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“To Be Sure He is My Husband Good Enough,”¹ or is He? An Analysis of Common Law Marriage in Pennsylvania

Ryan P. Newell*

I Introduction

On September 17, 2003, the Commonwealth Court of Pennsylvania in *PNC Bank Corp. v. Workers' Compensation Appeal Board (Stamos)* prospectively abrogated the Commonwealth Court's recognition of common law marriage.² The *PNC Bank Corp.* court inferred from the most recent Pennsylvania Supreme Court case dealing with common law marriage³ that, given the opportunity, the Pennsylvania Supreme Court would abrogate Pennsylvania's recognition of common law marriage.⁴ Despite the Commonwealth Court's clear stance on how it will deal with common law marriage, the *PNC Bank Corp.* decision has only muddied the waters of Pennsylvania's longstanding acceptance of common law marriage.⁵

The general rule in Pennsylvania is that a valid marriage requires a marriage license.⁶ However, the Pennsylvania Consolidated Statutes

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1. *Hantz v. Sealy*, 6 Binn. 405, 406 (Pa. 1814). See *infra* Part III, section A(1).

2. *PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos)*, 831 A.2d 1269, 1282 (Pa. Commw. Ct. 2003).

3. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016 (Pa. 1998).

4. *PNC Bank Corp.*, 831 A.2d at 1282.

5. *Id.* at 1274. Pennsylvania has recognized common law marriage claims as far back as 1814. See *infra* Part III.

6. 23 PA. CONS. STAT. § 1301(a) (2003). “No person shall be joined in marriage in this Commonwealth until a marriage license has been obtained.” *Id.*

explicitly state that Pennsylvania accepts common law marriage despite the license requirement.⁷ The legislature,⁸ the Superior Court⁹ and the Pennsylvania Supreme Court¹⁰ have not abrogated the common law marriage doctrine. Two key unanswered questions in Pennsylvania regarding common law marriage are: (1) whether common law marriages should still be valid, and (2) what effect the intermediate appellate court decision in *PNC Bank Corp.* will have on Pennsylvania's longstanding acceptance of common law marriage.

The Commonwealth Court in *PNC Bank Corp.* correctly stated that the time has come for Pennsylvania to abrogate common law marriage.¹¹ However, the Commonwealth Court incorrectly analyzed the stance of the Pennsylvania Supreme Court on common law marriage and should have left abrogation to the legislature.¹² Part II of this comment summarizes the history and rudiments of common law marriage in the United States. Part III of this comment discusses Pennsylvania's longstanding acceptance of common law marriage. Part IV of this comment analyzes *Staudenmayer v. Staudenmayer*,¹³ the most recent Pennsylvania Supreme Court decision on common law marriage. This analysis shows that the Pennsylvania Supreme Court's decision in *Staudenmayer* did not suggest that the Pennsylvania Supreme Court would abrogate the doctrine if given the opportunity. Part V of this comment analyzes the decision in *PNC Bank Corp.* Finally, Part VI of this comment illustrates not only why common law marriage should be abrogated, but also why the *PNC Bank Corp.* court's analysis of *Staudenmayer* was wrong.

II The History of Common Law Marriage in the United States

In her article, "*A Feminist Proposal to Bring Back Common Law Marriage*," Cynthia Grant Bowman detailed the history of common law marriage.¹⁴ According to Bowman, marriage began outside the realm of legal requirements.¹⁵ Formal marriages typically occurred only among

7. 23 PA. CONS. STAT. § 1103 (2003). "This part shall not be construed to change the existing law with regard to common law marriage." *Id.*

8. *Id.* See *supra* notes 193-94 and accompanying text.

9. *Bell v. Ferraro*, 849 A.2d 1233, 1234 n.2 (Pa. Super. Ct. 2004). See *supra* notes 63-66, 68-75, 89 and accompanying text.

10. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016 (Pa. 1998).

11. See *infra* Part VI, section A.

12. See *infra* Part VI, section B.

13. *Staudenmayer*, 714 A.2d 1016.

14. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712-70 (1966). Bowman is a Professor of Law at the Northwestern University School of Law.

15. *Id.* at 718.

the wealthy, with the majority of the population relying on informal unions.¹⁶ Unlike today, the legal authorities of the past had little connection to the regulation of marriage.¹⁷ The informal marriage was predicated upon the couple's agreement to be married, cohabitation, and the surrounding community's recognition of that couple behaving as a married couple.¹⁸

Bowman's research reveals that informal marriage has been the norm for the majority of human existence with the formal restrictions representing just a small fragment of human history.¹⁹ Prior to Lord Hardwicke's Act in 1753, England allowed informal, or common law, marriages to occur via two avenues.²⁰ A common law marriage could be created when the couple expressed their intent to be married in words of the present tense.²¹ Alternatively, a party could become common law wed through words expressed in the future tense indicating their intention to wed, followed by consummation by sexual intercourse.²²

A. English Influence

The American colonies were split on recognition of common law marriage.²³ Some of the colonies resisted common law marriage and mandated formal requirements.²⁴ Other colonies simply accepted informal marriage as part of the common law.²⁵ This common law acceptance was affirmed in an 1809 New York case, *Fenton v. Reed*.²⁶

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 718-19. It was not until 1563 that the Roman Catholic Church formalized its recognition of marriage during the Council of Trent. Similarly, the Church of England acknowledged informal marriages as late as 1753, at which point Lord Hardwicke's Act required formal marriage in the Church. *Id.*

20. Hon. 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, 402 (1998/99).

21. *Id.* Courts often use the Latin phrase "*sponsalia per verba de praesenti*" for words in the present tense. *Id.* The English phrase will be used in this comment.

22. *Id.* Courts often use the Latin phrase "*sponsalia per verba de futuro cum copula*" for words in the future tense followed by consummation by sexual intercourse. *Id.* Pennsylvania does not recognize words in the future tense as a means to establish a common law marriage. See *infra* Part III, section B.

23. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 719 (1966). Bowman points to Massachusetts as one of the colonies to reject common law marriage. Massachusetts was heavily populated by dissenters from the Church of England who rejected regulation of marriage by canon law and favored intricate marriage laws. *Id.* at 719-20.

24. *Id.* Conversely, Bowman provides New York as an example of acceptance of common law marriage in the colonies. *Id.* at 719-22.

25. *Id.* at 721.

26. *Fenton v. Reed*, 4 Johns. 52 (N.Y. Sup. Ct. 1809).

The *Fenton* court held that formal requirements are unnecessary for a valid marriage and that words in the present tense will suffice.²⁷ According to *Fenton*, a marriage in New York could be proved by “cohabitation, reputation, acknowledgement of the parties, reception in the family, and other circumstances from which a marriage may be inferred.”²⁸

Approximately seventy years after *Fenton*, the United States Supreme Court recognized common law marriage and set forth some important principles regarding marriage.²⁹ In *Meister v. Moore*, the United States Supreme Court held that marriage is a common right and that the statutes are only directory.³⁰ The right to common law marriage is presumed to exist unless explicitly stated otherwise in a statute.³¹ Marriage as a civil contract may be entered into by either adherence to statutory regulations or through common law marriage.³²

B. Frontier Conditions in the United States

In addition to the English influence on the colonies, the frontier conditions of the early country led to the acceptance of common law marriage.³³ The difficulty of entering into a formal solemnization³⁴ and the benefits that married life provided in the rough conditions of frontier, promoted common law marriages.³⁵

C. Protection of the Family Unit

Acceptance of common law marriage helped with problems

27. *Id.* at 54. The issue in *Fenton* was whether a woman was the legal widow of a man she purported to be married to in order to receive the annuity payments. The man belonged to a society that provided annuity payments to the widowed spouses of members. *Id.* at 52.

28. *Id.* at 54.

29. *Meister v. Moore*, 96 U.S. 76 (1877).

30. *Id.* at 78-81. By directory, the United States Supreme Court meant that statutes do not grant the right to marriage. A statute describing the methods with which a marriage may be entered into merely directs citizens as to how they can formally contract to enter a marriage. Such a statute, unless explicitly stated, does not preclude citizens from the common law method of achieving the same effect. *Id.* The Supreme Court here held that the lower court erred when the jury was instructed that marriage could only be entered into when a minister or magistrate was present. *Id.* at 83.

31. *Id.* at 78.

32. *Id.*

33. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 722 (1966).

34. *Id.* at 722-23. It was difficult to formalize a marriage in the frontiers because there were few ministers in the lightly populated frontiers. Primitive means of travel made it difficult to get to the larger cities that had ministers. *Id.*

35. *Id.* Marriage was a necessity for frontier men and women because spouses assisted with the large amounts manual labor involved with frontier life. *Id.*

resulting from economically dependent women.³⁶ Common law marriage allowed financially dependent women to look to the family for financial support as opposed to burdening the state.³⁷ Furthermore, children of a common law marriage would be regarded as legitimate, where otherwise they would be children born out of wedlock.³⁸ In addition, courts promoted the marital unit by converting what could be deemed “subversive relationships” into marriages that satisfied societal norms.³⁹

III. The History of Common Law Marriage in Pennsylvania

A. Nineteenth Century Beginnings

1. Marriage as a Civil Contract

Just five years after the *Fenton v. Reed* decision in New York, the Pennsylvania Supreme Court faced a confusing, yet typical, claim for common law marriage in *Hantz v. Sealy*.⁴⁰ The court reporter noted that the parties went before a minister in a formal marriage ceremony in 1799 and thereafter lived as husband and wife.⁴¹ Despite having children and acting as a married couple, the parties were aware that the husband had never been legally divorced from his former wife.⁴² Sometime after going before the minister, the husband received a legal divorce from his prior wife thereby removing any impediment to a potential marriage with his new partner.⁴³ Through the advice of counsel, the man then spoke the words of present tense, but when the woman was told to say the same her response was, “to be sure he is my husband good enough.”⁴⁴

The Pennsylvania Supreme Court set forth the principles of common law marriage when it held that marriage is a civil contract, “which might be completed by any words in the present time without

36. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 968-69 (2000). Towns often used public funding to support widowed and abandoned women. *Id.*

37. *Id.* Common law marriage enabled the towns to shift their financial responsibilities from public funds to a common law husband or to the town in which that common law husband lived. *Id.*

38. *Id.*

39. *Id.* A relationship would be subversive because the couple would be acting in opposition to “the social and legal institution of marriage.” *Id.*

40. *Hantz v. Sealy*, 6 Binn. 405 (Pa. 1814).

41. *Id.* at 406.

42. *Id.* at 406, 408.

43. *Id.* at 408.

44. *Id.* at 408-09.

regard to form.”⁴⁵ The concurring opinion more fully addressed the requisites for a common law marriage, “[a common law marriage] is binding between the parties, when entered into with full consent *per verba in praesenti*.”⁴⁶

The Pennsylvania Supreme Court held that the marriage was invalid.⁴⁷ Not only did the parties lack the intent to become husband and wife when speaking their words, but the court held that the woman’s words referred to the past contract that the woman viewed as a lawful marriage.⁴⁸ However, that past marriage was void because the man was still married to another woman at the time.⁴⁹ Even though the man obtained a divorce from his lawful wife, both parties had to exchange the words in the present tense with the intention to be husband and wife because any reference to the past was a reference to a marriage that never could have existed.⁵⁰ Had the parties formalized the marriage before a minister (for a second time when no impediments existed), no dispute as to the validity of their relationship would have arisen.⁵¹

2. Marriage Statutes were Ill-Suited to Real Life

In 1833, the Pennsylvania Supreme Court held that common law marriage is necessary as an alternative to the strict requirements of the marriage statutes.⁵² According to the *Rodebaugh* court, decided nineteen years after *Hantz*, strict adherence to the marriage statutes would leave numerous relationships in violation of the law and would leave any children of such relationships as children born out of wedlock.⁵³ Thus,

45. *Id.* at 408.

46. *Id.* at 413. The language of the concurring opinion states a rough formulation of the rule that the *Staudenmayer* court would confirm, “a common law marriage does not come into existence unless the parties uttered the *verba in praesenti*, the exchange of words in the present tense for the purpose of establishing the relationship of husband and wife.” *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998).

47. *Hantz*, 6 Binn. at 409. Arguably, the court would have recognized the marriage had both the wife and husband spoken the words in the present tense with the requisite intention. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* Essentially, the court was saying that the woman’s statement indicated a belief that the relationship up to the point in question was in fact a marriage and consequently she believed that the man was her husband. The court noted that there was a void marriage. In order for there to be a marriage from that date on the parties had to express their intent to take the other as a spouse from thereon out. *Id.*

52. *Rodebaugh v. Sanks*, 2 Watts 9, 11 (Pa. 1833).

53. *Id.* As the *Rodebaugh* court stated:

“Many provisions in the acts of 1700 and 1729, though doubtless wholesome when they were enacted, are ill adapted to the habits and customs of society as it now exists. It is not too much to say, that a rigid execution of them would

the *Rodebaugh* court held that the formal requirements for marriage were only directory, not the exclusive means of obtaining a marriage.⁵⁴

B. Confusion in the Pennsylvania Supreme Court

A look at two decisions in the Pennsylvania Supreme Court just seven years apart reveals the confusion the Pennsylvania courts have faced in applying the doctrine of common law marriage. Consistent with earlier Pennsylvania case law, the Pennsylvania Supreme Court in 1866 in *Commonwealth v. Stump* held that marriage is a civil contract that can be entered into through words in the present tense and, absent proof of such words, proven through reputation and cohabitation.⁵⁵ Seven years later, the Pennsylvania Supreme Court in *Richard v. Brehm* cited to the holding in *Stump*, yet without citing any common law precedent, also held that marriage could be entered into through words in the future tense followed by consummation.⁵⁶

By 1960, the Pennsylvania Supreme Court reverted back to its holding in *Stump* with its decision in *Manfredi Estate*.⁵⁷ The *Manfredi Estate* court held that a common law marriage is formed: 1) with “the express agreement of the parties without ceremony;” 2) with words in the present tense; and 3) with the purpose of establishing a husband and wife relationship.⁵⁸ In fact, the *Manfredi Estate* court explicitly rejected words in the future tense as a method of entering a common law marriage.⁵⁹ The *Manfredi* court held that, absent proof of words in the present tense, a rebuttable presumption in favor of marriage arises when there is constant cohabitation and a reputation of marriage.⁶⁰

In light of confusion over the law in the highest court in the state, it is ironic foreshadowing that the *Stump* court encouraged parties to avoid confusion by adhering to formal requirements.⁶¹

bastardize a vast majority of the children which have been born within the state for a half century. . . .”

Id. at 10-11.

54. *Id.* at 11. For a description of a statute’s directory function see *supra* note 30 and accompanying text.

55. *Commonwealth v. Stump*, 53 Pa. 132, 136 (Pa. 1866).

56. *Richard v. Brehm*, 73 Pa. 140, 144 (Pa. 1873).

57. *Manfredi Estate*, 159 A.2d 697 (Pa. 1960).

58. *Id.* at 700.

59. *Id.*

60. *Id.* The court distinguished “constant cohabitation” from “irregular or inconstant cohabitation.” “Reputation of marriage” means “broad and general” and not “confined to a few persons.” Together, constant cohabitation and reputation of marriage amount to a rebuttable presumption of marriage, but they do not amount to marriage per se. *Id.*

61. *Commonwealth v. Stump*, 53 Pa. 132, 136 (Pa. 1866). The *Stump* court keenly noted the potential for confusion with common law marriage claims. The remaining portion of this comment will detail the struggles the citizens and courts of Pennsylvania

C. *Dissatisfaction with Common Law Marriage*

The twentieth century showed increasing dissatisfaction with Pennsylvania's acceptance of common law marriage, yet not one court acted to abrogate common law marriage.⁶² In *Baker v. Mitchell*, the Superior Court noted that there is a great deal of confusion as to what constitutes a common law marriage.⁶³ In particular, the *Baker* court pointed to the incorrect public perception that all cohabiting relationships between man and woman without satisfaction of a formal marriage ceremony result in a common law marriage.⁶⁴ Further, while Pennsylvania law accepts common law marriages, "they are a fruitful source of perjury and fraud, and, in consequence, they are to be tolerated, not encouraged. . . ."⁶⁵ Any claim of common law marriage is to be met with "great scrutiny" and only where it is clear that a common law marriage was entered into should such a union be acknowledged.⁶⁶ The Pennsylvania Supreme Court confirmed the level of scrutiny by holding that "[t]he law, of necessity, imposes a heavy burden on one who grounds his claim on an allegation of common-law marriage."⁶⁷

By the mid-twentieth century, the Pennsylvania courts had realized that the need for common law marriage was nonexistent and the law now stood as an invitation for fraud.⁶⁸ The Superior Court in *Buradus v. General Cement Products Co.* reasoned that common law marriage in the present day is an "anachronism" because the problems of frontier life have been solved by readily available transportation.⁶⁹ Despite the heavy burden placed on claimants, the *Buradus* court keenly perceived that it is "still not difficult for unprincipled claimants to convert illicit relationships into honest marriages, to their advantage, on spurious claims for workmen's compensation or against the estate of a decedent."⁷⁰ The *Buradus* court described the Superior Court's experience with common law marriage claims as unsatisfactory because spurious claims outweighed the "rarely actual" claim.⁷¹ Yet, the *Buradus*

will have. Finally, the comment calls for an end to common law marriage, which would avoid the confusion that the *Stump* court recognized.

62. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016 (Pa. 1998).

63. *Baker v. Mitchell*, 17 A.2d 738, 741 (Pa. Super. Ct. 1941).

64. *Id.*

65. *Id.*

66. *Id.* (citing *Stevenson's Estate*, 116 A. 162, 164-65 (Pa. 1922)).

67. *Nikitka's Estate*, 346 Pa. 63, 67 (Pa. 1943).

68. *Buradus v. Gen. Cement Prod. Co.*, 48 A.2d 883, 885 (Pa. Super. Ct. 1946).

69. *Id.* Improved means of transportation made traveling to the location of marriage officials easier than in frontier times. For the problems of frontier life, see *supra* Part II, section B.

70. *Buradus*, 48 A.2d at 885.

71. *Id.* at 887.

court refused to disturb the law because it is the role of the legislature to abrogate the long accepted common law doctrine.⁷²

Almost forty years later, the Pennsylvania Superior Court again refused to abrogate Pennsylvania’s acceptance of common law marriage.⁷³ The Pennsylvania Superior Court noted that the opportunity to abrogate common law marriage has been before the courts and the legislature numerous times and that the doctrine had yet to be abrogated.⁷⁴ The Superior Court limited its role to the application of the law by saying that any changes to the law must be left to the legislature.⁷⁵

IV. *Staudenmayer v. Staudenmayer*

A. *Factual Background*

The most recent Pennsylvania Supreme Court decision on common law marriage, and the decision on which the Commonwealth Court in *PNC Bank Corp.* relied, is the 1998 case *Staudenmayer v. Staudenmayer*.⁷⁶ The parties in this case were disputing what constituted marital property in the equitable distribution proceedings as part of the divorce action filed by the husband.⁷⁷ The parties were ceremonially married in December of 1984, but Linda Staudenmayer claimed a common law marriage existed as early as 1978; thus, she claimed that a tort settlement received by Theodore Staudenmayer that settled in April of 1984 was marital property.⁷⁸

The decisions in the lower courts and the factual circumstances are indicative of the confusion surrounding a common law marriage claim. The Staudenmayers had cohabited since 1976, and had a daughter in 1979.⁷⁹ Despite the availability of both parties to testify as to the words in the present tense, Linda Staudenmayer, as the party claiming a

72. *Id.* The Superior Court reasoned that abrogation of common law marriage, “will be exclusively for the legislature to determine.” *Id.*

73. In the Interest of Miller, 448 A.2d 25, 32 (Pa. Super. Ct. 1982).

74. *Id.* The Superior Court stated: “We have not overlooked the arguments of counsel for appellant’s mother, urging that we re-examine the doctrine of common law marriage, and either abolish it or align the age of consent to that required for statutory marriage. (citation omitted). However, we have declined previous opportunities to abolish or modify the doctrine of common law marriage. Past efforts in the Legislature to abolish common law marriage have failed.” *Id.*

75. *Id.* “If common law marriage is to be abolished, or the requirements for entering into it changed, it must be done by the Legislature, not the courts. . . . Our responsibility is to interpret and apply the law. If a marriage is lawful, that is the end of the inquiry.” *Id.*

76. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016 (Pa. 1998).

77. *Id.* at 1018.

78. *Id.*

79. *Id.*

common law marriage, instead attempted to prove a common law marriage through cohabitation and reputation.⁸⁰ She offered up behaviors that are similar to those of a married couple: use of the same surname, joint accounts, ownership of a marital residence, and jointly filed tax returns.⁸¹

However, while the Staudenmayers for the most part presented themselves as husband and wife prior to 1984, Linda never told her parents that they were married.⁸² Linda even referred to the date of their marriage in 1984 as “the date for legal purposes,”⁸³ apparently unaware that a common law marriage is just as valid in the eyes of the law as a formal marriage.⁸⁴

B. Procedural History

The trial court held that Linda had failed to prove “clearly and convincingly” that words in the present tense had been exchanged.⁸⁵ The trial court was not satisfied that Linda had proven that the reputation was broad and general⁸⁶ because her immediate family was unaware of the marriage prior to the December 1984 ceremony.⁸⁷ Thus, the tort settlement obtained before the formal marriage was deemed separate property.⁸⁸

The Superior Court reversed, holding that Linda had met her burden of proving a common law marriage through “numerous, objective indicia of marriage.”⁸⁹ On appeal, the Pennsylvania Supreme Court was left with the issue of whether a common law marriage existed.⁹⁰

C. The Pennsylvania Supreme Court’s Holding

The Pennsylvania Supreme Court reversed the decision of the Superior Court because Linda failed to prove clearly and convincingly that Theodore and she had exchanged words in the present tense.⁹¹ Furthermore, Linda was not entitled to the rebuttable presumption of a common law marriage because the rebuttable presumption through

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1019.

84. *See infra* note 187 and accompanying text.

85. *Staudenmayer*, 714 A.2d at 1019.

86. *See supra* note 60 and accompanying text.

87. *Staudenmayer*, 714 A.2d at 1019.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1022.

cohabitation and reputation is available only when testimony as to the exchange of words in the present tense is unavailable.⁹²

In its analysis, the *Staudenmayer* court set forth the common law doctrine, but from the outset the court said, "[w]hile we do not today abolish common law marriages in Pennsylvania, we reaffirm that claims for this type of marriage are disfavored."⁹³ The *Staudenmayer* court reiterated that Pennsylvania courts view common law marriage claims with hostility due to the potential for fraud, that the claimant has a heavy burden, and that such claims are reviewed with "great scrutiny."⁹⁴ The *Staudenmayer* court was similar to earlier Pennsylvania courts that have disfavored common law marriage claims.⁹⁵

D. Only Two Justices Supported Abrogation

In a concurring opinion joined by Justice Castille, Justice Nigro advocated the abrogation of common law marriage in Pennsylvania.⁹⁶ Justice Nigro supported his position for abrogation by using supporting language from courts in other jurisdictions.⁹⁷ Justice Nigro cited various reasons for abrogation of common law marriage: it is an antiquated law; common law marriages are "uniformly misunderstood;" formal marriages are not costly;⁹⁸ the pioneer conditions that necessitated informal marriages are gone;⁹⁹ common law marriages promote a lack of commitment;¹⁰⁰ and the doctrine allows for fraudulent claims.¹⁰¹ Justice

92. *Id.* The court held, "Here, Linda was available to testify, and did testify, concerning the exchange of verba in praesenti between her and Theodore. She simply did not do so convincingly, and therefore did not meet her burden." *Id.*

93. *Id.* at 1019-20. The Pennsylvania Supreme Court noted that the validity of the common law doctrine was not an issue before the Pennsylvania Supreme Court, which is why the issue of abrogation was not addressed. *Id.* at 1020 n.4.

94. *Id.* (citing *Estate of Wagner*, 159 A.2d 495, 497 (Pa. 1960); *Estate of Gavula*, 417 A.2d 168, 171 (Pa. 1980)).

95. See *supra* Part III, section C.

96. *Staudenmayer*, 714 A.2d at 1022 (Nigro, J., concurring).

97. *Id.* at 1022 (Nigro, J., concurring). See *Orsburn v. Graves*, 210 S.W.2d 496 (Ark. 1948) (stating that the pioneer conditions that necessitated common law marriage no longer exist); *Johnson v. Young*, 372 A.2d 992 (D.C. 1977) (stating that common law marriage is an antiquated law which is misunderstood and serves little purpose); *Dunphy v. Gregor*, 643 A.2d 372 (N.J. 1994) (stating that common law marriage has an inherent nonrecognition of the legal process and results in relationships lacking in commitment); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (stating that common law marriage does not properly separate false claims of marriage from legitimate claims); *Nestor v. Nestor*, 472 N.E.2d 1091 (Ohio 1984) (stating that, "[t]he days of the walking preacher and of the bishop on horseback are long gone.").

98. *Staudenmayer*, 714 A.2d at 1022-23 (Nigro, J., concurring) (citing *Johnson v. Young*, 372 A.2d 992, 995-96 (D.C. 1977) (citation omitted)).

99. *Id.* at 1023 (Nigro, J., concurring) (citing *Osburn et al. v. Graves*, 210 S.W.2d 496, 498 (Ark. 1948)).

100. *Id.* (Nigro, J., concurring) (citing *Dunphy v. Gregor*, 642 A.2d 372, 382 (N.J.

Nigro opined that official records should determine the existence of a marriage, not the Pennsylvania judiciary's interpretation of facts.¹⁰²

V. *PNC Bank Corp. v. Workers' Compensation Appeal Board*
(Stamos)

According to the Commonwealth Court, "the continued viability of the doctrine of common law marriage" was "left open" after *Staudenmayer*.¹⁰³ What was considered "left open" after *Staudenmayer* was closed (at least in the Commonwealth Court)¹⁰⁴ as the *PNC Bank Corp.* court held that it abrogated common law marriage in the Commonwealth Court, though it gave the holding a "purely prospective effect."¹⁰⁵

A. *Factual Background*

The factual history in *PNC Bank Corp.* is illustrative of the problems the Commonwealth Court sought to remedy. In 1994, Janet Stamos, who worked for PNC Bank, was killed in an airplane crash.¹⁰⁶ In 1997, John Kretz filed a claim for Stamos's death benefits from PNC Bank claiming to be the common law husband of Stamos.¹⁰⁷ Kretz's claim came before a Workers' Compensation Judge (WCJ).¹⁰⁸ To prove a common law marriage through words in the present tense, Kretz admitted into evidence an affidavit that both Stamos and he signed.¹⁰⁹ The affidavit from December 22, 1990, stated that the parties had expressed the words in the present tense with the intent of being husband and wife, that the parties had held themselves out as husband and wife, and that the only way to remove Stamos from the plan would be through legal divorce proceedings.¹¹⁰ The affidavit set June 15, 1988, as the date that Kretz and Stamos entered into their common law marriage.¹¹¹

1994)).

101. *Id.* (Nigro, J., concurring) (citing *Morone v. Morone* 413 N.E. 2d 1154, 1157 (N.Y. 1980)).

102. *Id.* (Nigro, J., concurring).

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

104. *See infra* Part VI, section B(3).

105. *Id.* at 1282. That is, the common law marriages entered into prior to this holding would be valid, but any entered into after this holding would not be recognized in the Commonwealth Court. Given the purely prospective approach, the Court had to determine whether a common law marriage existed in this case. *Id.* at 1282-86.

106. *Id.* at 1272.

107. *Id.*

108. *Id.*

109. *Id.* at 1273.

110. *Id.*

111. *Id.*

Despite the apparent clarity of the affidavit, Kretz’s testimony revealed that the actual date of the marriage was one year later, in 1989.¹¹² In fact, Stamos could not have entered into the marriage in 1988 because she was still married to another man as of December of 1988.¹¹³ Regardless of the date, Kretz testified that the parties signed the affidavit so that Stamos would be financially protected in case tragedy struck Kretz.¹¹⁴ Kretz contended that the parties were financially dependent upon each other.¹¹⁵ He offered evidence of activities and trips taken by the couple.¹¹⁶ Kretz also testified that he served as the intermediary between the airline and Stamos’s family after her death.¹¹⁷

Despite the parties’ intention to establish a common law marriage, they maintained separate bank accounts, filed separate income tax returns, and mortgaged their house under one party’s name.¹¹⁸ Further, Kretz and Stamos did not share any jointly owned assets or debts.¹¹⁹ PNC even pointed to Stamos’s death certificate that claimed she was divorced with no surviving spouse.¹²⁰

B. Procedural History

The WCJ found that the parties had expressed the words in the present tense in June of 1989 and reaffirmed their intentions in December of 1990 when they signed the affidavit.¹²¹ Thus, the WCJ determined that Kretz, as the common law husband of Stamos, was entitled to the surviving spouse’s benefits.¹²² The Workers’ Compensation Appeal Board (Board) affirmed the WCJ’s decision.¹²³ From the Board’s decision, PNC Bank appealed to the Commonwealth Court.¹²⁴

112. *Id.*

113. *Id.* at 1273 n.3.

114. *Id.* at 1273.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1274.

122. *Id.*

123. *Id.*

124. *Id.* at 1272.

C. *The Commonwealth Court's Decision*

1. Common Law Marriage Is Abrogated in the Commonwealth Court

In the Commonwealth Court, PNC Bank argued primarily that common law marriage should be abrogated.¹²⁵ In the alternative, PNC Bank argued that Kretz had failed to meet the heavy burden of proof necessary in the case of common law marriage.¹²⁶

The *PNC Bank Corp.* court began with a historical analysis of common law marriage.¹²⁷ In particular, the court relied heavily upon the historical information presented in Professor Bowman's article, *A Feminist Proposal to Bring Back Common Law Marriage*,¹²⁸ and Ariela R. Dubler's article, *Wifely Behavior: A Legal History of Acting Married*.¹²⁹

Emerging from the historical analysis, the *PNC Bank Corp.* court focused on criticisms of the doctrine of common law marriage.¹³⁰ The *PNC Bank Corp.* court cited to Pennsylvania case law stating that common law marriage is "an anachronism in the present day—born as it was of the exigencies of pioneer life. . . ."¹³¹ Furthermore, the *PNC Bank Corp.* court reasoned that, "[t]he law of Pennsylvania recognizes common law marriages. But they are a fruitful source of perjury and fraud, and, in consequence, they are to be tolerated, not encouraged. . . ."¹³²

In abrogating common law marriage,¹³³ the *PNC Bank Corp.* court relied upon the Pennsylvania Supreme Court's decision in *Staudenmayer*.¹³⁴ The *PNC Bank Corp.* court inferred from the *Staudenmayer* decision that the time had come for common law marriage to be abrogated.¹³⁵ Although the issue of abrogation was not before the *Staudenmayer* court, the Pennsylvania Supreme Court stated that the

125. *Id.*

126. *Id.*

127. *Id.* at 1274-75.

128. *Id.* at 1275-77. See Bowman, *supra* note 14.

129. *PNC Bank Corp.*, 831 A.2d at 1275-79. See Dubler, *supra* note 36.

130. *PNC Bank Corp.*, 831 A.2d at 1277-81.

131. *Id.* at 1278 (citing *Buradus v. Gen. Cement Prod. Co.*, 48 A.2d 883, 885 (Pa. Super. Ct. 1946)).

132. *Id.* (citing *Manfredi Estate*, 159 A.2d 697, 700-01 (Pa. 1960) (citation omitted)).

133. *Id.* at 1282. The decision of the Workers Compensation Judge was upheld because the court reasoned that the affidavit and testimony were sufficient to establish the burden of proof. *Id.* at 1283-86

134. *Id.* at 1278-79.

135. *Id.* at 1279 (citing *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1019-20 (Pa. 1998)).

doctrine's "continued viability is seriously in question"¹³⁶ and Justice Nigro encouraged its abrogation in his concurring opinion.¹³⁷

With the issue of abrogation of common law marriage before the Commonwealth Court, the *PNC Bank Corp.* court examined various reasons for abrogation.¹³⁸ First, single women are no longer viewed as a burden on the state and are now eligible to receive child support regardless of marital status.¹³⁹ Second, eligibility for inheritance rights of children no longer bears any relation to the marital status of their parents.¹⁴⁰ Third, access to ceremonial marriages is cheap, quick, and simple.¹⁴¹ Fourth, couples can solemnize their own marriage once they have obtained certification that no impediments exist.¹⁴²

The *PNC Bank Corp.* court also illustrated numerous advantages to abrogating common law marriage.¹⁴³ Adherence to statutory requirements provides the courts with a bright line standard.¹⁴⁴ Abrogation would reduce litigation and prevent fraudulent claims.¹⁴⁵ Furthermore, abrogation would clear up confusion as to what the law is,¹⁴⁶ and as a result would protect innocent parties in vulnerable situations due to misguided reliance.¹⁴⁷ In addition, the *PNC Bank Corp.*

136. *Id.* (citing *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020 n.4 (Pa. 1998)).

137. *Id.* (citing *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1023 (Pa. 1998) (Nigro, J., dissenting)).

138. *Id.*

139. *Id.* See 23 PA. CONS. STAT. § 4323(b) (2003) ("In making an order for the support of a child, no distinction shall be made because of the marital status of the parents.").

140. *PNC Bank Corp.*, 831 A.2d at 1279. For purposes of intestate succession, children born out of wedlock will be treated as the child of their mother and father. 20 PA. CONS. STAT. § 2107 (2003). "Parents are liable for the support of their children who are unemancipated and 18 years of age or younger." 23 PA. CONS. STAT. § 4321(2) (2003). "All children shall be legitimate irrespective of the marital status of their parents, and, in every case where children are born out of wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents except as otherwise provided in Title 20 (relating to decedents, estates and fiduciaries)." 23 PA. CONS. STAT. § 5102(a) (2003).

141. *PNC Bank Corp.*, 831 A.2d at 1279. See 23 PA. CONS. STAT. § 1303 (2003) (A license will be issued three days after an application for a license has been made. In emergency circumstances, a license can be granted immediately.); see also 23 PA. CONS. STAT. § 1105(a); see *infra* note Part VI, section A(2).

142. *PNC Bank Corp.*, 831 A.2d at 1280 (citing 23 PA. CONS. STAT. § 1502 (2003)). See 23 PA. CONS. STAT. § 1502(a) ("In all cases in which the parties intend to solemnize their marriage by religious ceremony without officiating clergy, the marriage shall not take place until their right to do so is certified in a declaration in substantially the following form. . .").

143. *PNC Bank Corp.*, 831 A.2d at 1280.

144. *Id.*

145. *Id.*

146. *Id.* at 1280-81 (citing *Baker v. Mitchell*, 17 A.2d 738, 741 (Pa. Super. Ct. 1941)).

147. *Id.*

court noted that the advanced role of women has resulted in a greater need for third parties to know the marital status of people.¹⁴⁸

Finally, the *PNC Bank Corp.* court reasoned that common law marriage gives parties the opportunity to use the doctrine as a “legal raincoat.”¹⁴⁹ The *PNC Bank Corp.* court exhibited disdain for parties who use the doctrine to receive benefits of being married when it suits them, only to deny their marriage when it is not favorable.¹⁵⁰ For example, one party’s family might not condone the marriage making it better to tell the family they were not married, while the parties would otherwise represent themselves as married in order to receive certain financial benefits.¹⁵¹ The *PNC Bank Corp.* court refused to support a doctrine that allowed such disrespect for the law.¹⁵²

2. Anticipatory Overruling

Despite the reasons for abrogating common law marriage,¹⁵³ the *PNC Bank Corp.* court realized that its decision to abrogate the doctrine would be contrary to the Pennsylvania Supreme Court’s refusal to do so.¹⁵⁴ Not finding any support for such action in the Pennsylvania Supreme Court, the *PNC Bank Corp.* court looked to federal courts that have held that “anticipatory overruling” may at times be both permissible and obligatory.¹⁵⁵ The *PNC Bank Corp.* court reasoned that “anticipatory

148. *Id.* at 1281. The Commonwealth Court reasoned that a third party needs to ascertain a person’s marital status because that person’s rights in relation to the third party are often contingent upon marital status. The court gave the example that, in the past, third parties interested in engaging in a business transaction would only evaluate the creditworthiness and earning capability of the husband. Now, the court reasoned, third parties will need to know whether the party is contracting as a member of a married couple because of the effect on creditworthiness and earning capability. A marriage license provides third parties with an immediate answer, while a common law marriage may not be discovered until it is brought to court in a dispute. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. See *supra* notes 130-152 and accompanying text.

154. *PNC Bank Corp.*, 831 A.2d at 1282.

155. *Id.* See *U.S. v. Girouard*, 149 F.2d 760, 765-67 (1st Cir. 1945) (Woodbury, J., dissenting) (stating that Congress did not intend to restrict conscientious objectors from naturalization, “[n]othing is to be gained by our deciding a question contrary to the way we think the Supreme Court would decide it.”); *Salerno v. Am. League of Prof’l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (stating that “we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom.”); *Specter Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting) (stating that “I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties

overruling” should only be employed in the “extraordinary circumstance” where there can be no doubt as to how the Pennsylvania Supreme Court would decide the issue.¹⁵⁶ The court reasoned that the Pennsylvania Supreme Court in *Staudenmayer*, “has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons.”¹⁵⁷ The *PNC Bank Corp.* court reasoned that this was such an “extraordinary circumstance;” therefore, it would no longer recognize common law marriages.¹⁵⁸

VI. Analysis of *PNC Bank Corp.* & Common Law Marriage

Although common law marriage should be abrogated in Pennsylvania, the Commonwealth Court in *PNC Bank Corp.* should have left abrogation to the legislature, especially because its analysis of the *Staudenmayer* holding is misplaced.

A. Common Law Marriage Should be Abrogated in Pennsylvania

Common law marriage should be abrogated by the legislature.¹⁵⁹ The law should be purely prospective: abrogating common law marriages from the date of enactment, but leaving all common law marriages entered into prior to that date as valid. In addition, full faith and credit¹⁶⁰ should be given to all common law marriages entered into in jurisdictions that recognize common law marriage.¹⁶¹ Only marriages

may not choose to appeal.”); see also Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53 (1982).

156. *PNC Bank Corp.*, 831 A.2d at 1282.

157. *Id.* (citing *Republic Steel v. Maddox*, 379 U.S. 650, 667 (1965) (Black, J., dissenting)).

158. *Id.*

159. Because common law marriage has been relied on by the citizens of Pennsylvania, an effort must be made to make people aware that they can no longer enter into common law marriages. See *House Judiciary Committee Task Force on Family Law: Hearing in H.B. 316*, Session of 2001, 11-14 (statement of Robert E. Rains, Esquire, Professor of Law and Co-Director, Family Law Clinic Pennsylvania State University Dickinson School of Law). Mailings and postings at common spaces throughout the state are one idea. Local representatives should also have a role in effectuating the spread of the new law. It is especially important that there not be any reliance when the law no longer allows for common law marriage.

160. U.S. CONST. art. IV, § 1. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” *Id.*

161. The Commonwealth Court in *PNC Bank Corp.* did not address the validity of marriages entered into in other states. *PNC Bank Corp. v. Workers’ Comp. Appeal Bd.* (Stamos), 831 A.2d 1269, 1282 n.80 (Pa. Commw. Ct. 2003). For more information on full faith and credit of marital laws, see Mark Strasser, *Baker and Some Recipes for*

entered into in Pennsylvania pursuant to title 23, section 1301 of the Pennsylvania Consolidated Statutes should be recognized as valid.¹⁶²

1. Abrogation Promotes Judicial Efficiency

A brief overview of Pennsylvania common law marriage cases demonstrates that fact-sensitive claims of this sort are judicially cumbersome.¹⁶³ Removing the potential for common law marriage claims would leave the courts with a clear-cut determination as to whether and when a party was married. Marriage records offer the court a bright line rule to follow. If parties want the benefits of being a married couple, then they should have to adhere to the statutory requirements.¹⁶⁴

A simple act of abrogation would immediately end any potential claims from the date of enactment.¹⁶⁵ Parties would no longer be able to use common law marriage as a “legal raincoat.”¹⁶⁶ A couple who wants the benefits of being married would have but one choice: to formally get married.¹⁶⁷ Courts would no longer have to separate fraudulent claims from valid claims of marriage. The marriage records would solve that problem in a quick and decisive manner.

Part of the reason that courts have had such difficulty with common law marriage cases is because the doctrine is confusing.¹⁶⁸ If the courts have struggled to apply the correct law, then ordinary citizens cannot be expected to know if they are common law married. A simple statutory requirement that conforms to majority practice in the nation would be much simpler for the citizens of Pennsylvania. Instead, common law marriage casts a shadow of uncertainty over relationships not ceremonially entered into. What good is a law designed for people to

Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence, 64 BROOK. L. REV. 307 (1998).

162. 23 PA. CONS. STAT. § 1301 (2003). *See supra* note 6.

163. *See supra* Parts III-V.

164. *See supra* note 6.

165. The General Assembly could simply repeal common law marriage by amending the language of 23 PA. CONS. STAT. § 1103 (2003) to read, “common law marriage is not recognized as valid. Only common law marriages validly entered into in Pennsylvania prior to the date of enactment and common law marriages validly entered into in a jurisdiction that recognizes common law marriages will be recognized as valid in this Commonwealth.”

166. *See supra* notes 149-52 and accompanying text.

167. Parties electing not to get married may not be unprotected. In Pennsylvania, “agreements between nonmarried cohabitators fail only to the extent that they involve payment for sexual services.” *Knauer v. Knauer*, 470 A.2d 553, 564 (Pa. Super. Ct. 1983). The *Knauer* court’s holding protects agreements made between nonmarried cohabitators, not agreements made between nonmarried cohabitators and third parties. *Id.*

168. *See supra* Part III, section B.

self-implement if it is almost impossible to understand?

2. The Need for Common Law Marriage No Longer Exists

The frontier conditions¹⁶⁹ that once necessitated common law marriages no longer exist. With increased ease of transportation, the citizens of Pennsylvania can readily travel to an official¹⁷⁰ who can solemnize a formal marriage ceremony.¹⁷¹ A marriage license fee of three dollars is minimal.¹⁷² Furthermore, the license does not impinge on a couple's choice of how they want to enter into a marriage because parties can either go before an official or marry themselves.¹⁷³ The *PNC Bank Corp.* court correctly reasoned that the only difference between common law marriage and a statutory marriage is the requirement for witnesses and a license.¹⁷⁴ Requiring such minimal effort for the benefits of marriage is not much to ask, especially when adherence to the statute will improve judicial efficiency.

3. Common Law Marriage Is Now Less Beneficial to Both Men and Women

In part, courts created common law marriage to entitle women and children to the support they would otherwise be denied due to the status of single woman or the status of a child born out of wedlock.¹⁷⁵ Common law marriage also entitled children born out of wedlock to inheritance rights.¹⁷⁶ Today, a child can receive support and inheritance regardless of whether the child's parents are married to each other.¹⁷⁷

169. See *supra* Part II, section B.

170. See 23 PA. CONS. STAT. § 1503 (2003). Officials who can solemnize a marriage include: justices, judges, district justices, magistrates, mayors, ministers, rabbis, and priests. *Id.*

171. *PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos)*, 831 A.2d 1269, 1279 (Pa. Commw. Ct. 2003).

172. 23 PA. CONS. STAT. § 1105(a) (2003). “The fee to be charged for issuing a marriage license or declaration and for returns thereof to the department shall be \$3 of which \$2.50 shall be retained by the county wherein the license is issued and 50 shall be remitted to the Commonwealth.” *Id.*

173. 23 PA. CONS. STAT. §§ 1502-03 (2003). Pennsylvania entitles members of religious organizations to marry themselves in accordance with the rules of their religion as long as they obtain the proper marriage certificates. *Id.* See *supra* note 142 and accompanying text.

174. *PNC Bank Corp.*, 831 A.2d at 1280.

175. *Id.* at 1279.

176. See *supra* note 38 and accompanying text.

177. See *supra* notes 139-40. See also 20 PA. CONS. STAT. § 2107 (2003). For more information on the rights of children born out of wedlock, see Timothy G. Barrett, *Is Discrimination Against Illegitimate Children Worthy of Stricter Scrutiny Under the Constitution?—The Relationship Between State Intestate Succession Statutes and the Social Security Act In Claims for Child Benefits for Illegitimate Children*, 33 U. OF

While common law marriage still offers protection to some, common law marriage nonetheless poses a threat to men and women alike. A person who never exchanges words in the present tense with his or her partner, but relies on promises from the partner that a marriage exists, is left in jeopardy should the person ever need to prove a marriage.¹⁷⁸ A marriage license assures a couple of their marital status.¹⁷⁹ Without a license, cohabiting nonmarried parties can only hope that courts will enforce any agreements made between them.¹⁸⁰ Furthermore, the confusing nature of common law marriage may trap parties in relationships which they believe to be common law marriages. Strict adherence to the license requirement¹⁸¹ would alleviate any of these concerns.

4. The Effect on Third Parties is Greater Now¹⁸²

The *PNC Bank Corp.* court reasoned that third parties are burdened by the existence of common law marriage because third parties now deal with both husband and wife, as opposed to just the husband when the doctrine was first created.¹⁸³ In this day and age of business, full disclosure of marital status is important. A simple marriage license circumvents any of the potential confusion that may be created with a common law marriage scenario. Reducing such burdens on third parties is a sufficient reason to abrogate common law marriage in light of the acceptable statutory alternative—the marriage license.¹⁸⁴

5. Common Law Marriage Does Not Promote Respect for the Law

The common law marriage doctrine invites parties to use the doctrine to their benefit without fully accepting the consequences. The *PNC Bank Corp.* court used the term “legal raincoat” to describe the actions of parties who choose to avow a common law marriage when it

LOUISVILLE J. OF FAM. L. 79 (1994).

178. See *supra* Part IV, section C and note 167.

179. See *supra* note 6.

180. See *supra* note 167.

181. See *supra* note 6.

182. For more information on third parties, see Heidi J. DeBernardo, *Pennsylvania's Workers Comp. Law: An Examination of Key Changes Made to Supersedeas Proceedings by Act 57 of 1996*, 35 DUQ. L. REV. 881 (1997); Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851 (1987); Ruth Ben-Israel, *Social Security In the Year 2000: Potentialities and Problems*, 16 COMP. LAB. L. 139 (1995).

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

184. See *supra* note 6.

benefits them, but to disavow it when it does not.¹⁸⁵ A sampling of Pennsylvania cases reveals that many common law marriage claims involve parties claiming marital status for financial benefits but denying marital status at other times.¹⁸⁶ A common law marriage is a marriage in every sense of the word.¹⁸⁷ Abrogating common law marriage, as proposed, would still allow any willing man and woman who meet the requirements of marriage to enter into marriage, but it would remove the possibility that marriage could be used fraudulently. Allowing for such abuse of the law, when a viable alternative exists, is intolerable.

B. The PNC Bank Corp. Court Should Have Left Abrogation to the Legislature

1. The Analysis of the *Staudenmayer* Court was Wrong

In her dissent in *PNC Bank Corp.*, Judge Doris A. Smith-Ribner correctly noted that only Justices Nigro and Castille voted to abrogate common law marriage while the five other justices did not.¹⁸⁸ Two out of the seven justices does not mean that the Pennsylvania Supreme Court “has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons.”¹⁸⁹ The majority’s language disfavoring common law marriage is consistent with the Pennsylvania judiciary’s hesitant toleration of common law marriage claims, and while the issue of abrogation was not before the court, it is important to note that the Supreme Court did not even suggest that common law marriage should be abrogated.¹⁹⁰ Dicta is not binding¹⁹¹ and reliance upon such

185. See *supra* notes 149-52 and accompanying text.

186. See *Richard v. Brehm*, 73 Pa. 140 (Pa. 1873) (defendant explicitly denied marriage to his partner’s sister, but claimed common law marriage to receive by devise real estate owned by his alleged common law wife); *Staudenmayer v. Staudenmayer*, 714 A.2d 1016 (Pa. 1998) (appellee did not tell immediate family members about the marriage, but claimed common law marriage to receive tort settlement); *Baker v. Mitchell*, 17 A.2d 738 (Pa. Super. Ct. 1941) (appellant did not tell immediate family members about the marriage, but claimed common law marriage to receive death compensation); *In re Estate of McNeil*, 56 Pa. D. & C.4th 77 (Ct. Com. Pl. 2001) (petitioner considered herself single for government documents, but claimed common law marriage in order to receive death certificate for alleged common law spouse killed in the September 11th terrorist attacks).

187. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1019 (Pa. 1998). “Marriage in Pennsylvania is a civil contract by which a man and a woman take each other for husband and wife. (citation omitted) There are two kinds of marriage: (1) ceremonial; and (2) common law. (citation omitted)” *Id.*

188. *PNC Bank Corp.*, 831 A.2d at 1286 (Smith-Ribner, J., dissenting).

189. See *supra* note 157 and accompanying text.

190. See *supra* Part III, section C.

191. *Hunsberger v. Bender*, 180 A.2d 4, 6 (Pa. 1962).

dicta in a two-justice concurring opinion should not be a basis for an intermediate court to overrule the highest court in the State.

2. Judicial Activism is Wrong

Judge Smith-Ribner noted that the intent of the legislature has been to retain common law marriage.¹⁹² Following the Pennsylvania Supreme Court decision in *Staudenmayer*, both Chambers of the General Assembly introduced bills to abrogate common law marriage in Pennsylvania.¹⁹³ However, none of these bills were enacted and title 23, section 1103 of the Pennsylvania Consolidated Statutes remains unchanged as common law marriage is still recognized in the Pennsylvania Consolidated Statutes.¹⁹⁴

In addition to the resistance from the legislature, the Commonwealth Court upheld a common law marriage in 2000 in *Brandywine Paperboard Mills v. Workers' Comp. Appeal Board (Zittle)*.¹⁹⁵ The holding is not unusual because common law marriages were recognized in all Pennsylvania courts as well as the state legislature.¹⁹⁶ What is unusual is that the opinion in *Brandywine Paperboard Mills* is completely devoid of any indication that the Commonwealth Court disfavored common law marriages—even though the case was decided two years after *Staudenmayer*.¹⁹⁷ The *Brandywine Paperboard Mills* court did not even suggest an action by the legislature to abrogate common law marriage.¹⁹⁸ In essence, the Commonwealth

192. *PNC Bank Corp.*, 831 A.2d at 1287-88 (Smith-Ribner, J., dissenting).

193. See H.R. 43, 1999 Gen. Assem., Sess. of 1999 (Pa. 1999); S.P. 814, 1999 Gen. Assem., Sess. of 1999 (Pa. 1999); H.R. 316, 2001 Gen. Assem., Sess. of 2001 (Pa. 2001); S.P. 1233, 2001 Gen. Assem., Sess. of 2001 (Pa. 2001); H.R. 1233, 2001 Gen. Assem., Sess. of 2001 (Pa. 2001); H.R. 2271, 2002 Gen. Assem., Sess. of 2002 (Pa. 2002).

194. 23 PA. CONS. STAT. § 1103 (2003). Following the Commonwealth Court's decision in *PNC Bank Corp.*, bills in both the House and Senate of the General Assembly of Pennsylvania have been proposed. Both bills propose a prospective abolishment of common law marriage in Pennsylvania. As of the date that this comment was sent to publication, neither have been signed into law. See H.R. 2165, 2003 Gen. Assem., Sess. of 2003 (Pa. 2003); S.P. 985, 2003 Gen. Assem., Sess. of 2003 (Pa. 2003). However, on May 11, 2004, the Pennsylvania Senate passed Senate Bill 985 with a 49-1 vote. Jan Murphy, *Senate OKs end to common-law marriage*, THE PATRIOT-NEWS (Harrisburg, PA), May 11, 2004, at B1. Despite the resounding support received in the Senate, there was concern in the Senate that the House would hurt the bill's chances of becoming law by including controversial same-sex marriage provisions in the bill. *Id.* The bill was before the House when this comment was sent to publication.

195. *Brandywine Paperboard Mills v. Workers' Comp. Appeal Bd. (Zittle)*, 751 A.2d 1205 (Pa. Commw. Ct. 2000).

196. See *supra* note 6 and Parts III-IV.

197. See *Brandywine Paperboard Mills v. Workers' Comp. Appeal Bd. (Zittle)*, 751 A.2d 1205 (Pa. Commw. Ct. 2000).

198. See *id.*

Court's opinion in *Brandywine Paperboard Mills* is nothing more than a rudimentary application of the common law doctrine.¹⁹⁹ With continued legislative inaction,²⁰⁰ the Pennsylvania Supreme Court's holding in *Staudenmayer*,²⁰¹ and the Commonwealth Court's silent acquiescence in the common law marriage doctrine in *Brandywine Paperboard Mills*,²⁰² the Commonwealth Court's decision in *PNC Bank Corp.*²⁰³ came as a great surprise.

The legislature makes the law of Pennsylvania,²⁰⁴ and it has chosen not to change the common law marriage doctrine.²⁰⁵ It is the judiciary's role to interpret the law,²⁰⁶ not to make it. The *PNC Bank Corp.* court erred by ignoring both the statutory recognition of common law marriage²⁰⁷ and the judicial precedent of leaving any changes to the doctrine to the legislature.²⁰⁸

3. The *PNC Bank Corp.* Court has Confused the Law in Pennsylvania

By usurping the powers of the legislature, the Commonwealth Court left the viability of common law marriage in Pennsylvania in question. While the Superior Court and the Pennsylvania Supreme Court disagreed as to the existence of a common law marriage between Linda and Theodore Staudenmayer, both courts recognized the existence of common law marriage in the law²⁰⁹ and neither holding went as far as the *PNC Bank Corp.* court.²¹⁰ The *PNC Bank Corp.* court expressly stated that it will no longer recognize common law marriage claims brought

199. *See id.*

200. *See supra* note 193.

201. *See supra* Part IV, section C.

202. *See supra* notes 197-99 and accompanying text.

203. *See supra* Part V, section C.

204. PA. CONST. art. II, § 1 "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." *Id.*

205. *See supra* note 7.

206. PA. CONST. art. V, § 1 provides:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Id.

207. *See supra* note 6.

208. *See supra* Part III, section C.

209. *See supra* Part IV.

210. *See supra* Part V, section C.

before the Commonwealth Court.²¹¹ Since neither the Pennsylvania Supreme Court²¹² nor the legislature have acted in response to the *PNC Bank Corp.* court's holding, it is difficult to determine where the law stands.

Given the unique structure of Pennsylvania's court system, common law marriage cases can arise under the jurisdiction of both the Commonwealth Court and the Superior Court.²¹³ After the *PNC Bank Corp.* case, the Superior Court in *Bell v. Ferraro* has stated that it is not bound by the Commonwealth Court's decision.²¹⁴ Noting that both the Superior Court and the Pennsylvania Supreme Court have declined to abrogate common law marriage, the *Bell* court heard a common law marriage case and applied the law as developed in the Superior Court and the Pennsylvania Supreme Court.²¹⁵

211. *PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos)*, 831 A.2d 1269, 1282 (Pa. Commw. Ct. 2003).

212. The time to file a petition for allowance of appeal to the Supreme Court is thirty days after the entry of the order of the Commonwealth Court. 11 PA. R.A.P. 1113 (2003). *PNC Bank* elected not to appeal within the allotted thirty days. Robert E. Rains, *Adding Uncertainty to Uncertainty About Common Law Marriage*, 25 PA. FAM. LAWYER 101, 103 (2004). The Supreme Court could have assumed jurisdiction over this case even if there was not an appeal. However, the Supreme Court did not assume King's Bench jurisdiction. *Id.* The Supreme Court may

on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 PA. CONS. STAT. § 726 (2003). For more information on the King's Bench jurisdiction, see Alexandra Makosky, *The King's Bench Power in Pennsylvania: A Unique Power That Provides Efficient Results* King's Bench Power in Pennsylvania, 101 DICK. L. REV. 671 (1997). See also, Bernard F. Scherer, *The Supreme Court of Pennsylvania and the Origins of King's Bench Power*, 32 DUQ. L. REV. 525 (1994).

213. See 42 PA. CONS. STAT. §§ 741, 742, 761, 762, 763, 764 (2003). Pennsylvania has two intermediate appellate courts, the Commonwealth Court and the Superior Court. The difference, essentially, is that the Commonwealth Court deals with all civil cases in which the state government or any officer of the state government is a party. The Superior Court has jurisdiction over cases involving all other parties. Both courts receive appeals from the Courts of Common Pleas and both can have cases appealed to the Pennsylvania Supreme Court. See *id.* However, the Superior Court will hear more domestic relations cases than the Commonwealth Court. Robert E. Rains, *Adding Uncertainty to Uncertainty About Common Law Marriage*, 25 PA. FAM. LAWYER 101, 102 (2004). The Commonwealth Court will likely hear common law marriage cases similar to the *PNC Bank Corp.* case where the party is seeking compensation from a government body. Common law claims raised in Superior Court will be between individual citizens, as in a divorce case based on a common law marriage.

214. *Bell v. Ferraro*, 849 A.2d 1233, 1234 n.2 (Pa. Super. Ct. 2004).

215. *Id.* The Superior Court affirmed the Court of Common Pleas of Monroe County that no common law marriage existed. *Id.* at 1235. The Superior Court found that the appellee's testimony that the marriage was not entered into with the requisite intent was more credible than the appellant's testimony that the intent was present when the words

While the Commonwealth and Superior Courts will treat common law marriage claims differently,²¹⁶ it remains to be seen how the Pennsylvania Supreme Court will handle a common law marriage claim. It is uncertain whether the Pennsylvania Supreme Court will give any deference to the Commonwealth Court’s holding in *PNC Bank Corp.* Most likely, if given the opportunity, the Pennsylvania Supreme Court will overturn the *PNC Bank Corp.* court because the *Staudenmayer* court did not stand for the proposition that the Pennsylvania Supreme Court would abrogate common law marriage if given the opportunity.²¹⁷ Regardless, all that is clear is that the law is unclear.

VII. Conclusion

The *PNC Bank Corp.* court was correct in holding that common law marriage should be abrogated.²¹⁸ The legislature should abrogate common law marriage for various reasons. First, adherence to the license requirement in Title 23, section 1301 of the Pennsylvania Consolidated Statutes would promote judicial efficiency because courts would not have to engage in fact-intensive inquiries for common law marriage claims.²¹⁹ Second, the need for common law marriage no longer exists because all citizens can avail themselves of the formal marriage requirements.²²⁰ Third, common law marriage no longer protects men or women as it did in the past.²²¹ Fourth, the effect on third parties is greater now than when the courts created common law marriage.²²² Finally, common law marriage promotes disrespect for the law.²²³

Although the *PNC Bank Corp.* court was correct in its reasons for abrogating common law marriage, it should have left abrogation to the legislature.²²⁴ The Commonwealth Court’s analysis of *Staudenmayer* was misplaced.²²⁵ The majority in *Staudenmayer* did not give any indication that the Pennsylvania Supreme Court would abrogate common

in the present tense were exchanged. *Id.* The parties entered into an “Affidavit of Common Law Marriage,” but the Appellee testified that this agreement was entered into only to allow the Appellant to be added to the Appellee’s health insurance plan. *Id.* at 1234-35.

216. See *supra* notes 214-15 and accompanying text, Part IV, and Part V, section C.

217. See *supra* Part VI, section B(1).

218. See *supra* Part VI, section A.

219. See *supra* Part VI, section A(1).

220. See *supra* Part VI, section A(2).

221. See *supra* Part VI, section A(3).

222. See *supra* Part VI, section A(4).

223. See *supra* Part VI, section A(5).

224. See *supra* Part VI, section B.

225. See *supra* Part VI, section B(1).

law marriage if given the opportunity, but in dicta only two concurring justices encouraged abrogation.²²⁶ The Commonwealth Court should not have relied on the dicta of two concurring justices²²⁷ from *Staudenmayer* to abrogate a longstanding common law doctrine.²²⁸ In addition, judicial activism is wrong because the legislature is the law making branch and it has chosen not to abrogate common law marriage.²²⁹ Because of the holding in *PNC Bank Corp.*, the status of common law marriage in Pennsylvania is uncertain.²³⁰

It is time for the Pennsylvania General Assembly to end the confusion existing around common law marriage by abrogating it.²³¹

226. *See id.*

227. *See supra* note 191.

228. *See supra* note 5. *See also supra* Part III.

229. *See supra* Part VI, section B(2).

230. *See supra* Part VI, section B(3).

231. *See supra* Part VI, section A.