Peed v. Peed, 325 S.E.2d 275, 279 (N.C. Ct. App. 1985)) (finding the "existence of a partnership does not require an express agreement"); Wyman v. Davis, 223 S.C. 172, 173, 74 S.E.2d 694, 695 (1953) (noting that a partnership agreement may be implied and formed without express intention).

carry on as co-owners in a business for profits.[179] Thus, even where parties undertake no formalities to create the partnership and where the parties may not have even intended to create a partnership, the courts may impose such a relationship based on the substantive nature of the relationship.[180]

Similarly, adverse possession is a property law doctrine that confers rights on persons who have not followed the legal formalities for obtaining a piece of land. Adverse possession transfers "a legal interest in property from the original owner to one who has acted *as if* she owned the land for a certain period of time, regardless of whether or not that person actually has title to the land."[181] Thus if a person mimics the legal formalities of land ownership by acting like a landowner, a court may grant that person legal title to the land over the claim of the rightful owner.[182]

In contrast, the contractual doctrine of the statute of frauds demonstrates an area of law where courts will not impose a legal relationship unless the legal formalities of a writing requirement have been met.[183] The original statute of frauds was enacted by the English Parliament in 1677 to prevent fraud and perjury.[184] The doctrine persists in the United States, arguably for the same reasons, and perhaps as a form of consumer protection.[185] By maintaining the statute of frauds, the legislatures have determined that some contracts are so important they must be reduced to writing, and a failure to follow such formalities will result in the contract being unenforceable. Despite the potential for harsh results, the legislature has made a policy choice favoring certainty despite any negative consequences.[186]

In each of these settings, courts and legislatures imposed legal relationships when the parties failed to follow the traditional frameworks for creating the relationships. The rationale for the decision in each area may be different. For example, in the partnership law arena, the rationale may be based on the desire to protect innocent third parties.[187] In the adverse possession arena, the doctrine

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179. *See* S.C. CODE ANN. § 33-41-210 (2006) (adopting the Uniform Partnership Act).

180. Fischer v. Brancato, 937 S.W.2d 379, 382 (Mo. Ct. App. 1996) (citing Bernard McMenamy Contractor, Inc. v. Kitchen, 692 S.W.2d 817, 820 (Mo. Ct. App. 1985)).

181. Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 565–66 (2005).

182. *Id.* at 566.

183. *See* RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981) (setting forth the classes of contracts covered by the statute of frauds writing requirement).

184. Note, *The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170, 170 (1967) (quoting 29 Car. II, c.3 (1677)).

185. *See* Phillipp v. Shapell Indus., Inc., 743 P.2d 1279, 1289 (Cal. 1987) (noting the California legislature's desire to protect consumers by requiring certain contracts to be in writing).

186. In reality, however, states have lessened the harsh effects of the statute of frauds through equitable doctrines. *See, e.g.*, Farmers Bank & Trust Co. of Georgetown, Ky. v. Wilmott Hardwoods, Inc., 171 S.W.3d 4, 10 (Ky. 2005) (citing Smith v. Ash, 448 S.W.2d 51, 53 (Ky. 1969)) ("Estoppel is a doctrine of equity, and equitable relief may be granted to relieve the harsh effects of the statute of frauds.").

187. *See* Kansallis Fin. Ltd. v. Fern, 659 N.E.2d 731, 733–36 (Mass. 1996) (discussing how agency principles apply to partnerships to protect the interests of third parties).

may be used to reward the productive use of land[188] and "protect the reliance interests of the [adverse] possessor."[189] Yet all the rationales have one thing in common: they reflect a cost-benefit analysis where the legislatures and courts decided when it is necessary to impose legal relationships despite formalities, and when it is not. The South Carolina legislature should use this cost-benefit approach in assessing the propriety of abolishing the common law marriage doctrine.

VII. ABROGATING COMMON LAW MARRIAGE IN SOUTH CAROLINA

An overview of South Carolina common law marriage claims demonstrates the wide variety of contexts in which claimants attempt to apply the doctrine. While the traditional claims of common law marriage still exist in the context of property distributions following the termination of a marriage or the death of one of the parties, claimants today also assert the existence of a common law marriage for other purposes. Male claimants frequently allege their former spouse has entered into a common law marriage with a third party and thus seek termination of alimony payments based on this remarriage or change in circumstances.[190] In one unusual case, the creditor of a decedent successfully brought a claim to impose common law marriage on the decedent's alleged spouse in order to collect on an unpaid judgment.[191]

Regardless of the context, all of these cases demonstrate that the fact-intensive nature of common law marriage claims makes the doctrine judicially cumbersome. While some proponents of common law marriage argue the doctrine is realistic and can be applied with "ease and certainty,"[192] these arguments fail to take into account the unlikelihood of summary judgment given the fact-sensitive nature of the claims. The strict standards required for establishing a common law marriage may indeed sort out the fraudulent claims from the legitimate ones, yet these claims still must be fully adjudicated in order to reach this determination. Thus, this time-consuming process wastes the resources of the courts and the parties involved.[193] Essentially, the recognition of common law marriage is achieved "at the expense of clarity and

188. *See* Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (asserting that the policy rationale behind adverse possession is "to reward those using the land in a way beneficial to the community").

189. Clarke, *supra* note 181, at 568.

190. *See, e.g.*, Christy v. Christy, 354 S.C. 203, 204, 580 S.E.2d 444, 445 (2003); Rogers v. Rogers, 260 S.C. 613, 614, 197 S.E.2d 921, 922 (1973); Jeanes v. Jeanes, 255 S.C. 161, 163, 177 S.E.2d 537, 538 (1970); Miles v. Miles, 355 S.C. 511, 515, 586 S.E.2d 136, 138 (Ct. App. 2003); Cathcart v. Cathcart, 307 S.C. 322, 323–24, 414 S.E.2d 811, 812 (Ct. App. 1992); Cartee v. Cartee, 295 S.C. 103, 104, 366 S.E.2d 269, 269 (Ct. App. 1988).

191. *See* Richland Mem'l Hosp. v. English, 295 S.C. 511, 512, 369 S.E.2d 395, 395 (Ct. App. 1988).

192. *See* Crawley, *supra* note 1, at 400.

193. Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 183 (2005).

predictability."[194] "No one can be certain of a couple's marital status under the common law marriage doctrine until a judicial determination is made . . . . The resulting uncertainty creates costs for the courts, for couples . . . , and for the third parties who deal with such couples in both private and commercial settings."[195]

In addition to the costs imposed by common law marriage claims, the historical rationale for adopting the doctrine no longer exists in contemporary American culture. The frontier conditions the settlers faced do not exist in modern society.[196] But more importantly, the need to protect economically dependent women and to legitimize children can now be accomplished through avenues other than common law marriage. Today, a child can receive support and inheritance rights regardless of whether the child's parents are married to each other.[197] While some women in informal marital relationships remain financially dependent on their partners, these women may now employ the various equitable remedies used by unmarried cohabitants in order to alleviate their economic hardship.[198] In addition, the historical need to protect the institution of marriage by creating a presumption in favor of marital rather than subversive relationships no longer exists today given the general acceptance of cohabitation of unmarried couples.[199]

Finally, while common law marriage may have developed to protect the property interests of parties, the rise in cohabitation rates and the general acceptance of cohabitation in contemporary society may now allow common law marriage to have the opposite effect. People today, for various reasons, often make a cognizant choice *not* to marry and instead simply choose to live with a partner, but common law marriage may force these people to defend an alleged claim of marriage brought by a former partner after their relationship dissolves. They may also be forced to defend a claim for liability by a third-party creditor based on of the creditor's allegation of a common law marriage.[200] Although parties in cases such as this can argue they never possessed the intent required for a common law marriage, they will still have to endure litigation due to the fact-specific nature of common law marriage claims. Additionally, those cohabitants who think they have entered into a common law marriage based on promises from their partner that a marriage exists may find themselves in jeopardy should they ever need to prove the existence of marriage. However, abolishing common law marriage and relying solely on the statutory license

194. *Id.* at 183.

195. *Id.* at 183–84.

196. *See supra* note 92–95 and accompanying text.

197. *See* S.C. CODE ANN. § 20-7-90 (1976 & Supp. 2006) (requiring a parent to provide reasonable support to his or her legitimate or illegitimate child); §§ 62-2-101 to -109 (1987 & Supp. 2006) (allowing legitimate and illegitimate children to inherit by way of intestate succession).

198. *See supra* Part V.

199. *See supra* notes 97 and accompanying text.

200. *See* Richland Mem'l Hosp. v. English, 295 S.C. 511, 369 S.E.2d 395 (Ct. App. 1988).

requirement would solve this problem and give couples a high degree of certainty regarding their marital status.

Strict adherence to a license requirement would also obviate the burdens put on third parties in determining the existence of a common law marriage. A Pennsylvania court recently emphasized the interests of third parties in the common law marriage context when the court stated it was time to abolish the common law marriage doctrine:[201]

> [U]ncertainty as to marital status has a far greater detrimental impact on third parties today than when the [common law marriage] doctrine was created. . . . In twenty-first century commerce, third parties need and are entitled to know whether the men, women and couples with whom they contract are married or single, for that may significantly affect their rights. Statutory marriage provides a certain record if third parties chose to investigate; [on the other hand,] common law marriage may be impossible to ascertain or verify until some dispute brings about court proceedings.[202]

Given that third parties now deal with both husbands and wives in relation to business deals, particularly those involving credit transactions, the certainty of a license requirement would protect these third parties from the uncertainty that arises from common law marriage.[203] The requirement would also protect unmarried cohabitants from third party creditors who may try to use a claim of common law marriage to secure a payment from a non-obligated partner.[204]

VIII. CONCLUSION

When the South Carolina General Assembly again encounters an opportunity to abolish common law marriage by way of a bill similar to House Bill 3588, the House and Senate should vote to pass the bill and abrogate common law marriage in the state. This abolition would promote judicial efficiency and certainty because courts would no longer have to engage in fact-intensive inquiries relating to common law marriage claims. Instead, courts, third parties, and cohabiting couples could rely on a bright-line rule that clearly defines legal rights based on one simple requirement: a valid marriage license. Although this abolition may have an impact on economically dependent women and others who rely on their nonceremonial marital status to secure the benefits

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201. PNC Bank Corp. v. Workers' Comp. Appeal Bd., 831 A.2d 1269, 1272, 1281 (Pa. Commw. Ct. 2003).

202. *Id.* at 1281.

203. *Id.*

204. *See English*, 295 S.C. at 512, 369 S.E.2d at 395 (finding the decedent had entered into a common law marriage, and thus his common law wife was liable to his creditor for the decedent's debt).

of marriage, South Carolina courts can provide various equitable remedies to deal with the these parties' claims and thus alleviate some of this negative impact. Overall, the license requirement set forth in section 20-1-210 is a small price to pay for certainty and efficiency in dealing with couples claiming rights based on marriage.

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