THE HISTORY AND NATURE OF MARRIAGE (AND PUTATIVE MARRIAGE) IN NEVADA[1]

For most of the history of modern humans, we have been concerned with regulation of relationships between bonded pairs. Some anthropologists even consider pair bonding one of the defining characteristics marking the evolution of our species in differentiation from our hominid ancestors and cousins.[2]

The history of the evolution of "marriage" as an institution is beyond the scope of this work, but in broad strokes it may be said that even ancient societies needed a secure environment for the perpetuation of the species, a system of rules to handle the granting of property rights, and the protection of bloodlines.

After the fall of Rome, marital practices in the West devolved to the level of tribal or local custom. The practice of community ownership had existed among the Germanic tribes after the fall of Rome, and was brought by them in their migrations to and through the Iberian Peninsula to what is now Spain and France.[3]

The Spanish community property system, because of its adoption by other countries and the Spanish colonization of Latin America, has become perhaps the dominant form of community property in the western world. In what has been characterized as its "most salient characteristic," this conceptualization appropriates to the community the fruit of labors during marriage, which is why it defines as "marital" property earned during marriage by the labor of either or both parties, and as separate property that which is acquired before marriage, or during marriage by gift, bequest, or descent.[4]

There are other conceptualizations of marital property, of course. An alternate form called the "Roman-Dutch" system, adopted in some Scandinavian countries (plus South Africa and Brazil), adopts the "hotch-pot" theory found in various common-law American States, in which all property is considered marital, whether acquired before or during the marriage.[5] It is this conceptualization

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[1] This short article was drafted as a companion piece to *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-marital Property and Support Law*, written for the Nevada Lawyer, and also posted on this page.

[2] *See*, *e.g.*, Nicholas Wade, BEFORE THE DAWN: RECOVERING THE LOST HISTORY OF OUR ANCESTORS (Penguin Press, 2006).

[3] William Reppy, Jr. and William De Funiak, COMMUNITY PROPERTY IN THE UNITED STATES at 1 (Bobbs-Merrill Company 1975).

[4] *See* Grace Blumberg, COMMUNITY PROPERTY IN CALIFORNIA at 2 (4th ed., Aspen 2003).

[5] *See* Rheinstein and Glendon, Interspousal Relations (ch. 4) at 49-77, 139, in 4 Int. Encyclopedia of Compl. L. (A. Chloros ed. 1980). The hotch-pot States are apparently Alaska, Delaware, Hawaii, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, Washington, and Wyoming.

that most nearly gives meaning to the oft-recited wedding vow of "With all my worldly goods I thee endow."

Another variant, found in Europe, considers property individual until divorce or death, at which time it is essentially treated as though it were community property.[6]

The common law received in this country from England was the common law as it existed upon the founding of the United States, and thus at a time when jurisdiction over matters of marriage and divorce still belonged to the ecclesiastical courts. The Nevada Supreme Court has held that the law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statute.[7]

In the U.S., common law marriage remained the norm in most of the country throughout its early history, presumably due to the size of the frontier and vast distances to government centers. The Spanish system of property ownership was, essentially, in place through much of the country prior in time to organized government.

Louisiana utilized the community theory as early as the 1700s under the "Custom of Paris," and later by the laws of Spain, retaining the system in its first legal code of 1808. Texas continued the system by Constitutional provision, even though the common law was adopted otherwise, in 1840. The California Constitution of 1849 continued the existing law of community property after much debate, modeling its laws on those of Texas. New Mexico operated solely under Spanish community property law until comprehensive statutes were enacted in 1901. Arizona – which included much of the area that is now Clark County, Nevada (including Las Vegas), and was part of New Mexico until 1863 – continued the community property system by statute as of 1865. Idaho recognized the community form of property in 1867, and Washington in 1869.[8]

Given these developments, and the time and place that they were being debated and implemented, it is unsurprising that Nevada followed suit. Nevada's first statutes were passed in 1861, styled the "Laws of the Territory of Nevada." They were passed at the first regular session of the territorial legislative assembly, which convened from October 1 to November 29, 1861, in Carson City, and laid the groundwork for a body of laws to be enacted upon entry into the Union.

That first legislative set fell into line completely with the conceptualization of marriage as determined by the mid-19th century, and declared: "That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting, is essential."[9] The early case law opined that Nevada's adoption of a statutory, regulated procedure for

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[6] *See* Grace Blumberg, COMMUNITY PROPERTY IN CALIFORNIA at 2 (4th ed., Aspen 2003).

[7] *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886 (1882).

[8] William Reppy, Jr. and William De Funiak, COMMUNITY PROPERTY IN THE UNITED STATES at 2 (Bobbs-Merrill Company 1975).

[9] *See* Laws of the Territory of Nevada, Ch. 33, § 1 (1861).

marriage was presumed to be ***in addition*** to the tradition of common-law marriage.[10]

The original territorial laws were non-specific, stating only in Chapter 33, Section 25, that in granting a divorce, "the court shall also make such disposition of the property of the parties, as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children."

In 1943, the Nevada Legislature did away with common-law marriage, adding a sentence to the definition of marriage that had existed since the original Territorial Statutes: "Consent alone will not constitute marriage; it must be followed by solemnization as authorized and provided by this chapter."[11] But existing common-law marriages remained valid; the new provision applied only to marriages contracted after the date of enactment.

In the 1948 *Wolford* case,[12] the husband alleged that he was still married to another at the time he entered into the marriage ceremony with the wife, although at that time he thought his earlier wife was dead. He requested an annulment and half of the property. The district court granted the annulment and divided the property in half. The Supreme Court affirmed.

By the time of *Williams*[13] nearly 60 years later, everyone had forgotten about *Wolford*, and neither party cited the earlier opinion, leading the Nevada Supreme Court to incorrectly believe it was dealing with "an issue of first impression." *Williams* was, however, the first Nevada case to explicitly recognize the "putative spouse doctrine" by name in an annulment case – the kind of case in which parties live together as man and wife, often for many years, and only discover when one of them files for a divorce that there was a legal impediment to their marriage in the first place.

While stating what kind of a case *Williams* was ***not***, Justice Becker stated that recognition of the putative spouse doctrine would not interfere with public policy supporting lawful marriage, after which she added the unfortunate dicta: "Nor does the doctrine conflict with Nevada's policy in refusing to recognize common-law marriages or palimony suits." This was not a holding, but it is problematic, because while there ***is*** a statutory statement of public policy in NRS 122.010 prohibiting formation of common law marriages, there is ***no*** such statement relating to palimony suits, in any case, statute, or court rule.

So, by 2004, Nevada law had evolved to eliminate common-law marriage, establish a strict

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[10] *See*, *e.g.*, *State v. Zichfeld*, 23 Nev. 304, 313-14, 46 P. 802, 805 (1896) ("Our statute does not expressly, nor by necessary implication, as we view it, render a marriage had in disregard of its prescribed formalities void. We are to presume that the legislature knew that marriages by contract are valid at common law; that they have thus been entered into from time immemorial, and are liable to continue to be so contracted . . . .")

[11] NRS 122.010(1).

[12] *Wolford v. Wolford*, 65 Nev. 710, 200 P.2d 988 (1948).

[13] *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004).

procedure for State-sanctioned ceremonial licensed marriage, but provided "escape mechanisms" for recognition of both property (and perhaps support) in "putative marriages," and for joint acquisition of property between unmarried cohabitants.[14] The evolution of "marriage" in Nevada is clearly far from over.

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[14] For background, see Marshal Willick, "What Do You Do When They Don't Say 'I Do'? Cohabitant Relationships and Community Property" (Council of Community Property States & State Bar of Nevada, 1998), posted at http://www.willicklawgroup.com/palimony_cohabitation.