CHAPTER 5

TRADITIONAL MARRIAGE AND ALTERNATIVES

CONTENTS

A. Chapter Competencies

After studying chapter 5 the student should be able to:

1. state the essential requirements for a valid contract.
2. define a heart balm cause of action.
3. state the kinds of damages that can be awarded in an action for breach of contract to marry where this action is still allowed.
4. state the elements of a cause of action for fraud where this action is still allowed.
5. state how a fraud action is sometimes used to avoid a heart balm statute.
6. give an example of when a breach of promise to marry might give rise to a tort action for intentional infliction of emotional distress—assuming this action is not barred by the heart balm statute.
7. state when a gift is irrevocable.
8. state when gifts made in connection with a contemplated marriage must be returned.
9. identify interviewing questions and investigation tasks relevant to an action for breach of contract to marry and for the return of gifts.
10. distinguish a general restraint on entering a marriage from a reasonable limitation on the right to marry and identify those circumstances when one person is legally allowed to restrict the right of another person to marry.
11. identify the most common situations in which the validity of a marriage may have to be determined.
12. state the two main methods of entering marriage.
13. state the test used by the United States Supreme Court in the *Zablocki* case to determine the validity of restrictions placed by a state on the decision to marry.
14. define miscegenation.
15. state the major requirements for a ceremonial marriage.
16. state the consequences of failing to follow a technical requirement for entering a ceremonial marriage.
17. identify the most common reasons why someone wants to claim that a common law marriage exists or existed.
18. state the elements of a valid common law marriage.

19. state the conflict-of-law principle on the validity of a common law marriage.
20. state the effect of the removal of an impediment to forming a common law marriage.
21. state the requirements for a putative marriage.
22. list the major arguments that have been made in favor of legalizing same-sex marriages and to state how the courts have responded to these arguments.
23. state the extent to which homosexuals can enter a Marvin-type contract, can adopt children or other adults, and can be granted rights accorded married couples in housing.
24. define a domestic partnership and state the rights of the domestic partners.
25. distinguish between the rational basis test and the strict scrutiny test.
26. state how legalizing same-sex marriages in one state might effect the other states. (e.g., Would the latter have to recognize them as well?)
27. state why Hawaii did not declare that the prohibition against same-sex marriage violated the Hawaii state constitution.
28. state the function of the Defense of Marriage Act (DOMA) and the Mini-DOMAs.
29. state why Vermont did not declare that the prohibition against same-sex marriage violated the Vermont state constitution.
30. state the differences that exist in Vermont when participants enter a marriage, a civil union, and a reciprocal beneficiaries relationship.
31. state the differences that exist in Vermont between state rights given to a civil union and federal rights given to a marriage.

The student should also know:

1. why some states have abolished the action for breach of contract to marry.
2. whether there any requirements on taking a new surname upon marriage.
3. the function of a proxy marriage.
4. the legal and psychological significance of a couple's choice of a covenant marriage.
5. why it is relatively difficult to prove the existence of a common law marriage.

B. Breach of Promise to Marry

Some states are very opposed to breach-of-promise actions. You may want to tell your class about Florida's statutory hostility. See § 771.07 below, the penalty component of the following statutes:

West's Florida Statutes Annotated

§ 771.01. Certain tort actions abolished

The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are hereby abolished.

§ 771.05. Unlawful to file certain causes of action

It shall hereafter be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to file or serve, cause to be filed or served, threaten to file or serve, or threaten to cause to be filed or served, any process or pleading, in any court of the state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this law, whether such cause of action arose within or without the state.

§ 771.06. Validity of certain contracts

All contracts and instruments of every kind, name, nature or description, which may hereafter be executed within this state in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this law, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument; or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of any such claim or cause of action; or to receive, take, or accept any such money or thing of value as such payment, satisfaction, settlement, or compromise. It shall be unlawful to commence or cause to be commenced, either as party or attorney, or as agent or otherwise in behalf of either, in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or with-

out this state; provided, however, that this section shall not apply to the payment, satisfaction, settlement, or compromise of any causes of action which are not abolished or barred by this law, or any contracts or instruments heretofore executed, or to the bona fide holder in due course of any negotiable instrument which may be hereafter executed.

§ 771.07. Penalties

Any person who violates any of the provisions of this chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

C. Assignment 5.1 (*Stanard v. Bolin*)

a. (i) Specific examples of evidence of damages the plaintiff will try to introduce in the new trial:

- She will be seeking damages to compensate her for her pain, impairment to health, humiliation, and embarrassment; she will want to recover for loss to reputation, mental anguish, and injury to health, in addition to recovering for expenditures made in preparation for the marriage.
- The following quote from the court suggests lots of evidence areas that can be pursued. We have underlined good targets for evidence: "When two persons agree to marry, they should realize that certain actions will be taken during the engagement period in reliance on the mutual promises to marry. *Rings* will be purchased, *wedding dresses* and other *formal attire* will be ordered or reserved, and *honeymoon plans* with their attendant expenses will be made. Wedding plans such as the *rental of a church*, the *engagement of a minister*, the *printing of wedding invitations*, and so on, will commence. It is also likely that the parties will make *plans for their future residence*, such as *purchasing a house, buying furniture*, and the like. Further at the time the parties decide to marry, they should realize that their plans and visions of future happiness will be communicated to friends and relatives and that wedding gifts soon will be arriving. When the plans to marry are abruptly ended, it is certainly foreseeable that the party who was unaware that the future marriage would not take place will have expended some sums of money and will *suffer some forms of mental anguish, loss to reputation*, and *injury to health*. We do not feel these injuries should go unanswered merely because the breach-of-promise-to-marry action may be subject to abuses; rather, an attempt should be made to eradicate the abuses from the action." (emphasis added)

Examples of evidence she will try to present:

- After the proposal, the parties found a suitable home for their residence and signed the purchase agreement as husband and wife. (We need to know whether she had any out-of-pocket liability as a cosigner.)
- At the insistence of the defendant, the plaintiff placed her home on the market for sale.
- At the insistence of the defendant, the plaintiff sold most of her furniture at a public auction.
- The parties set the wedding date, reserved a church, and engaged a minister to perform the service.
- Dresses for plaintiff, her mother, and the matron of honor were ordered.
- A reception was arranged at a local establishment.
- The parties began informally announcing their plans to a wide circle of friends.
- After the wedding date was set, plaintiff's employer hired another person and requested plaintiff to assist in teaching the new employee the duties of her job. (We need to know whether she was able to get her old job back with the same pay and benefits.)
- A month before the wedding, defendant informed plaintiff that he would not marry her. This came as a great shock to plaintiff and caused her to become ill and lose sleep and weight. She sought medical advice and was treated by her physician.
- The plaintiff had to take her home off the market.
- The plaintiff also had to repurchase furniture at a cost in excess of that which she received for her older furniture.
- In addition, the plaintiff was forced to cancel all wedding plans and reservations.
- The plaintiff had to explain to her matron of honor, her mother, and her children, that she was not marrying.
- She had to return wedding gifts and explain to her friends and neighbors what had happened.

a. (ii) Specific examples of evidence of damages she will be *forbidden* to introduce:

- She cannot present evidence to seek damages that will compensate her for her loss of expected financial security. She cannot recover for loss of the pecuniary and social advantages that the promised marriage offered.

Examples of evidence she *cannot* present:

- During their courtship, the defendant assured the plaintiff that he was worth in excess of $2 million.
- During their courtship, the defendant told her he was planning to retire in two years and that the two of them would then travel.
- The defendant promised the plaintiff that she would never have to work again.
- The defendant also promised the plaintiff that he would see to the support of her two teenage boys.
- He also promised to see that the plaintiff's mother would never be in need.
- After the proposal, the parties found a suitable home for their residence and signed the purchase agreement as husband and wife. (This is evidence of the standard of living that might be expected in the future—depending on the kind and cost of the residence involved.)
- Also, there can be no evidence of punitive damages. The court said it would not consider such damages in this case: "[W]e note that although other states allow punitive damages, these damages are not allowed in this state because they are not authorized by statute."
- Finally, there can be no evidence on aggravated damages: "As for retaining aggravated damages for seduction under a promise to marry, and the like, since plaintiff here was not seeking aggravated damages, we leave a decision on aggravated damages for a future case in which the issue for these damages arises."

b. In referring to the "modern society's concept of marriage," the court said: "Although it may have been that marriages were contracted for material reasons in 17th Century England, marriages today generally are not considered property transactions, but are, in the words of Professor Clark, 'the result of that complex experience called being in love.' H. Clark, *The Law of Domestic Relations in the United States* 2 (1968) A person generally does not choose a marriage partner on the basis of financial and social gain; hence, the plaintiff should not be compensated for losing an expectation which he or she did not have in the first place."

Here are some arguments that suggest the court is *wrong* about marriage in the modern age:

- Many women today are entering the work force; many have a career in place (or are planning such a career) while pursing romance. Isn't it true that such a woman is more likely to explore the economic consequences of marital union with a prospective mate than the stay-at-home woman?
- Many couples are marrying later. Older newlyweds are more likely to think about the economics of marriage than those who marry in their teens or early twenties.
- Many couples are entering second marriages. They are often very interested in the economic picture of a second and third marriage.

This is not to suggest that starry-eyed love has no role in today's marriages. It is to suggest, however, that there is some reason to question the *Stanard* court's statement that "A person generally does not choose a marriage partner on the basis of financial and social gain." Therefore, there is room to argue that a successful plaintiff in a breach-of-promise-to-marry suit should be allowed to collect damages for the loss of expected financial security.

D. Assignment 5.3 (heart balm action)

At the time Dan broke his promise to marry Carol, the latter was incapable of being married since Carol was still married to Bill. Arguably, therefore, Carol did not lose anything by Dan's breach of promise. The promise was worthless at the time it was made.

Also, Carol has "dirty hands." It seems fairly outrageous that Carol never told Dan about the marriage to Bill at the time of her engagement to Dan.

Of course, Dan is no angel either. He runs off and marries Linda. There is an argument that Dan should not be able to walk away home free just because Carol was technically unable to marry at the time of Dan's promise to marry Carol. If we compare Dan's misconduct with Carol's misconduct, the latter is arguably *less* culpable. Carol intended to tell Dan about the marriage to Bill before Carol's marriage with Dan. Carol may have been naive.

Is there any room for arguing the tort of intentional infliction of emotional distress (outrage)? See also chapter 17 for more on this tort.

E. I Want My Kidney Back!

You might want to tell the class about a recent case in the news. A man and woman become engaged to marry. The fiancé needs a kidney transplant. He convinces the brother of his fiancée to donate a kidney to him. Two days after the transplant operation, the fiancé calls off the wedding.

The fiancée and her brother have filed suit for $200,000 in damages.

F. Assignment 5.4 (gifts)

You would want to inquire into the relative wealth of Mary and Bob. Were they both very rich? If so, then perhaps it is less surprising that the car would be given as a birthday gift.

The value of the car needs to be compared with the value of the bracelet which we have indicated was probably a gift. If the bracelet is very expensive and perhaps close to the value of the car, Mary has an argument that Bob was simply in the habit of making expensive "gifts." We also want to know exactly what Bob said when he gave Mary the car and what Mary said in response. Was there, for example, any discussion of the use of the car when they are married?

Note that unconditional courting gifts are sometimes called *gifts of pursuit*. They are irrevocable.

G. Assignment 5.5(b) (gifts)

The Gold Wristwatch:

It is unclear whether Jim gave the watch to Bob because of friendship and gratitude or for the purpose of wearing it on Jim's wedding day. When the watch was given, Jim was not engaged. He apparently had never even met Joan. He was acting on impulse. He didn't tell Bob that the watch was given in order to be worn on Jim's wedding day. Jim was simply listing one of the uses Bob might want to make of the watch. It was a gift. There was no implied condition of marriage. (It would be helpful to know whether Jim was in the habit of giving expensive presents to his friends.)

The Family Bible:

Jim and Joan were not engaged at the time Jim gave Joan's mother the Bible. It is, therefore, unlikely that the Bible was given conditionally—on the condition of his marriage to Joan. It is true that a Bible is usually the kind of present that you would give a family member. This may be some indication that Jim was thinking of the mother as his potential mother-in-law at the time. But, again, the marriage decision did not come until six months later. The Bible does not appear to have been given conditionally.

The Loan:

Jim and Joan were not engaged at the time of the loan. Again we have the question of whether there was a conditional "gift" of the interest on the loan. It is a somewhat unusual present. Is it one that friends make to each other? Or is it the kind of present that only family members (or soon-to-be family members) make to each other? An interest-free loan appears to fall into the latter category. We know that since February l3, Jim has had marriage on his mind in one form or another. Given the nature of this present and the state of Jim's mind (the marriage proposal is about three months away), there is a good argument that this was a conditional gift.

How much interest can be recovered? Perhaps the current market rate for the duration of the loan. Not necessarily 10 percent.

Diamond Bracelet:

What is meant (or what was intended) by the statement, "I want you to have this no matter what happens."? It could mean: Keep it even if we do not go through with the marriage. But this would be rather odd since they both just agreed to become married. Why would such a condition be contemplated?

The statement could mean: Keep the bracelet even if they cannot afford it, or even if they later need money and, in prudence, ought to sell the bracelet. If this meaning was intended, then the bracelet was an irrevocable gift. The strongest argument the other way, however, is the fact that it was given on the day they became engaged.

H. Assignment 5.6 (restraints on marriage)

a. The restriction is almost total. If John and Brenda have children, he will not remarry if Brenda dies before him. If he is fairly young when Brenda dies, the restriction could last for decades. Is there an implied limiting condition to the promise, e.g., that he will not remarry while the children are minors—under 18? If so, the restriction might be deemed more reasonable.
b. Does a marriage restriction problem exist here? She has agreed not to have children; she has not agreed to refrain from marrying. But, is there an implied promise not to marry until she is 21? Perhaps. But even if there is such an implied promise, the restraint or restriction on marriage appears to be reasonable, partial, and not otherwise illegal.

c. The restriction is partial. Fred did not agree that he would never marry. Yet from another perspective, the restriction appears quite broad. How many female doctors or medical students are there? And how many of them are available? If there are very few, does the restriction begin to look like a near total restriction?
d. As we saw in chapter 4, such a contract might be against public policy to the extent that "meretricious sexual services" are involved, and the court looks at the arrangement as an assault on traditional family values.

Assume that there is no public policy problem. There is a restriction on marriage. Jean cannot marry while her "boy friend" Bill is still alive without forfeiting the money in the account. The restriction is fairly extensive. There can be no marriage as long as Bill lives. If Bill was young and healthy when the deal was made, the restriction could last for decades. It may be too long to be enforceable. Also what useful purpose is being served? If the court enforces this contract, is it encouraging men to exploit women in this way?

I. Clause Encouraging Divorce?

Closely related to the issue of agreements that restrain marriage are agreements that encourage divorce. We will study the latter in chapter 8. As a preview, you might want to ask the class whether the following set of facts violates public policy:

The will of a father says his daughter (Eileen "Tweedy" Prager) cannot have any income from a trust he sets up until she turns 65 or loses her husband.

Does this trust encourage the daughter to obtain a divorce? Ask the class if there was a reasonable economic basis for the father to impose this condition.

The case was resolved by a New Jersey court in *Matter of Estate of Donner*, 623 A.2d 307 (N.J. Super. A.D., 1993). The court held the trust was valid since the father had a reasonable economic reason for what he did even though the trust had the effect of encouraging his daughter to divorce her husband, whom the father, by the way, did not like.

Here is what the court said:

> *We must now consider the circumstances under which a testator may lawfully leave a bequest to his daughter on the condition that she obtain a divorce. . . . The main provision that is challenged denies plaintiff income from the trust and the opportunity to invade principal until she becomes 65 years old unless before then her husband Martin Prager dies or they are divorced. Plaintiff argued unsuccessfully before Judge Kentz that the conditions attached to the trust are against public policy and therefore unenforceable because their purpose was to induce her to divorce her husband. We now affirm. . . .*
>
> *[W]here there is a reasonable economic basis for placing a condition on a bequest or devise, courts should not "attempt to probe [the] testator's mind and determine" whether in fact his or her motive was to obstruct a spouse's remarriage or disrupt a child's marriage. The facts in the present case are not disputed. The decedent strongly disliked plaintiff's husband. He believed that her husband had tricked him into investing $10,000 in a worthless venture. He also knew that her husband's financial affairs were under Federal investigation. [The father] was very concerned that any gift that he might give to his daughter, Tweedy, might wind up being the subject matter of fines or levies by the government. . . . [It was the father's] intent that she be provided for on age 65 or upon her separation from her husband in the event of a divorce or his demise. The decedent further had desired that his daughter Tweedy not turn over the decedent's hard earned assets to a man whom he felt was a poor money manager. He expressed the view that Prager had exercised bad judgment regarding money management. Moreover, the decedent felt that Prager had more than adequate resources to support his family. . . . [The father] felt any gift . . . given to [plaintiff] should be at a time . . . when it would be most needed—i.e., when Tweedy no longer had a husband to provide for her or a time of age when it was most likely that he would be retired and his daughter would need an increased source of income. Thus he provided for her to receive income upon age 65. He had absolutely no intent to foster any divorce. These facts present a reasonable economic basis for the [father] to have withheld the trust income from plaintiff until she reaches age 65 unless she sooner loses her husband, the breadwinner of her family, through either death or divorce. Although we therefore need not consider whether the decedent harbored the motive of encouraging divorce, there is no evidence here that he did. Affirmed.*

J. Cost of a Wedding Partner

Before beginning the coverage of marriage formation, you might want to share with the class the following oddity. In Fort Moresby, New Guinea, there is a law that regulates the legal price to be paid for a wedding partner:

- A man must pay five pigs, one bird, and $240 cash for a "brand-new bride."
- For a widower or a divorced woman, it's two pigs, one bird, and only a $30 fee.
- For a woman who has already been married twice, the law states: "Such women are of no commercial value."

Doris Childs, *Loony Laws*, quoted in 14 Legal Paraphernalia 6 (September/October 1994).

K. Warning: Marriage Could Be Hazardous

Some members of the Washington state legislature have a proposal to add a warning on every marriage license application that would say:

> *"Neither you nor your spouse is the property of the other. The laws of this state affirm your right to enter into this marriage and at the same time to live within the marriage free from violence and abuse."*

To date, this proposal has not been enacted into law.

L. Assignment 5.10 (authority to marry)

Did George and Linda have the "full belief" that Rev. Smith had no authority to marry them? They knew that five of the seven ministers at Triple Faith Church were illegally performing marriages. But does this constitute knowledge that Rev. Smith was one of the five? They certainly were on notice that something was wrong at Triple Faith Church, but the statute calls for a very high degree of knowledge—"full belief." Are doubts or suspicions enough? Maybe they thought that the five ministers had since acquired the legal right to marry.

On the other hand, it was only one week after they read the newspaper article that the marriage took place. Does this help to establish that they had the requisite "full belief"? Probably not. It might help establish that they were *careless* in going ahead, but the standard of "full belief" is higher than carelessness.

We do not know whether George and Linda have "consummated" their marriage. Would this make any difference?

M. Assignment 5.11 (covenant marriage)

Could children be hurt by covenant marriages? You might want to tell the students that "In Arizona and Louisiana, only about 3 percent of couples are estimated to have chosen the covenant option. Critics of the covenants object to forcing couples to choose between two types of marriage, and they fear that children could be trapped in bad marriages."

Pam Belluck, *States Declare War on Divorce Rates, Before Any 'I Dos'*, New York Times, April 4, 2000, at A1.

N. Assignment 5.13 (common law marriage)

The marriage was invalid when they entered their agreement in state "Y" since common law marriages cannot be entered there. But they moved to state "X" where their "marriage" would have been valid if it had been entered there. The question is whether they entered a valid marriage *for the first time* in state "X." They continued to hold themselves out as husband and wife while in state "X." Is this enough?

We need to know if state "X" has any other requirements for a valid common law marriage. They may not have made a new agreement to marry in state "X," but is this necessary? See the quote in the text from the *Matthews v. Britton* case on impediment removal.

The conflict-of-law rule says that the marriage is valid according to the state of celebration or entry. State "Y" would have to recognize the marriage as valid if state "X" is the state where they "entered" the marriage.

O. Assignment 5.14 (common law marriage)

Same issue as in Assignment 5.13. The "marriage" was invalid in the first state—Oregon—where they attempted to enter a common law marriage. Then they went to a state where such marriages are valid—Montana.

But their relationship with the state of Montana is very tenuous. How would this be different from doing nothing more than driving through or flying over a state where common law marriages are valid? Surely this would not be enough to validate the marriage.

On the other hand, how much time is needed to enter a marriage? Seconds? Two people simply agree to be married and hold themselves out as such?

Also, is a new agreement needed in Montana? Does the *Matthews v. Britton* quote apply here?

P. Assignment 5.15 (common law marriage)

a. To prevent fraud, to maintain permanent records on the population, to reinforce the seriousness of the institution of marriage, to foster public health goals such as to identify parties with infectious diseases when applying for a marriage license, etc.
b. See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Oregon Law Review 709 (1996):

"I conclude from this study that the common law marriage doctrine should be revived because it protects the interests of women, especially poor women and women of color, more effectively than any of the theories suggested to address the problems created by its absence. Most of the original reasons for abolishing common law marriage—fears of fraud, protection of morality and the family, racism, eugenics, and health-related reasons—do not withstand scrutiny; and other arguments, based on administrative convenience, are outweighed by more important values. The impact of nonrecognition is clearly disparate: it hurts most those women who are most vulnerable, and its effect is greatest on issues with a significant impact on their welfare, such as the ability to leave a violent relationship or to obtain a variety of benefits upon the death of a family's breadwinner. The negative impact also differs significantly by class, race, ethnic group, and cultural tradition, falling most harshly upon groups that are already disadvantaged."

Q. Assignment 5.17 (*Baker v. State*)

a. The exclusion of the classification of same-sex couples from marriage is not reasonably related to any state government purpose. None of the arguments in favor of restricting marriage to opposite sex couples made sense to the court.

Here is the court's summary of these arguments:

"The State has a strong interest, it argues, in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support. The State contends, further, that the Legislature could reasonably believe that sanctioning same-sex unions 'would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing.' The State argues that since same-sex couples cannot conceive a child on their own, state-sanctioned same-sex unions 'could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children.' Hence, the Legislature is justified, the State concludes, 'in using the marriage statutes to send a public message that procreation and child rearing are intertwined.'"

b. No. The court said that the legislature must come up with a program to give same-sex couples the same state rights as married couples. If it fails to do so, the court may force decree that same-sex couples must be allowed to marry. The court said:

"We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. . . . [We hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion. . . . In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought."

c. *In re B.L.V.B.*, the court gave a woman the status of the "spouse" of her lesbian partner, the natural mother of a child the woman was seeking to adopt. If this was not so, the natural mother's parental rights would have to be terminated. The only way to avoid termination of a natural parent's rights is when the person adopting the child is the spouse of the natural parent. The same-sex couples here argued that the same reasoning should apply. *In B.L.V.B.*, the word "spouse" was interpreted to include a person in a same-sex relationship. The Vermont marriage statutes should be interpreted to include same-sex applicants.

The court, however, rejected this argument:

"In re B.L.V.B., 160 Vt. 368, 628 A.2d 1271 (1993). There, we held that a woman who was co-parenting the two children of her same-sex partner could adopt the children without terminating the natural mother's parental rights. Although the statute provided generally that an adoption deprived the natural parents of their legal rights, it contained an exception where the adoption was by the "spouse" of the natural parent. See id. at 370, 628 A.2d at 1273 (citing 15 V.S.A. § 448). Technically, therefore, the exception was inapplicable. We concluded, however, that the purpose of the law was not to restrict the exception to legally married couples, but to safeguard the child, and that to apply the literal language of the statute in these circumstances would defeat the statutory purpose and "reach an absurd result." Id. at 371,

628 A.2d at 1273. Although the Legislature had undoubtedly not even considered same-sex unions when the law was enacted in 1945, our interpretation was consistent with its "general intent and spirit." Id. at 373, 628 A.2d at 1274.

"Contrary to plaintiffs' claim, B.L.V.B. does not control our conclusion here. We are not dealing in this case with a narrow statutory exception requiring a broader reading than its literal words would permit in order to avoid a result plainly at odds with the legislative purpose. Unlike B.L.V.B., it is far from clear that limiting marriage to opposite-sex couples violates the Legislature's "intent and spirit." Rather, the evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman. Accordingly, we reject plaintiffs' claim that they were entitled to a license under the statutory scheme governing marriage."

d. No. The marriage prohibition applies equally to same-sex male couples and to same-sex female couples.

R. Assignment 5.18(a) (*Baker v. State*)

a. Rights and protections under Vermont law that apply to opposite-sex married couples:

- the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions
- preference in being appointed as the personal representative of a spouse who dies intestate
- the right to bring a lawsuit for the wrongful death of a spouse
- the right to bring an action for loss of consortium
- the right to workers' compensation survivor benefits
- the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance
- the opportunity to be covered as a spouse under group life insurance policies issued to an employee
- the opportunity to be covered as the insured's spouse under an individual health insurance policy
- the right to claim an evidentiary privilege for marital communications
- homestead rights and protections
- the presumption of joint ownership of property and the concomitant right of survivorship
- hospital visitation and other rights incident to the medical treatment of a family member
- the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce

S. Ethics in Practice

Rev. Fox appears to be giving the couple legal advice. If so, he is engaged in the unauthorized practice of law. He is giving answers to questions posed by specific persons—Mary and Ted. He is not giving general legal information to the public at large.

Louisiana statutes require premarital counseling for couples entering a covenant marriage. Do these statutes authorize nonattorneys such as Rev. Fox to explain the law and to give legal advice during premarital counseling sessions? This would have to be researched. If the statutes do provide such authorization, the next question would be whether the practice of law is exclusively regulated by the courts in Louisiana. If so, then the legislature may not have the authority to allow people like Rev. Fox to give legal advice and in effect to practice law in the area of covenant marriages.