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## Fairness and the Putative Spouse

Mark Strasser

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# Fairness and the Putative Spouse

Mark Strasser\*

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## INTRODUCTION

Several states recognize putative spouse status, which entitles individuals to receive property or support when their “marriages” end, even though those marriages were void.<sup>1</sup> But states recognizing this status impose various limitations on who qualifies as a putative spouse and on the types of benefits that a putative spouse might enjoy. While states recognizing this status employ it as an equitable remedy to prevent unfairness and unjust enrichment, they differ in approach in ways that are sometimes surprising and occasionally self-defeating. The doctrine needs to be modified if fairness to the various interested parties is to be achieved.

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1. See *Tagupa v. Tagupa*, 121 P.3d 924, 926 (Haw. Ct. App. 2005) (“[E]ven in cases where a putative spouse is determined to be entitled to a share of the quasi-marital property, the marriage is nonetheless deemed to be void.”).

Part I of this Article offers some background on putative spouses. Part II explains some of the differences among the states with respect to their treatment of putative spouses, noting some of the competing policy choices and, occasionally, internal inconsistencies. The Article concludes by recommending some changes and issuing alerts about some of the difficulties that will have to be resolved.

## I. PUTATIVE SPOUSE DOCTRINE

Marriages may be void for a variety of reasons ranging from a defect in the marriage ceremony to the failure of one of the spouses to obtain a divorce before attempting to marry again. States must decide how, if at all, to distribute assets when a void marriage “ends,” and putative spouse status provides a blueprint for appropriate asset distribution in particular cases.

### A. Background

Historically, putative marriages were recognized in Louisiana and many southwestern states,<sup>2</sup> tracing back to Spanish<sup>3</sup> and French law.<sup>4</sup> However, currently, states in various parts of the country recognize that status.<sup>5</sup>

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2. See *In re Krone's Est.*, 189 P.2d 741, 742 (Cal. Ct. App. 1948).

3. Monica Hof Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 LA. L. REV. 71, 78–79 (2003) (“Under Spanish law, a bigamous husband who died leaving both a legal and a putative spouse had to forfeit his share of the property earned during the putative marriage to his two wives as compensation for the grievous wrong he committed against the legal wife and for deceiving the good faith, putative wife.”).

4. *Id.* at 79 (“The 1804 French Code Napoleon recognized the effects of putative marriages.”).

5. See Leon Gabinet, *Common Law and “Putative” Marriages*, in TAX ASPECTS OF MARITAL DISSOLUTION § 3:11.50 n.1 & 2 (2d. ed., 2019) (listing California, Colorado, Illinois, Louisiana, Minnesota, Montana, Nebraska, Nevada, Texas, and Washington); see also *Rodriguez v. Rodriguez*, 908 P.2d 1007, 1011 (Alaska 1995) (noting that the state recognizes putative marriages); *Cvitanovich-Dubie v. Dubie*, 254 P.3d 439, 449 (Haw. 2011) (same); *Allen v. Allen*, 703 A.2d 1115, 1115 (R.I. 1997) (same); *Carnes v. Sheldon*, 311 N.W.2d 747, 752 (Mich. Ct. App. 1981) (“The courts of this state have been willing to grant equitable relief, in certain circumstances, to putative spouses.”).

Traditionally, a putative marriage involves two individuals who participate in a marriage ceremony<sup>6</sup> and then live together as a married couple but nonetheless do not have a valid marriage because some impediment prevented their marrying,<sup>7</sup> e.g., one of the parties still had a living spouse.<sup>8</sup> An additional requirement for a putative marriage is that at least one of the ceremony participants believed the marriage valid,<sup>9</sup> e.g., one of the parties was unaware that his or her would-be spouse was already married to someone else.<sup>10</sup> The putative marriage ends once the

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6. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979) (“[T]he Illinois Marriage and Dissolution of Marriage Act . . . provides that an unmarried person may acquire the rights of a legal spouse only if he goes through a marriage ceremony and cohabits with another in the good-faith belief that he is validly married. When he learns that the marriage is not valid his status as a putative spouse terminates.”).

7. *Succession of Marinoni*, 164 So. 797, 810 (La. 1935) (“Parties may be married and not validly married. They may have been willing to contract, agreed to contract, and may have actually contracted pursuant to the forms and ceremonies prescribed by law but still not be validly married because of some legal impediment to their marriage which destroys one of the essentials to a valid marriage, to wit, the ability to contract.”); *Miller v. Johnson*, 29 Cal. Rptr. 251, 253 (Ct. App. 1963) (“The usual putative marriage arises where it is solemnized in due form and celebrated in good faith but because of some legal infirmity is either void or voidable.”); see also Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 25 (1985) (“[M]ost states that do not recognize common-law marriage require a marriage ceremony as a prerequisite to a putative marriage.”). However, a different rule applies if the state recognizes common-law marriage. See *Garduno v. Garduno*, 760 S.W.2d 735, 738 (Tex. Ct. App. 1988) (“A putative marriage may arise out of either a ceremonial or common law marriage.”) (citing *Rey v. Rey*, 487 S.W.2d 245, 248 (Tex. Ct. App. 1972)).

8. *In re Marriage of Tejada*, 102 Cal. Rptr. 3d 361, 365–66 (Ct. App. 2009) (“Under the equitable putative spouse doctrine, a person's reasonable, good faith belief that his or her marriage is valid entitles that person to the benefits of marriage, even if the marriage is not, in fact, valid.”) (citing *In re Domestic Partnership of Ellis*, 76 Cal. Rptr. 3d 401, 402 (Ct. App. 2008)).

9. See *Sancha v. Arnold*, 251 P.2d 67, 71 (Cal. Ct. App. 1952); see also Casey E. Faucon, “*Living Separate and Apart*”: *Solving the Problem of Putative Community Property in Louisiana*, 85 TUL. L. REV. 771, 828 (2011) (“The earliest formulations of Louisiana's putative marriage rule sought to protect the rights of the good faith putative spouse.”).

10. *Caruso v. Lucius*, 448 S.W.2d 711, 712–13 (Tex. Ct. App. 1969) (writ refused n.r.e. Apr. 1, 1970) (“Since Arcelia Lucius Caruso was innocent of knowledge of the pre-existing marriage, she was not a meretricious spouse, but was a putative spouse, and entitled to one-half of the ‘community’ properties acquired by herself and Pasquale Caruso during their marriage relationship.”).

impediment is revealed and neither of the parties believes the marriage valid.<sup>11</sup>

Putative marriage claims arise in a variety of circumstances. Sometimes, both parties to the marriage are laboring under a mistaken belief that there is no impediment to their marriage. Such a misunderstanding might arise for a number of reasons, including:

- 1) both parties misunderstood when one of the party's divorce decree was effective,<sup>12</sup> or
- 2) one of the parties had reasonably relied on a former spouse's assertion that he or she would obtain a divorce but, for whatever reason, that individual did not follow through,<sup>13</sup> or

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11. *Williams v. Williams*, 97 P.3d 1124, 1128 (Nev. 2004) (“[O]nce a spouse learns of the impediment, the putative marriage ends.”); *Blumenthal v. Brewer*, 69 N.E. 3d 834, 853 (Ill. 2016) (“Once the putative spouse learns that the marriage is not valid, his status as a putative spouse terminates.”).

12. *Galbraith v. Galbraith*, 396 So. 2d 1364, 1367 (La. Ct. App. 2d Cir.) (“Even though the judgment of divorce which dissolved plaintiff's previous marriage was rendered in open court before his purported marriage to defendant, the judgment was not *signed* until after this remarriage.”), *writ denied*, 401 So. 2d 974 (La. 1981), *and writ denied*, 401 So. 2d 975 (La. 1981); *id.* at 1368 (“[P]laintiff's prior marriage was not dissolved by a final judgment until the signing of that judgment . . .”); *id.* (“The trial court specifically found both plaintiff and defendant to be in good faith and thus the annulled marriage was held to nevertheless produce the civil effects of a valid marriage.”).

13. *Neureither v. Workmen's Comp. App. Bd.*, 93 Cal. Rptr. 162, 165 (Ct. App. 1971) (“Burris, whose testimony was taken in Michigan by the insurance carrier, verified that he did make such a telephone call from Michigan to petitioner in California, and did tell her that he was going to obtain a divorce, but that he did not do so.”). *But see* *Freet v. Freet*, 442 So. 2d 1366, 1368 (La. Ct. App. 3d Cir. 1983) (“Gary, on the other hand, *blindly* relied on the assertion of his ex-wife, who was located in Florida. He knew as late as the summer of 1967 that his divorce proceedings had not yet begun, and then failed to check on the status of the proceedings before his wedding in 1968.”) (emphasis added); *Funderburk v. Funderburk*, 38 So. 2d 502, 504 (La. 1949) (“[T]he mere assertion by the man to the woman that he has secured a divorce from his wife whom she knows he is married to is not sufficient in itself to create a presumption of good faith on her part where there are no further facts and circumstances that would lead her to believe the man is actually divorced.”).

- 3) some third party had failed to fulfill his or her responsibilities, which meant that one of the parties did not obtain a valid divorce.<sup>14</sup>

At other times, only one of the parties believes in the validity of the marriage, e.g., because the other party never mentioned his or her prior marriage, much less that it never ended through death or dissolution.<sup>15</sup> Or, perhaps one of the parties relies on the other's word that his or her former

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14. See, e.g., *Hart v. Hart*, 427 So. 2d 1341, 1343 (La. Ct. App. 2d Cir.), *writ denied*, 433 So. 2d 152 (La. 1983) (“[T]he court felt that she was relying on her attorney there to handle the proceedings properly and therefore was in good faith in contracting the marriage with Mr. Hart.”); *Mara v. Mara*, 452 So. 2d 329, 332 (La. Ct. App. 4th Cir. 1984):

Gaudin explained that the Alabama lawyer had defrauded her into believing in the validity of the divorce judgment which he had issued to her, and that she was an easy mark for his trickery and deceit, having only a high school education and no knowledge of divorce law.

Given the undisputed facts of this case, we are satisfied that Gaudin was indeed an unwitting victim of deceit by her Alabama attorney, and that Gaudin entered her marriage to Mara in the belief that her divorce from Buglione was valid.

*Thomason v. Thomason*, 776 So. 2d 553 (La. Ct. App. 3d Cir. 2000) (finding that one of the parties was a putative spouse because she had not realized that the justice of the peace had failed to fill out the marriage license).

15. See *Kindle v. Kindle*, 629 So. 2d 176, 176–77 (Fla. Dist. Ct. App. 1993) (“At the time of the purported marriage, the appellant/husband was already married. The appellee/wife was not aware of this fact and, therefore, was an innocent victim of the husband's wrongdoing.”); *Holcomb v. Kincaid*, 406 So. 2d 650, 652 (La. Ct. App. 2d Cir. 1981), *writ denied*, 410 So. 2d 1136 (La. 1982) (“There is documentary proof in the record of defendant obtaining his final divorce decree after his marriage to plaintiff. At the annulment proceeding defendant testified he knew he was not free to marry plaintiff.”).

Some jurisdictions distinguish between cases in which the alleged putative spouse never knew that the partner had married and cases in which the alleged putative spouse knew of the marriage but wrongly thought that there had been a divorce. See *Garduno v. Garduno*, 760 S.W.2d 735, 740 (Tex. Ct. App. 1988) (“When the spouse is unaware of a prior undissolved marriage, good faith is presumed. [Citing *Whaley v. Peat*, 377 S.W.2d 855, 857 (Tex. Civ. App. 1964.)] However, when the putative spouse is aware that a former marriage existed at one time, the question becomes one of the reasonableness of that party's belief that the former marriage has been dissolved.”).

marriage had ended in divorce,<sup>16</sup> even though the latter party knows that no divorce was secured.<sup>17</sup>

### *B. Common-Law Marriage and Putative Spouse Doctrine*

Some of the states recognizing putative spouses<sup>18</sup> refuse to recognize common-law marriage, while others recognize both putative marriage and common-law marriage.<sup>19</sup> States that make a conscious decision not to permit common-law marriages to be contracted<sup>20</sup> within the state<sup>21</sup> may

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16. See *Succession of Zinsel*, 360 So. 2d 587, 593 (La. Ct. App. 4th Cir.), writ denied, 363 So. 2d 72 (La. 1978) (“[T]he trial judge apparently concluded, based on a credibility determination, that Linda was not under any obligation to investigate further Zinsel’s marital status after having been told by him that he had been divorced. We find no error.”).

17. See *Allen v. Allen*, 703 A.2d 1115, 1116 (R.I. 1997) (“[T]he plaintiff’s failure to acknowledge his prior marriage on the marriage license, his failure to identify the date his ‘divorce’ became final, and his admission that he was married at the time of the second marriage do not support a finding of good faith and preclude the application of the putative spouse doctrine.”).

18. For a listing of some of those states, see sources cited *supra* note 5.

19. See *Small v. McMaster*, 352 S.W.3d 280, 282 (Tex. Ct. App. 2011) (“An informal or common-law marriage exists in Texas if the parties (1) agreed to be married, (2) lived together in Texas as husband and wife after the agreement, and (3) there presented to others that they were married.”); *Smith v. Smith*, 966 A.2d 109, 114 (R.I. 2009) (“This state recognizes common-law marriage.”) (citing *Souza v. O’Hara*, 395 A.2d 1060, 1062 (R.I. 1978)); *In re Est. of Ober*, 62 P.3d 1114, 1115 (Mont. 2003) (“The State of Montana recognizes common-law marriages.”); *In re Est. of Little*, 433 P.3d 172, 176 (Colo. App. 2018) (“In Colorado, [a] common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship.”) (citing *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987)).

It is also true that some of the states recognizing putative spouses are common law jurisdictions while others are community property jurisdictions. See *Wallace*, *supra* note 3, at 77 (“The recognition of putative marriage crosses both civil and common law lines.”).

20. See, e.g., *Est. of Edgett*, 168 Cal. Rptr. 686, 688 (Ct. App. 1980) (“California does not accept the doctrine of common law marriage abolished in California by statute in 1895.”) (citing *Norman v. Norman*, 54 P. 143 (Cal. 1898)); see also *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979) (“[P]ublic policy disfavors private contractual alternatives to marriage.”).

21. States prohibiting common law marriages to be contracted within the state may nonetheless recognize those common law marriages validly contracted elsewhere. See *Colbert v. Colbert*, 169 P.2d 633, 635 (Cal. 1946) (“By this statute

well require individuals to have participated in a marriage ceremony to qualify as a putative spouse.<sup>22</sup> In contrast, jurisdictions recognizing common-law marriage will likely not impose such a requirement for putative spouses.<sup>23</sup> In those latter jurisdictions, because common-law marriage is an additional, valid way to enter into a marriage, those who in good faith attempt to enter into marriage that way but are unable to do so because of some existing, unknown impediment<sup>24</sup> should also qualify for putative spouse status.<sup>25</sup>

Suppose that two individuals, Robin and Lynn, live in a state recognizing putative but not common-law marriage. Suppose further that they participate in a marriage ceremony before Lynn's divorce is final.<sup>26</sup>

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California recognizes common law marriages validly contracted in a sister state.”) (citing *McDonald v. McDonald*, 58 P.2d 163 (Cal. 1936)).

22. *Hewitt*, 394 N.E.2d at 1209–10 (noting that in the very act in which common-law marriage was rejected the legislature recognized putative spouses and that one of the qualifications for that status was to have participated in a ceremonial marriage); see also *Welch v. State*, 100 Cal. Rptr. 2d 430, 433 (Ct. App. 2000), *disapproved of by* *Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211 (Cal. 2013) (“Appellant and Leonard Welch made no attempt whatsoever to comply with the procedural requirements for a lawful California marriage. Appellant, having been legally married and divorced twice, must have been aware of these requirements. Further, appellant’s claim that their common law vows established a valid marriage is unreasonable as a matter of law because California abolished common law marriage in 1895.”).

23. *Garduno v. Garduno*, 760 S.W.2d 735, 738 (Tex. Ct. App. 1988) (“A putative marriage may arise out of either a ceremonial or common law marriage.”) (citing *Rey v. Rey*, 487 S.W.2d 245, 248 (Tex. Civ. App. 1972)).

24. *Cf. Dean v. Goldwire*, 480 S.W.2d 494, 496–97 (Tex. Ct. App. 1972) (writ refused n.r.e. Oct. 4, 1972) (“We hold that if either appellee or appellant believed in good faith that she had obtained a valid Mexican divorce from Dean and that she was therefore legally free to marry appellee at the time of their marriage, then the marriage was putative and remained such until they *both* learned that she was not divorced from Dean.”).

25. *Hupp v. Hupp*, 235 S.W.2d 753, 756 (Tex. Ct. App. 1950) (“[E]very reason that exists for allowing relief to a party who has entered into a putative marriage relationship applies with equal force to the situation where the putative marriage was entered into as a common law marriage as where it was entered into pursuant to a marriage ceremony.”).

26. *Est. of Sax*, 263 Cal. Rptr. 190, 191 (Ct. App. 1989) (“Decedent’s affidavit for final judgment of divorce from his former spouse was filed with the court for signature on October 8, 1957. The decedent remarried that same day. The final judgment of divorce which terminated the decedent’s first marriage was signed and entered in the judgment book of the court not on the date filed with the court but on the following day, Oct. 9, 1957.”) (citing *Dean v. Goldwire*, 480



Ceremony notwithstanding, their marriage is not valid because Lynn was married to someone else at the time the ceremony took place.<sup>27</sup> Robin will likely be treated as a putative spouse,<sup>28</sup> assuming that Robin was unaware that Lynn's divorce was not final when their marriage ceremony took place.<sup>29</sup>

Suppose, instead, that Robin and Lynn live in a jurisdiction recognizing common-law marriage. Common-law marriages may be established when the members of the couple (1) agree to be married; (2) live together and hold themselves out to the community as married; and (3) are legally permitted to marry.<sup>30</sup> Suppose further that Robin and Lynn participate in a marriage ceremony when Lynn's divorce is not final, they continue living together even after Lynn's divorce is final, and the impediment to their marriage has been removed. Many of the common-law-marriage jurisdictions will recognize their marriage.<sup>31</sup>

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S.W.2d 494, 496 (Tex. Ct. App. 1972)); *see also Garduno*, 760 S.W.2d at 739 (“[A]ppellant’s prior marriage was an impediment to a valid common law marriage to appellee, until the divorce became final on January 3, 1986. The parties could still have entered a putative marriage, however, during the times that appellee was unaware of the prior marriage or believed it had been terminated.”) (writ refused n.r.e. Oct. 4, 1972).

27. *Sax*, 263 Cal. Rptr. at 191 (“Since the judgment of divorce did not become effective until one day following the decedent’s remarriage, the second marriage was void.”).

28. *Mara v. Mara*, 452 So. 2d 329, 333 (La. Ct. App. 4th Cir. 1984) (“[W]e conclude that Gaudin is entitled to putative status.”).

29. *Id.* at 333 (“Mary Ann Gaudin, at the time of her marriage to Gustave Mara, entertained the good faith and reasonable belief that her divorce from John P. Buglione, Jr. was final and valid.”).

30. *See Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 451 (Mont. 2004) (“Common law marriage in Montana is an equitable doctrine used to ensure people are treated fairly once a relationship ends. Under our common law, such a marriage is established when a couple: 1) is competent to enter into a marriage, 2) mutually consents and agrees to a common law marriage, and 3) cohabits and is reputed in the community to be husband and wife.”) (citing *In re Est. of Ober*, 62 P.3d 1114, 1115 (Mont. 2003)).

31. *Dowd v. Dowd*, 418 A.2d 1387, 1389 (Pa. Super. Ct. 1980) (“[W]henver one or both parties enter a matrimonial relationship in good faith, ignorant of an impediment to a valid marriage, continued cohabitation after the impediment has been removed results in a valid marriage.”). Some states that do not recognize common law marriage have adopted an analogous approach via statute. *See Est. of Whyte v. Whyte*, 614 N.E.2d 372, 373 (Ill. App. Ct. 1993) (“Gloria and John’s previously void marriage became lawful under section 212(b) because the impediment of Gloria’s previous marriage to William was removed and the couple subsequently cohabitated with each other.”).

In jurisdictions that do not recognize common-law marriage, Robin would be entitled to some benefits at the conclusion of the “marriage” because she would be considered a putative spouse. Conversely, in a jurisdiction that recognizes common-law marriage, Robin would be recognized as Lynn’s common-law spouse once the impediment to marriage was removed; therefore, there would be no need to appeal to putative spouse status.<sup>32</sup>

By the same token, suppose that Riley and Kyle participate in a wedding. Neither has ever been married nor is there any legal impediment to their marriage.<sup>33</sup> However, there is an irregularity in the ceremony that prevents the marriage from being recognized.<sup>34</sup> The couple nonetheless settles down and raises a family. They treat each other as spouses and hold themselves out to the community as spouses. Later, when Riley sues for divorce, Kyle claims that they were never validly married. In this kind of case, their marriage will be recognized in a jurisdiction recognizing

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32. In some jurisdictions recognizing common-law marriage, mere removal of the impediment will not automatically result in recognition of the common-law marriage. Instead, the couple will have to do something that indicates that they understand that they are now able to contract a common-law marriage and in fact are doing so. *See* Yarbrough v. Yarbrough, 314 S.E.2d 16, 19 (S.C. Ct. App. 1984) (“A relationship illicit at its inception does not ripen into a common law marriage once the impediment to marriage is removed. Instead, the law presumes that the relationship retains its illicit character after removal of the impediment. [Citing *Kirby v. Kirby*, 241 S.E. 2d 415, 416 (S.C. 1978).] In order for a common law marriage to arise, the parties must agree to enter into a common law marriage after the impediment is removed, though such agreement may be gathered from the conduct of the parties.”) (citing *Byers v. Mt. Vernon Mills*, 231 S.E.2d 699 (S.C. 1977)).

33. For example, they are not too closely related by blood. *See* N.H. REV. STAT. ANN. § 457:2 (“No person shall marry his or her father, mother, father’s brother, father’s sister, mother’s brother, mother’s sister, son, daughter, brother, sister, son’s son, son’s daughter, daughter’s son, daughter’s daughter, brother’s son, brother’s daughter, sister’s son, sister’s daughter, father’s brother’s son, father’s brother’s daughter, mother’s brother’s son, mother’s brother’s daughter, father’s sister’s son, father’s sister’s daughter, mother’s sister’s son, or mother’s sister’s daughter. No person shall be allowed to be married to more than one person at any given time.”).

34. *Cf.* *Marriage of Shores v. Shores*, No. A12–2245, 2014 WL 1758102, at \*4 (Minn. Ct. App. May 5, 2014) (“There is nothing in the record indicating that respondent understood the marriage to be invalid because the person who signed the marriage certificate was not the person who performed the marriage ceremony.”).

common-law marriage.<sup>35</sup> However, in a jurisdiction not recognizing common-law marriage, they will not have a valid marriage,<sup>36</sup> which may mean that the protections for Riley will instead arise by virtue of Riley being a putative spouse.<sup>37</sup>

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35. *Fisher v. Fisher*, 243 P. 730, 730 (Okla. 1925) (“There is evidence from which it might be concluded that the plaintiff in error induced the defendant in error to go through a marriage ceremony, which she believed to be valid, but which, in fact, was invalid, for the reason that plaintiff in error had not secured a license.”); *id.* at 730–31 (“These facts and circumstances constituted a common-law marriage, valid in this state.”).

36. Some states not recognizing common-law marriage nonetheless provide a statutory method to validate such marriages. *See* MASS. GEN. LAWS ANN. ch. 207, § 6 (West 2020) (“If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.”).

Pennsylvania no longer recognizes common-law marriages and now has a statute addressing this issue. *See* 23 PA. STAT. AND CONS. STAT. ANN. § 1702(a) (West 2020) (“If a married person, during the lifetime of the other person with whom the marriage is in force, enters into a subsequent marriage pursuant to the requirements of this part and the parties to the marriage live together thereafter as husband and wife, and the subsequent marriage was entered into by one or both of the parties in good faith in the full belief that the former spouse was dead or that the former marriage has been annulled or terminated by a divorce, or without knowledge of the former marriage, they shall, after the impediment to their marriage has been removed by the death of the other party to the former marriage or by annulment or divorce, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and immediately after the date of death or the date of the decree of annulment or divorce.”); 750 ILL. COMP. STAT. ANN. 5/212(b) (West 2020) (“Parties to a marriage prohibited under subsection (a) of this Section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.”).

37. *See Shores*, 2014 WL 1758102, at \*4.

In the above examples, there is no need for putative spouse status in the jurisdictions recognizing common-law marriage.<sup>38</sup> However, a change in the facts illustrates why the recognition of putative marriage may be important in a jurisdiction recognizing common-law marriage.

Suppose that Lynn and Robin participate in a marriage ceremony, but the marriage is not valid because Lynn's divorce is not final. Suppose further that, unbeknownst to Robin, Lynn's divorce is *never* final.<sup>39</sup> In that event, Robin will never become Lynn's common-law spouse, because they will never have been legally permitted to marry. Unless there is putative spouse status, Robin might be viewed as a legal stranger to Lynn.<sup>40</sup>

Recognition of putative spouse status in common-law-marriage jurisdictions provides protection for the innocent spouse where the marriage can never be recognized because the impediment continues to exist.<sup>41</sup> Thus, while putative spouse status fills some gaps in states not recognizing common-law marriage that need not be filled in states recognizing common-law marriage,<sup>42</sup> putative spouse status does fill gaps even in jurisdictions recognizing common-law marriage.<sup>43</sup>

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38. See 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, 421 n.123 (1999) ("Alabama does not apply the putative spouse doctrine, apparently because those persons whose marriage fails to comply with the requirements of a valid ceremonial marriage can be found to have entered into a common-law marriage.").

39. Cf. *Gill v. Brickman*, 274 P.2d 7, 9 (Cal. Ct. App. 1954) ("[I]t was shown by affidavits that a search of the records of New York county failed to disclose divorce proceedings between Dalka Gill and George Gill; that the National Desertion Bureau in New York endeavored to locate him and ascertained that he left his employment in Brooklyn on December 5, 1930, and reported they were unable to locate him; that a search of the records in Los Angeles and San Diego counties failed to disclose divorce proceedings between Dalka Gill and George Gill.").

40. See Julie Greenberg et. al., *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?*, 17 MICH. J. GENDER & L. 13, 22 (2010) ("[O]ne of the parties who, perhaps, has all of the property in his or her name seeks to avoid a property division or being forced to pay spousal support by claiming that the marriage was void *ab initio*.").

41. *Hupp v. Hupp*, 235 S.W.2d 753, 756 (Tex. Ct. App. 1950) (writ refused n.r.e. Jan. 19, 1951) ("[E]very reason that exists for allowing relief to a party who has entered into a putative marriage relationship applies with equal force to the situation where the putative marriage was entered into as a common law marriage as where it was entered into pursuant to a marriage ceremony.").

42. See *supra* notes 23–31 and accompanying text.

43. *But see* Beatrice K. Sowald, *Putative Marriage*, in BALDWIN'S OHIO PRACTICE DOMESTIC RELATIONS Law § 2:50, Westlaw OHPRAC DOM R § 2:50

In effect, states recognizing common-law marriage and states not recognizing common-law marriage use analogous approaches when deciding whether an individual qualifies for putative spouse status. Where the parties to the putative marriage utilize an accepted method of establishing a marriage and at least one of the parties believes in good faith that the marriage is valid, the “innocent” individual<sup>44</sup> may be treated as a putative spouse if there were some legal impediment to the marriage. That individual would be entitled to at least some of the benefits that are accorded to those in valid marriages, although the particular benefits will vary depending upon local law.

In a state known not to recognize common-law marriage, the trier of fact may simply disbelieve an individual claiming a sincere belief in the validity of her marriage by private agreement.<sup>45</sup> States recognizing putative spouse status require a sincere belief in the validity of the marriage,<sup>46</sup> so an individual without such a belief will not qualify as a putative spouse.<sup>47</sup>

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(“A putative (or reputed) marriage is the standard equitable device used in those states that do not recognize common law marriages and have no other way to satisfactorily determine property division, probate claims of the (reputed) surviving spouse, etc.”).

44. See *In re Marriage of Tejada*, 102 Cal. Rptr. 3d 361, 365 (Ct. App. 2009) (“Where a marriage is invalid due to some legal infirmity, an innocent party may be entitled to relief under the putative spouse doctrine.”) (citing *Est. of DePasse*, 118 Cal. Rptr. 2d 143, 155 (Ct. App. 2002)).

45. So, too, individuals might simply be disbelieved if claiming to have had a sincere belief in the validity of their marriage, notwithstanding their failure to divorce a prior spouse. See *Combs v. Tibbits*, 148 P.3d 430, 433 (Colo. App. 2006) (“[A]t all times, both parties knew that plaintiff was legally married to another person throughout the period of his cohabitation with defendant. . . . Neither plaintiff nor defendant had a good faith belief that the two were validly married, and neither qualifies as a putative spouse.”) (citing *People v. McGuire*, 751 P.2d 1011 (Colo. App. 1987)); see also *Rebouche v. Anderson*, 505 So. 2d 808, 811 (La. Ct. App. 2d Cir.) (“The trial court found that plaintiff did not possess the requisite good faith in contracting the marriage with Rebouche that would entitle her to be recognized as Rebouche’s putative spouse. . . . [B]ased on the evidence presented . . . plaintiff did not possess a reasonable belief that she was divorced from Ramsey at the time she purportedly married Rebouche.”), *writ denied*, 507 So. 2d 228 (La. 1987).

46. *Blakesley*, *supra* note 7, at 6 (“The putative marriage doctrine is a device developed to ameliorate or correct the injustice which would occur if civil effects were not allowed to flow to a party to a null marriage who believes in good faith that he or she is validly married.”).

47. See *Miller v. Johnson*, 29 Cal. Rptr. 251, 253 (Ct. App. 1963) (“Here, the farcical solemnization of divorce and marriage fails to meet any tests and negates

## II. VARIATIONS IN STATE PUTATIVE SPOUSE APPROACHES

States as a general matter employ putative spouse status to protect individuals who sincerely believed their void marriages valid, although the states are by no means uniform with respect to which benefits may be accorded, how the benefits should be distributed, or even what standard should be used to determine whether an individual qualifies as a putative spouse.<sup>48</sup> Some of the differences among the states are readily understood in terms of other policy choices, while other differences are less readily explained and seem to undercut the state's policy commitments. Several states should reconsider their approaches to putative spouses.

### *A. Which Benefits Do Putative Spouses Enjoy?*

Courts offer a few justifications for recognizing a putative spouse. A couple might have lived together for years and worked hard to build a business or acquire assets,<sup>49</sup> and it would be unfair not to permit the putative spouse to enjoy the fruits of his or her labor.<sup>50</sup> In addition, refusing

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good faith.”); *id.* (“The trial court found that plaintiff not only failed to prove a divorce from her former husband, but failed to prove either a valid or a putative marriage to Mr. Miller. These findings are well supported by the evidence.”).

48. *Compare* Williams v. Williams, 97 P.3d 1124, 1126 (Nev. 2004) (“[A]bsent fraud, the doctrine does not apply to awards of spousal support.”), *with* Smithers v. Smithers, 804 So. 2d 489, 491 (Fla. Dist. Ct. App. 2001) (“[A] trial court may award temporary alimony and attorney's fees to a putative spouse, even when she is the wrongdoer.”), *and* In re Parental Resps. Concerning D.P.G., 472 P.3d 567, 571 (Colo App. 2020) (“A putative spouse has the same rights as a legal spouse, including the right to maintenance.”).

49. *Combs*, 148 P.3d at 431 (“In addition to their domestic relationship, the parties were also involved in a business that sold vitamins and herbal extracts.”); *Est. of Vargas*, 111 Cal. Rptr. 779, 780 (Ct. App. 1974) (“Throughout the years Josephine continued to perform secretarial work for Juan's business at home without pay.”).

50. *See* Brennfleck v. Workmen's Comp. App. Bd., 84 Cal. Rptr. 50, 53 (Ct. App. 1970) (“There is a fundamental unfairness in treating such a putative wife who has reason to believe and in good faith believes that she is the workmen's wife, as does he, differently from a legal wife. The putative wife has contributed equally as much as the legal wife in preparing the workmen's meals, encouraging him in his work and generally enabling him to carry on.”); *Est. of Levie*, 123 Cal. Rptr. 445, 447 (Ct. App. 1975) (discussing the “equities connected with property acquired during the putative marriage . . . [where] the joint efforts of the putative spouses . . . contribute to the acquisition of . . . property”), *disapproved of on other grounds* by *Est. of Leslie*, 689 P.2d 133 (Cal. 1984); *Sancha v. Arnold*, 251 P.2d 67, 71 (Cal. Ct. App. 1953) (“The decedent had agreed with respondent that if and

to recognize a person's putative spouse status would seem unfair, because an individual would then not be entitled to the benefits that he or she had expected in good faith.<sup>51</sup> The California Supreme Court explained that "the fundamental purpose of the putative spouse doctrine was to protect the expectations of innocent parties and to achieve results that are equitable, fair, and just."<sup>52</sup>

While both of these rationales support dividing property acquired through joint efforts,<sup>53</sup> states disagree about which marital benefits should be accorded to a putative spouse. Even states permitting the "civil effects of a marriage to flow in favor of the party who marries in good faith as though the marriage had been legally contracted"<sup>54</sup> may disagree about which civil effects should be included.<sup>55</sup> For example, protecting the innocent party's expectations would support ordering spousal support in

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when he died the property he agreed to acquire and in the use of which she agreed to toil, together with what earnings the two could so accumulate, would belong to her. There can in equity be no just result save a decree specifically enforcing the agreement made.").

51. *In re Est. of Chen*, No. B182317, 2006 WL 1545714, at \*2 (Cal. Ct. App. June 7, 2006) ("Putative spouse status may also be based on the good faith reasonable expectations of the parties."); Blakesley, *supra* note 7, at 41 ("[T]he trend in the United States appears to be to allow support when equity requires it in order to enforce the reasonable expectations of the parties.").

52. *Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211, 216 (Cal. 2013).

53. *See In re Marriage of Tejada*, 102 Cal. Rptr. 3d 361, 366 (Ct. App. 2009) ("Quasi-marital property is 'property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable' [citing *Est. of Leslie*, 689 P.2d 133, 136 n.5 (Cal. 1984)]. . . . Upon declaration of putative spouse status, the court is required to divide the quasi-marital property as if it were community property.") (citing *Marvin v. Marvin*, 557 P.2d 106, 118 n.13 (Cal. 1976)).

54. *In re Koonce*, 380 So. 2d 140, 142 (La. Ct. App. 1st Cir. 1979), *writ denied sub nom.*, *Application of Koonce*, 383 So. 2d 23 (La. 1980).

55. *Williams v. Williams*, 97 P.3d 1124, 1128 (Nev. 2004) ("States differ . . . on what exactly constitutes a 'civil effect.'"); *see also* Wallace, *supra* note 3, at 74 ("[S]tates that recognize the rule disagree on the breadth of effects that a putative spouse can receive."). For example, one issue is whether the putative spouse then has the ability to adopt as a stepparent. *Koonce*, 380 So. 2d at 142 ("We also find that appellant's status as a 'spouse' was a civil effect in his favor at the time of the adoption which entitled him to obtain a final adoption decree at the first hearing."). Apparently, Koonce did not view this as a benefit—he was seeking to have the adoption annulled. *See id.* at 141 ("Mr. Koonce obtained a judgment declaring his marriage to Mrs. Anderson an absolute nullity and holding Mrs. Anderson to be in legal bad faith. Shortly thereafter, he filed a petition for annulment of the adoption decree.").

appropriate cases,<sup>56</sup> but jurisdictions differ with respect to the conditions, if any, under which spousal support might be ordered. Some jurisdictions permit support as a matter of statute,<sup>57</sup> others do not permit permanent support to be awarded,<sup>58</sup> and still others only permit permanent support upon a showing of fraud.<sup>59</sup>

Consider benefits other than property and support; for example, the right not to testify against one's spouse. States have been unwilling to extend that right to the putative spouse.<sup>60</sup> Ironically, the failure to recognize the testimonial privilege in the putative marriage context might mean that the innocent spouse who wrongly believes that there is a valid marriage might detrimentally rely upon the privilege to reveal a great deal to his or her partner,<sup>61</sup> whereas the party who knows that the marriage is not valid might be less forthcoming.<sup>62</sup> Further, the benefits of recognizing

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56. *But see infra* notes 57–59 and accompanying text.

57. *Williams*, 97 P.3d at 1130, 1130 n.27 (citing CAL. FAM. CODE § 2254 (West 1994); COLO. REV. STAT. ANN. § 14–2–111 (West 2003); 750 ILL. COMP. STAT. ANN. 5/305 (West 1999); MINN. STAT. ANN. § 518.055 (West 1990); MONT. CODE ANN. § 40–1–404 (2003)) (“Although some states permit the award of alimony, they do so because their annulment statutes permit an award of rehabilitative or permanent alimony.”).

58. *See Whitebird v. Luckey*, 67 P.2d 775, 777 (Okla. 1937) (“A court cannot say without an unpardonable degree of inconsistency, ‘This marriage contract being void or voidable is hereby set aside,’ and, in the next breath, ‘the contract is valid and enforceable and by reason of its validity and enforceability, it will be enforced to the extent of requiring the payment of alimony.’”).

59. *See Williams*, 97 P.3d at 1126 (“[A]bsent fraud, the doctrine does not apply to awards of spousal support.”).

60. *See Weaver v. State*, 855 S.W.2d 116, 121 (Tex. Crim. App. 1993) (“Absent proof of a ceremonial or common law marriage recognized as a legal marriage by the law of this state, we hold that the privilege not to testify against one's spouse does not extend to putative marriages.”); *Est. of Edgett*, 168 Cal. Rptr. 686, 688 (Ct. App. 1980) (“[T]he marital communication privilege is extended only to persons who have a valid marriage.”) (citing *People v. Delph*, 156 Cal. Rptr. 422, 424 (Ct. App. 1979)).

61. *State v. Byrd*, 676 S.W.2d 494, 501 (Mo. 1984) (“This privilege is intended to encourage full disclosure and trust between the parties to a marriage.”) (citing *State v. Euell*, 583 S.W.2d 173, 175–76 (Mo. 1979)).

62. Were the fear that recognizing the privilege would prevent a wronged spouse from testifying against the other spouse, that worry could be met either by specifying who owns the privilege, *see* LA. CODE EVID. art. 505 (“In a criminal case or in commitment or interdiction proceedings, a witness spouse has a privilege not to testify against the other spouse. This privilege terminates upon the annulment of the marriage, legal separation, or divorce of the spouses.”), or by providing an exception when one spouses wishes to testify against the other



the privilege, e.g., promoting the parties' honesty and forthrightness,<sup>63</sup> might not be realized, which would mean that the relationship that may not have started out well (because of the existing legal impediment to the marriage) might be further weakened because of the lack of support for honesty and trust that would have been provided by recognition of the privilege in this context.<sup>64</sup>

### *B. Was the Marriage Void or Voidable at Its Inception?*

Jurisdictions vary with respect to what is necessary for an individual to qualify as a putative spouse. Some states require that an individual participate in a ceremony yielding a marriage that is void or voidable at the outset,<sup>65</sup> whereas others do not. These limitations may undermine the state's ability to achieve its goals of fairness and the protection of reasonable expectations.

The paradigmatic putative marriage involves two individuals who participated in a ceremony that yielded a void marriage because one of the

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spouse with respect to harms allegedly perpetrated against the testifying spouse. See TEX. RULES OF EVID. HANDBOOK Rule 504(4)(C) (2020 ed.) (“This privilege does not apply: In a: (i) proceeding in which a party is accused of conduct that, if proved, is a crime against the person of the other spouse, any member of the household of either spouse, or any minor child; or (ii) criminal proceeding involving a charge of bigamy under Section 25.01 of the Penal Code.”).

63. See *Bergner v. State*, 397 N.E.2d 1012, 1019 (Ind. App. 1979) (“The privilege is based on strong public policy grounds which ‘favors the promotion and preservation of marital confidences, even at the expense, in certain instances, of depriving honest causes of upright testimony.’”) (citing *Shepherd v. State*, 277 N.E.2d 165, 167 (Ind. 1971)).

64. Cf. *People v. Trzeciak*, 5 N.E.3d 141, 149–50 (Ill. 2013) (noting that the privilege “is intended to further marital harmony, mutual understanding and trust by encouraging full disclosure, free communication, and confidential communications between spouses”) (citing *People v. Simpson*, 350 N.E.2d 517, 524 (Ill. App. 1976), *rev'd on other grounds*, 369 N.E.2d 1248 (Ill. 1977)).

65. See *Williams v. Williams*, 97 P.3d 1124, 1126 (Nev. 2004) (“Under the doctrine, an individual whose marriage is void due to a prior legal impediment is treated as a spouse so long as the party seeking equitable relief participated in the marriage ceremony with the good-faith belief that the ceremony was legally valid.”); see also *Blumenthal v. Brewer*, 69 N.E.3d 834, 853 (Ill. 2016) (noting that “the Illinois legislature adopted the civil-law concept of the putative spouse, which involves a situation where a person goes through a marriage ceremony and cohabits with another in the good-faith belief that he or she is validly married”) (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979)).

parties was still married to someone else.<sup>66</sup> Yet, an individual might sincerely but falsely believe that she is married for a reason other than having participated in such a ceremony. Suppose, for example, that a couple validly marries and then divorces.<sup>67</sup> However, one of the parties to the marriage does not understand or appreciate that the parties have divorced<sup>68</sup> and continues to live with her former spouse,<sup>69</sup> with the former spouse contributing to the belief that the couple is still married.<sup>70</sup> The Nebraska Supreme Court recognized that “[a] plausible argument can be made that putative spouse principles should be applied in the circumstance where one lives with a former spouse in the good faith belief that their valid marriage has not been dissolved,”<sup>71</sup> and also recognized that some other jurisdictions had recognized putative spouse status under analogous circumstances.<sup>72</sup> Nonetheless, because the couple had never participated in a ceremony yielding a void or voidable marriage, the Nebraska court

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66. Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2016 (2017) (“A paradigmatic example is when one spouse believes that she has successfully terminated a previous marriage but in fact has not.”).

67. *Manker v. Manker*, 644 N.W.2d 522, 527 (Neb. 2002) (“The parties were married in Kearney, Nebraska, on September 4, 1979.”); *id.* at 528 (“On May 8, James and his counsel appeared at the final hearing, but Karen did not appear personally or through counsel. The district court ordered the marriage dissolved after finding it to be irretrievably broken and then accepted the parties’ property settlement agreement and incorporated it in the decree.”).

68. *Id.* at 528–29 (“Karen further testified that sometime between April and June 1980, James informed her that he had, in fact, dismissed the divorce proceedings on the day after the parties signed the property settlement agreement.”); *id.* at 529 (“Karen testified that she had no reason to suspect her marriage to James had been dissolved until James made a suspicious comment during an argument in 1994. Based on this comment, Karen consulted an attorney who made inquiries and confirmed that the decree had, in fact, been entered in 1980. Karen testified that she was ‘shocked’ to learn of this fact.”).

69. *Id.* at 528 (“Notwithstanding the legal dissolution of their marriage, James and Karen continued to reside together and hold themselves out as husband and wife.”).

70. *Id.* (“James and Karen continued to reside together and hold themselves out as husband and wife.”).

71. *Id.* at 533.

72. *Id.* at 532 (discussing *In re Marriage of Monti*, 185 Cal. Rptr. 72 (Ct. App. 1982) in which a court had “applied California’s putative spouse statute in a circumstance where the parties were both lawfully married and then lawfully divorced, but the woman continued living with the man based upon his representation that the divorce was never finalized”).

rejected that the putative spouse doctrine was applicable,<sup>73</sup> although the court did approve the division of property as a matter of equity.<sup>74</sup>

### C. *The Sincerity of Belief*

One issue involves whether the person participated in a ceremony yielding a void marriage.<sup>75</sup> A separate issue involves how the jurisdiction determines whether the individual had a good faith belief in the validity of her marriage; for example, whether the jurisdiction requires that the good faith belief be “reasonable.”<sup>76</sup>

The reasonableness requirement<sup>77</sup> is itself ambiguous—it might involve whether an objective, informed individual would have a similar belief,<sup>78</sup> or it might instead involve whether it was credible (i.e., reasonable to believe) that this particular person subjectively believed in the validity of the marriage.<sup>79</sup> Depending upon the individual’s “background and

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73. *Id.* at 533. *But see In re Marriage of Monti*, 185 Cal. Rptr. 72, 75 (Ct. App. 1982) (“[T]he Family Law Act and specifically section 4452, must be interpreted to include as a putative spouse a divorced spouse who continues to live with the ex-spouse in ignorance of the final divorce decree and with a good faith belief in the continuing validity of the marriage.”).

74. *Manker*, 644 N.W.2d at 528.

75. *See supra* note 59.

76. *See Williams v. Williams*, 97 P.3d 1124, 1128 (Nev. 2004) (“‘Good faith’ has been defined as an ‘honest and reasonable belief that the marriage was valid at the time of the ceremony.’”) (citing *Hicklin v. Hicklin*, 509 N.W.2d 627, 631 (Neb. 1994)).

77. *See Mara v. Mara*, 513 So. 2d 1220, 1222 (La. Ct. App. 4th Cir. 1987) (“A good faith putative spouse is one who has an honest, reasonable belief that the marriage confectioned is valid.”) (citing *Zanders v. Zanders*, 434 So. 2d 1213 (La. Ct. App. 1st Cir. 1983)).

78. *See Vryonis v. Vryonis*, 248 Cal. Rptr. 807, 813 (Ct. App. 1988) (“A proper assertion of putative spouse status must rest on facts that would cause a reasonable person to harbor a good faith belief in the existence of a valid marriage.”), *overruled by Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211, 213 (Cal. 2013); *Fonss v. DeMartini*, No. A11–1660, 2012 WL 1658926, at \*5 (Minn. Ct. App. May 14, 2012) (distinguishing between a good faith and a reasonable belief because the former unlike the latter is subjective); *see also Choa Yang Xiong v. Su Xiong*, 800 N.W.2d 187, 191–92 (Minn. Ct. App. 2011) (“We reject Xiong’s argument because in Minnesota, ‘good faith’ is judged subjectively, while ‘reasonable belief’ is judged objectively. The plain language of section 518.055 requires only a ‘good faith belief,’ not a ‘reasonable belief.’”) (citing *Bahr v. Capella Univ.*, 788 N.W.2d 76, 82 (Minn. 2010)).

79. *Rebouche v. Anderson*, 505 So. 2d 808, 812 (La. Ct. App. 2d Cir. 1987) (“Although the good faith analysis incorporates the objective elements of

experience,”<sup>80</sup> what she sincerely believed may not correspond with what the reasonable, informed person would have believed.<sup>81</sup>

If a state imposes an objective requirement, then an individual, because of misinformation, naivety, or ignorance, might not be found to have a good faith belief in the validity of the marriage and thus might be left with nothing after having been in a relationship for years.<sup>82</sup> This might seem especially unfair if the other party in effect receives a reward for his or her having deceived the inexperienced, former partner. Ironically, in a case recognizing that the Louisiana test is *subjective*, an appellate court upheld a lower court determination that the plaintiff’s subjective belief in her marriage was not reasonable, notwithstanding that “the plaintiff ha[d] a sixth grade education and [was] below normal intelligence . . . [with] . . . a mental age of 12 years.”<sup>83</sup> In contrast, a Minnesota court upheld a lower court finding that an individual had a subjective, good faith belief in the validity of her marriage, notwithstanding her having been told by her husband’s actual spouse that he had never obtained a divorce.<sup>84</sup>

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reasonableness, the inquiry is essentially a subjective one.”); *see also* Hart v. Hart, 427 So. 2d 1341, 1344 (La. Ct. App. 2d Cir. 1983) (“Thus the good faith analysis called for in this context—although incorporating objective elements of reasonableness—is *essentially* a subjective one.”).

80. *Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211, 213 (Cal. 2013).

81. *Id.* (“The good faith inquiry, however, does not call for application of a reasonable person test, and a belief in the validity of a marriage need not be objectively reasonable.”).

82. *Cf. Monica Hof Wallace, A Primer on Marriage in Louisiana*, 64 LOY. L. REV. 557, 599 (2018) (“A spouse in bad faith at inception of the putative marriage will not receive a share of the putative community at death or divorce.”).

83. *Rebouche*, 505 So. 2d at 810.

84. *See Fonoti v. Fonoti*, No. A17–0091, 2018 WL 2187358, at \*1 (Minn. Ct. App. May 14, 2018) (“[T]hey received a phone call in 1991 from appellant’s ‘former’ wife, Beulah Fonoti, in which Beulah asserted that appellant’s prior marriage to her was not dissolved. But respondent testified that she retained her good-faith belief in the legality of her marriage even after this phone call, telling appellant to ‘take care of it,’ which, in her view, meant that he should resolve any potential impediments to the otherwise legal status of their marriage.”); *id.* at \*2 (“The district court also considered and rejected the notion that the assertion by Beulah extinguished respondent’s good-faith belief by providing respondent with knowledge that she was not legally married to appellant.”); *id.* at \*4 (Ross, J., dissenting) (“Today’s majority opinion distinguishes Minnesota as the first state in the union, and I expect last state, to dispose of the presumption that everyone knows she cannot marry an already-married man.”).

A state employing a subjective test may have some difficulty in justifying a requirement that the putative spouse meet a formal requirement such as participating in a marriage ceremony. An individual might not know that it is necessary to participate in a ceremony to have a valid marriage, e.g., because a cousin had a valid marriage (perhaps in another jurisdiction) without a ceremony.<sup>85</sup> So, too, while an individual might be aware of certain facts (e.g., that the person he or she just married had never obtained a divorce), the individual might not understand the significance of those facts<sup>86</sup> and might sincerely believe in the validity of the recent marriage.

While it is possible that someone might not be aware of the requirement that an individual end his or her first marriage before beginning another,<sup>87</sup> it seems likely that most people would understand that they cannot marry someone who is already married and that they will not be permitted to benefit from such a bigamous marriage.<sup>88</sup> As a practical

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A separate question is whether the defendant believed the wife's claim that her marriage had never been dissolved. *See id.* at \*2 ("Respondent . . . apparently chose to reject the assertion of Beulah.").

85. *Compare* *Brigham v. John Herlihy*, No. B178515, 2006 WL 92825, at \*2 (Cal. Ct. App. Jan. 17, 2006) ("Herlihy was aware of a license requirement, but chose not to obtain one. He asked the pastor whether he would be willing to perform the ceremony without a license, and the pastor agreed. Herlihy did not have a reasonable good faith belief in a valid marriage. The trial court properly ruled that he cannot be considered a putative spouse."), *with* *Wagner v. Cty. of Imperial*, 193 Cal. Rptr. 820, 822 (Ct. App. 1983) ("To establish she was Clifton's putative spouse . . . Sharon was not required to show she and Clifton participated in a solemnization ceremony. . . . Sharon must only prove she had a good faith belief her marriage to Clifton was valid; solemnization would be at most evidence of such good faith belief.").

86. *Marriage of Shores v. Shores*, No. A12-2245, 2014 WL 1758102, at \*4 (Minn Ct. App. May 5, 2014) ("The record reflects that respondent admitted that the individual who signed the marriage certificate as the person who performed the marriage ceremony was not the person or persons who actually performed the ceremony. . . . There is nothing in the record indicating that respondent understood the marriage to be invalid because the person who signed the marriage certificate was not the person who performed the marriage ceremony. Instead, as the district court found, respondent 'had a good faith belief that she was legally married' to appellant.").

87. *See* Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L. J. 75, 115 n.93 (2007) ("[A] married individual must divorce before she can remarry.").

88. *See* *Endres v. Grove*, 111 A.2d 638, 639-40 (N.J. Super. Ct. Div. 1955) ("[R]elief will not be granted where the claimant is shown to have known of the impediment when he entered into the marriage sought to be adjudged void.");

matter, it may be that determining whether someone is a putative spouse in light of a subjective standard (incorporating reasonableness)<sup>89</sup> will pick out the same people as would have been selected in light of an objective standard. The trier of fact might reject that the purported putative spouse actually believed in the validity of the marriage when an objectively reasonable person never would have believed in that marriage's validity.<sup>90</sup>

Nonetheless, the implications of the subjective standard may not be fully appreciated. Consider the requirement that at least one of the marriage participants believe the marriage valid *when the ceremony takes place*.<sup>91</sup> Imposing such a requirement is difficult to justify when the individuals later sincerely believe their marriage valid because the former impediment no longer exists. In some jurisdictions, such a belief is objectively reasonable, both because some states recognize common-law

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Baker v. Baker, 23 N.W.2d 582, 583 (Minn. 1946) (citing *In re Brenchley's Est.*, 164 P. 913 (Wash. 1917)) ("The lower court found that plaintiff knew of defendant's prior marriage at the time the alleged common-law marriage commenced . . . . Where the arrangement under which the parties lived together was a meretricious one, the court will grant no relief.").

89. *Cf. Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211, 215 (Cal. 2013) ("[T]he reasonableness of the claimed belief is properly considered as part of the totality of the circumstances in determining whether the belief was genuinely and honestly held.").

90. In *Rebouche v. Anderson*, the trial court suggested that it was not reasonable for plaintiff to have relied on her husband's obtaining the divorce, given that she did not trust him. *See* 505 So. 2d 808, 811 (La. Ct. App. 2d Cir. 1987). But it might have been reasonable to believe that he would get the divorce even if it would not be reasonable to believe that he would do other things. Further, because the court should have used the subjective standard, the correct question was whether she trusted him to do this (so that they would be divorced), even though a more experienced person would not have trusted him.

91. *Batey v. Batey*, 933 P.2d 551, 553 (Alaska 1997) ("Allowing a person who knowingly enters into a bigamous marriage to claim later he or she eventually developed a good faith belief in the validity of that marriage would vitiate this purpose. The better rule, in light of reason and policy, is to require good faith at the inception of the putative marriage.").

marriage<sup>92</sup> and because other states prohibiting common-law marriage<sup>93</sup> will validate marriages after removal of the impediment. But if an individual knows that her aunt's marriage was validated after removal of the impediment, that person might not appreciate that her own state does not validate marriages under those conditions. Suggesting that she should have known about her own state's law or, perhaps, should have found out what the law would involve using an objective rather than a subjective standard.

In states where the standard is subjective, the trier of fact may well take into account how the person acted after the ceremony in order to assess whether the person sincerely believed that he or she was married.<sup>94</sup> But individuals who did not meet the state's formal requirements might nonetheless act in ways strongly supporting their sincere belief that they had valid marriages.

Consider *Hewitt v. Hewitt*,<sup>95</sup> which involved a couple who met while they were both students in Iowa,<sup>96</sup> a state which recognizes common-law marriage.<sup>97</sup> Victoria Hewitt became pregnant, and Robert Hewitt allegedly said that they were husband and wife and did not need a formal ceremony

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92. Romualdo P. Eclavea, *Removal of Impediment to Marriage as Creating Valid Common-Law Marriage*, 52 AM. JUR. 2D MARRIAGE § 46 (May 2020 Update) ("In the states recognizing common-law marriages, persons who are living together in a relationship that would be a valid marriage except for the existence of an impediment precluding them from lawful matrimony, such as an existing undissolved marriage, acquire a valid marital status automatically, without any further ceremony or marriage agreement, when the impediment to their marriage is removed . . .").

93. See *supra* note 36 (listing some states not recognizing common law marriage that validate a marriage when the impediment is removed and the couple remains together a marriage might be validated once the impediment has been removed).

94. See, e.g., *Funderburk v. Funderburk*, 38 So. 2d 502, 505 (La. 1949) ("[I]mmediately after the marriage she and the decedent returned to the Pineville home and from that day until the day of his death some 12 years later they continued to live there as man and wife, during which time she not only went by the name of Mrs. Henry Edward Funderburk but was recognized and accepted as his legal and lawful wife throughout the community. She kept house for him, she nursed and cared for him, and she raised his children by his former marriage . . .").

95. 394 N.E.2d 1204 (Ill. 1979).

96. *Id.* at 1205.

97. See *Conklin by Johnson-Conklin v. MacMillan Oil Co.*, 557 N.W.2d 102, 104 (Iowa Ct. App. 1996) ("Iowa recognizes the validity of common-law marriages.") (citing *In re Estate of Fisher*, 176 N.W.2d 801, 805 (Iowa 1970)).

to be married.<sup>98</sup> They then held themselves out to the community, including their respective parents, as husband and wife.<sup>99</sup> The Illinois Supreme Court noted that the Hewitts would have had a common-law marriage prior to 1905, when Illinois prohibited such marriages.<sup>100</sup>

It is simply unclear whether the Hewitts lived together in Iowa before moving back to Illinois.<sup>101</sup> If they did not, then they would not have met one of the necessary elements needed to establish a common-law marriage in Iowa.<sup>102</sup> Further, even if the Hewitts had lived together in Iowa and met the criteria for common-law marriage, a separate question was whether the Hewitts had been domiciled in Iowa at the time.<sup>103</sup> If at the time their domicile was Illinois rather than Iowa because they always had the intention of returning to Illinois after finishing their Iowa schooling,<sup>104</sup> then the law of their domicile, Illinois, would be applied to determine whether they had a common-law marriage.<sup>105</sup> Because Illinois did not

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98. See *Hewitt*, 394 N.E.2d at 1205.

99. See *id.*

100. *Id.* at 1210 (“Plaintiff’s allegations disclose a relationship that clearly would have constituted a valid common law marriage in this State prior to 1905.”).

101. The trial suggested that the couple had not lived together in Iowa. See *Hewitt v. Hewitt*, 380 N.E.2d 454, 455 (Ill. App. Ct. 1978) (“The trial court . . . found that plaintiff conceded that . . . the parties had never lived together in the State of Iowa and that there was no common law marriage which the court might recognize.”), *rev’d*, 394 N.E.2d 1204 (Ill. 1979), and *overruled by Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979).

102. *Conklin by Johnson-Conklin*, 557 N.W.2d at 105 (“The three elements necessary to find a common-law marriage are: (1) present intent and agreement to be married; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife.”) (citing *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979)).

103. See *Bourelle v. Soo-Crete, Inc.*, 87 N.W.2d 371, 377–78 (Neb. 1958) (suggesting that the couple had established a common law marriage in Iowa because they had been domiciled there); see also *Est. of Loewenstein v. Bombeck*, No. A-90-913, 1992 WL 174736, at \*2 (Neb. Ct. App. 1992) (“[I]n the case cited by Welsh, *Bourelle v. Soo-Crete, Inc.*, . . . the parties changed their residence or domicile to the State of Iowa, where common-law marriages were valid.”).

104. *Abulqasim v. Mahmoud*, 49 A.3d 828, 834–35 (D.C. 2012) (“To satisfy domicile, a person must establish: ‘(1) physical presence and (2) an intent to abandon the former domicile and remain [at the new location] for an *indefinite period of time*; a new domicile comes into being when the two elements coexist.”) (quoting *Heater v. Heater*, 155 A.2d 523, 524 (D.C. 1959)).

105. See Mark Strasser, *Marriage, Domicile, and the Constitution*, 15 DUKE J. CONST. L. & PUB. POL’Y 103, 134–35 (2020) (discussing the importance of the Hewitts having been domiciled in Illinois).



permit common-law marriages to be contracted,<sup>106</sup> here was yet another reason that they did not have a valid marriage.

One question involves the intricacies of Iowa and Illinois law with respect to the conditions under which common-law marriages will be recognized.<sup>107</sup> A different question involves what either of the Hewitts sincerely and reasonably believed. They might well have known other individuals in Iowa who had established common-law marriages and might not have known about the legal requirements of cohabitation or domicile.<sup>108</sup> Nor would they likely have known about their need to validate their marriage via a marriage ceremony once they returned to Illinois after Robert had obtained his college degree. It might be very difficult to reject that Victoria had a reasonable, good faith belief that she and Robert were married.

Suppose that a state's sole goal is to promote fairness in its putative spouse policy. Even so, a state might have some difficulty in deciding whether to accord putative status to someone merely because that person subjectively believes that he or she is married to someone else.<sup>109</sup> Individuals may have a variety of sincere beliefs, and recognizing an individual's putative spouse status because of that person's sincere beliefs will have important implications for other interested, innocent parties, e.g., the legal spouse, children from any number of relationships, and other relatives. To make fashioning the optimal policy even more difficult, the state will likely want to promote other interests in addition to fairness, e.g.,

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106. See text accompanying *supra* note 100 (noting that Illinois refused to recognize common-law marriages starting in 1905).

107. See *supra* notes 94–106 and accompanying text.

108. Cf. *Stone v. Thompson*, 833 S.E.2d 266, 271 (S.C. 2019) (“A party is not required to show his opponent had legal knowledge of common-law marriage . . . . He must demonstrate that both he and his partner mutually intended to be married to one another, regardless of whether they knew their resident state recognized common-law marriage or what was required to constitute one.”), *reh'g denied* (Oct. 16, 2019).

109. Cf. Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 85 (1991) (“The concept of fairness is just as elusive in family law. What is considered fair is inevitably quite subjective.”).

promote clarity about who is married and who is not,<sup>110</sup> or about who owns and is entitled to alienate which property.<sup>111</sup>

One of the reasons that individuals have a void marriage from the outset is that one of the parties to the marriage did not validly divorce a previous spouse. States have differing policies with respect to the conditions under which one can divorce one's current spouse.<sup>112</sup> In addition, there are rules specifying the conditions under which a divorce secured in one state will be recognized in another state.<sup>113</sup> But a reasonable person without legal training would not know these rules, and the state must decide who will bear the burden when the relevant rules have not been followed.

Suppose that an individual goes to Mexico so that she can divorce her husband and marry her paramour. One question is whether she sincerely believes that she can end one marriage and enter into another so easily. Another question is whether a reasonable person would have believed that such a divorce and remarriage would be legally valid. Some courts reject

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110. See *Stone*, 833 S.E.2d at 296 (arguing that where common-law marriage is permitted, the “solemn institution of marriage is thereby reduced to a guessing game with significant ramifications for the individuals involved, as well as any third party dealing with them”).

111. Cf. *Donnelly v. Nolan*, 15 N.W.2d 924, 925 (Iowa 1944) (“[T]he claimed common law marriage, as asserted by the defendant, causes a cloud on the title to the property involved in plaintiff’s action.”).

112. Compare OHIO REV. CODE ANN. § 3105.01(J) (West 2020) (“The court of common pleas may grant divorces . . . . On the application of either party, when husband and wife have, without interruption for one year, lived separate and apart without cohabitation.”), with LA. CIV. CODE art. 103(1) (2018) (“Except in the case of a covenant marriage, a divorce shall be granted on the petition of a spouse upon proof that . . . [t]he spouses have been living separate and apart continuously for the requisite period of time, in accordance with Article 103.1, or more on the date the petition is filed.”), and LA. CIV. CODE art. 103.1 (2014) (“The requisite periods of time . . . shall be as follows: (1) One hundred eighty days where there are no minor children of the marriage. (2) Three hundred sixty-five days when there are minor children of the marriage . . . .”), and 15 R.I. GEN. LAWS ANN. § 15-5-3(a) (West 2013) (“Whenever, in the trial of any complaint for divorce from the bond of marriage or any complaint for dissolution of a marriage, it shall be alleged in the complaint that the parties have lived separate and apart from each other for the space of at least three (3) years . . . .”).

113. See *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.”).

that such an individual could subjectively believe that her divorce and remarriage would be valid<sup>114</sup> much less that a reasonable person would believe them valid,<sup>115</sup> whereas other courts might accept that she sincerely believed the divorce and remarriage valid if she were inexperienced or naive<sup>116</sup> but might nonetheless reject that a reasonable person would believe these valid. Or, a court might find that individuals might reasonably and sincerely believe such a Mexican divorce valid, enabling them to marry.<sup>117</sup>

#### *D. Presumptions of Good Faith*

At least in part because there seems to be so much variation when applying the applicable sincerity standard, some states employ a presumption of good faith,<sup>118</sup> which imposes a burden on the challenging

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114. *Miller v. Johnson*, 29 Cal. Rptr. 251, 253 (Ct. App. 1963) (“The trial court found plaintiff neither believed in good faith she was validly married to decedent . . .”).

115. *Id.* (“But there must also be a diligent attempt to meet the requisites of a valid marriage [citing *Flanagan v. Capital Nat. Bank*, 3 P.2d 307 (Cal. 1931)]. The trial court found plaintiff . . . had [not] made any diligent attempt to meet the requisites of a valid marriage.”).

116. *See In re Succession of Gordon*, 461 So. 2d 357, 363 (La. Ct. App. 2d Cir. 1984) (“It must be remembered that Elizabeth was a young girl living in a small, rural community. In this particular set of facts, it is the opinion of this court that Elizabeth had an honest and reasonable belief her marriage was valid and that no legal impediment existed to her marriage.”), *writ denied sub nom. Succession of Gordon*, 464 So. 2d 319 (La. 1985). *But see Rebouche v. Anderson*, 505 So. 2d 808 (La. Ct. App. 2d Cir. 1987) (affirming trial court finding that a woman with a sixth grade education and a mental age of twelve did not have the requisite good faith to qualify as a putative spouse); *see also Blakesley*, *supra* note 7, at 20–21 (“Intelligence, experience, education, maturity, and linguistic capability are among the characteristics which are important to the issue of whether a person does or does not have a good faith belief that a void marriage is valid. Thus, if the putative spouse is young, naive, and unsophisticated, mere rumor of an impediment may not be sufficient to trigger a duty to investigate or to place that person in the status of bad faith.”).

117. *See Dean v. Goldwire*, 480 S.W.2d 494, 496–97 (Tex. Ct. App. 1972) (*writ refused n.r.e.* Oct. 4, 1972) (“We hold that if either appellee or appellant believed in good faith that she had obtained a valid Mexican divorce from Dean and that she was therefore legally free to marry appellee at the time of their marriage, then the marriage was putative and remained such until they [b]oth learned that she was not divorced from Dean.”).

118. *Williams v. Williams*, 97 P.3d 1124, 1128 (Nev. 2004) (“Good faith is presumed.”).

party to show the lack of a good faith belief in the validity of the marriage.<sup>119</sup> The existence of rumors about another spouse or a suspicion that there might be someone else is insufficient to establish the lack of a good faith belief in the validity of the marriage.<sup>120</sup> A Louisiana appellate court explained: “The ‘good faith’ required . . . is only that the party should have no certain knowledge of any impediment to the marriage and should have an honest and reasonable belief that the marriage was valid and that no legal impediment existed at the time of its confection.”<sup>121</sup>

The presumption of good faith is not triggered in all cases. Some states distinguish between the individual who cannot remarry currently<sup>122</sup> and the individual who can, presuming good faith on the part of the latter but not the former.<sup>123</sup> If the party with the impediment claims to be a putative spouse, she or he has the burden of proving his good faith, whereas otherwise the one attacking the sincerity of the belief has the burden of proving the absence of good faith.<sup>124</sup>

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119. *Id.* (“The party asserting lack of good faith has the burden of proving bad faith.”); *see also* *Brown v. Brown*, 82 Cal. Rptr. 238, 243 (Ct. App. 1969) (“[W]hen the trial judge found that Charlotte did not act in good faith when she married Ralph, he did so contrary to the rule that it is presumed that persons who participate in marriage ceremonies do so in good faith and that ‘he who would assert ‘bad faith’ should be able to point to some evidence proving or tending to prove’ it.”) (citing *Krizman v. Industrial Acc. Com.*, 58 P.2d 405 (Cal. Ct. App. 1936)).

120. *Williams*, 97 P.3d at 1128 (“Unconfirmed rumors or mere suspicions of a legal impediment do not vitiate good faith.”); *Freet v. Freet*, 442 So. 2d 1366, 1368 (La. Ct. App. 3d Cir. 1983) (“The facts show that Jane knew of the existence of her husband’s prior marriage, but that fact does not prevent her from being in good faith simply because she does not conduct an independent investigation into the prior relationship.”) (citing *Gathright v. Smith*, 368 So. 2d 679 (La. 1978)).

121. *Succession of Jene*, 173 So. 2d 857, 860 (La. Ct. App. 4th Cir. 1965) (citing *Succession of Fields*, 62 So. 2d 495 (La. 1952)).

122. *Blakesley*, *supra* note 7, at 23 (“The presumption of good faith, however, is generally denied to the party who has the impediment of a pre-existing valid marriage in his or her background.”).

123. *Id.* (“[G]ood faith is presumed to exist in favor of a party claiming to be a putative spouse who, free of [his or] her own impediment, enters into the marriage and the burden of proving the lack of good faith is upon the party attacking the marriage.”) (citing *Succession of Zinsel*, 360 So. 2d 587, 592 (La. Ct. App. 4th Cir. 1978), *writ denied*, 363 So. 2d 72 (La. 1978)).

124. *Jene*, 173 So. 2d at 861; *see also Zinsel*, 360 So. 2d at 592 (citing *Succession of Chavis*, 29 So. 2d 860 (La. 1947)) (“[T]his good faith is presumed to exist in favor of a party claiming to be a putative spouse who, free of her own impediment, enters into the marriage and the burden of proving the lack of good faith is upon the party attacking the marriage.”).

The presumption is rebuttable, and the individual challenging putative spouse status might overcome the presumption by showing that the person claiming good faith knew that the would-be marital partner was barred from marrying because the latter's divorce was not final.<sup>125</sup> So, too, the person subject to the impediment might be able to establish good faith by producing a document that would lead one to believe that the divorce was final or, perhaps, by showing that he acted in ways supporting that he believed in the validity of his divorce.<sup>126</sup>

It is not difficult to imagine why such a presumption might be created. Individuals might not even know that their "spouses" had ever married before, so those persons would be reasonably presumed to be marrying in good faith.<sup>127</sup> If individuals know that they were once married, then it

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125. *Daniels v. Ret. Bd. of Policeman's Annuity & Ben. Fund*, 435 N.E.2d 1276, 1280 (Ill. App. Ct. 1982) ("[T]he evidence discloses that she knew deceased and defendant had not been divorced and was thus aware that the marriage between her and the deceased was not legal. . . . In light of plaintiff's knowledge that she was not legally married, she did not acquire putative spouse status . . .").

126. See *In re Succession of Gordon*, 461 So. 2d 357, 363–64 (La. Ct. App. 2d Cir. 1984), *writ denied sub nom.* *Succession of Gordon*, 464 So. 2d 319 (La. 1985) ("The testimony established decedent was a hard-working, honest and religious man who objected to cohabitation. . . . [D]ecedent married Elizabeth in the same small community and eventually settled there. Decedent did not conceal his prior marriage with Emma when he and Elizabeth applied for their marriage license. Rather, he declared he was divorced from 'Emma Gordon.' His wedding was attended by Emma's brother . . . . The course of decedent's conduct, particularly in remaining in the community after his marriage to Elizabeth to raise his family, evidences that he believed he was divorced. Decedent's good faith is further evidenced by his actions in 1969 when he was informed he was not divorced from Emma. Linda Gordon Mims testified decedent appeared upset and displayed an old paper which he indicated to be his 'divorce papers'. Decedent consulted an attorney and later initiated divorce proceedings in Arizona."); *Ceja v. Rudolph & Sletten Inc.*, 302 P.3d 211, 214 (Cal. 2013) ("Following their well-attended marriage ceremony, plaintiff held herself out as decedent's wife 'to all persons at all times.' She changed her last name to Ceja, and the two of them wore wedding rings, shared a joint checking account, lived together in the same house as husband and wife, and handled their taxes as married but filing separately. Plaintiff would not have had her wedding on September 27, 2003, had she not believed she would have a legal and valid marriage to decedent. Had she realized at any time that her marriage was invalid, she and decedent 'would have simply redone the ceremony.'").

127. See *Caruso v. Lucius*, 448 S.W.2d 711, 712–13 (Tex. Ct. App. 1969) (*writ refused n.r.e.* Apr. 1, 1970) ("Since Arcelia Lucius Caruso was innocent of knowledge of the pre-existing marriage, she was not a meretricious spouse, but was a putative spouse . . ."); *cf.* *Succession of Hopkins*, 114 So. 2d 742, 744 (La.

might be thought that they should bear some responsibility to make sure that they actually obtained a divorce.<sup>128</sup>

Yet, matters may not be so simple. If an individual who was married should be held responsible for making sure that the first marriage ended in divorce, the same argument might be made with respect to the individual who knows that her (soon-to-be) spouse was previously married.<sup>129</sup> Further, where there is no reason for the previously married person to believe that there was a defect in the divorce,<sup>130</sup> there would seem to be no

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Ct. App. 1st Cir. 1959) (suggesting that good faith in this context is “an honest and reasonable belief that the marriage is valid, and that no legal impediment thereto exists”).

128. See *Cardwell v. Cardwell*, 195 S.W.3d 856, 859 (Tex. Ct. App. 2006) (“[W]ife testified that after she left Gay in 1986, she did nothing to initiate divorce proceedings. She testified further that Gay told her he was taking care of the divorce, but she admitted she did nothing to determine whether Gay had done so.”). Sometimes, a party does not reveal all of his spouses. See *In re Est. of Williams*, 417 N.W.2d 556, 557 (Mich. Ct. App. 1987) (“Betty testified when she married decedent it was her understanding that decedent had been married only once previously and that his former wife, Estelle, had died. Betty’s marriage certificate supported her claim. It indicated only one previous marriage for decedent. The probate court found that Betty entered into marriage in good faith without knowledge of decedent’s first and second marriages and without knowledge that decedent had not divorced his previous wives.”).

129. See *Funderburk v. Funderburk*, 38 So. 2d 502, 504 (La. 1949) (“[T]he mere assertion by the man to the woman that he has secured a divorce from his wife whom she knows he is married to is not sufficient in itself to create a presumption of good faith on her part . . . .”); *Est. of Hite*, No. 09-98-349 CV, 1999 WL 278898, at \*3 (Tex. Ct. App. May 6, 1999) (“[A]t some point Janis became aware of the existence of the lawful marriage between the decedent and Dorothy. . . . This . . . placed Janis on notice that her capacity to act as a surviving spouse was an issue. As such, it became her responsibility to prove that the legal impediment to the establishment of a valid informal marriage to the decedent had been removed sometime before his death.”).

130. See, e.g., *Hart v. Hart*, 427 So. 2d 1341, 1344 (La. Ct. App. 2d Cir. 1983) (“The trial court specifically found that Mrs. Hart, as a lay person, was reasonable in relying on her attorney to [affect her] divorce. . . . There is nothing in the record to indicate any knowledge on her part of the infirmity in that divorce.”); see also *Mara v. Mara*, 452 So. 2d 329, 332–33 (La. Ct. App. 4th Cir. 1987) (“Since Gaudin’s marriage to Mara was annulled on the ground that her previous marriage to Buglione was never dissolved, appellant now assumes the burden to prove her good faith in marrying Mara . . . . [T]he Alabama lawyer had defrauded her into believing in the validity of the divorce judgment which he had issued to her, and that she was an easy mark for his trickery and deceit, having only a high school education and no knowledge of divorce law.”).

reason to impose a greater burden on that individual than on the individual who was not impeded from marrying.

The state use of a presumption of good faith makes sense in certain cases, because that may well aid the trier of fact to make a decision about the sincerity of the person claiming to be a putative spouse. However, it is not at all clear that this should simply be based on which individual was precluded from marrying because of some (possibly unknown) impediment. In some cases, the parties would seem to be in the same position with respect to whether they should be presumed to be in good faith, regardless of which party happens to be precluded currently from remarrying. While employing a presumption of good faith in certain cases makes sense, states should refine when that presumption is triggered.

#### *E. Asset Distribution When the Relationship Ends*

As a general matter, when a putative marriage ends, a court may distribute the property acquired during the relationship as the property would have been distributed had the parties had a valid marriage.<sup>131</sup> Sometimes, the authorization to distribute property that way is provided by statute.<sup>132</sup> At other times where putative marriage has been recognized

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131. *Sanguinetti v. Sanguinetti*, 69 P.2d 845, 847 (Cal. 1937) (“Where a ‘putative’ marriage has existed, that is, where one or both parties to an invalid marriage have in good faith believed such marriage to be valid, upon an annulment or declaration of invalidity the courts will recognize the right of the de facto wife in property acquired by the parties through their joint efforts, and which would have been community property had the marriage been valid, and will make an equitable division of such property.”).

*In Re Krone’s Est*, 189 P.2d 741, 743 (Cal. Ct. App. 1948) (“[U]pon the dissolution of a putative marriage by decree of annulment or by death the wife is to take the same share to which she would have been entitled as a legal spouse.”); *Rupert v. Rupert*, No. 54854, 2010 WL 3528611, at \*1 (Nev. July 20, 2010) (“When applying the putative spouse doctrine, the district court may divide the parties’ property according to community property principles.”). *But see* *Wallace*, *supra* note 3, at 102 (“Idaho recognizes the putative spouse’s right to bring a wrongful death action, but at the death of the common spouse, gives no other effects to a putative spouse.”) (citing *Williams v. Williams*, 97 P.3d 1124, 1129 (Nev. 2004)).

132. *See, e.g.*, MINN. STAT. ANN. § 518.055 (West 2020)

Any person who has cohabited with another to whom the person is not legally married in the good faith belief that the person was married to the other is a putative spouse until knowledge of the fact that the person is not legally married terminates the status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a

through the case law and not through statute,<sup>133</sup> the statutes governing the distribution of property upon the ending of a marriage will be viewed as instructive<sup>134</sup> rather than as controlling,<sup>135</sup> because a putative marriage is not in fact a marriage, so the relevant statutes would not expressly apply.<sup>136</sup>

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legal spouse, including the right to maintenance following termination of the status, whether or not the marriage is prohibited or declared a nullity. If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

CAL. FAM. CODE § 2251 (West 2020)

If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall:

(1) Declare the party or parties, who believed in good faith that the marriage was valid, to have the status of a putative spouse. (2) If the division of property is in issue, divide, in accordance with Division 7 (commencing with Section 2500), that property acquired during the union that would have been community property or quasi-community property if the union had not been void or voidable, only upon request of a party who is declared a putative spouse under paragraph (1).

133. Sometimes, putative status is first recognized through the courts and then subsequently via statute. *See Sanguinetti*, 69 P.2d at 847 (“Where a ‘putative’ marriage has existed, that is, where one or both parties to an invalid marriage have in good faith believed such marriage to be valid, upon an annulment or declaration of invalidity the courts will recognize the right of the de facto wife in property acquired by the parties through their joint efforts, and which would have been community property had the marriage been valid, and will make an equitable division of such property.”); *see also* *Marvin v. Marvin*, 557 P.2d 106, 118 (Cal. 1976) (“Prior to the enactment of the Family Law Act, no statute granted rights to a putative spouse.”).

134. *Turknette v. Turknette*, 223 P.2d 495, 498 (Cal. Ct. App. 1950) (“In such cases the courts look to the statutes dealing with divorce, annulment or separate maintenance not as a source of power, but as furnishing a standard to be used by way of analogy.”).

135. *See id.*

136. *See Weaver v. State*, 855 S.W.2d 116, 120 (Tex. Crim. App. 1993) (“With the exception of equity, putative marriages have never been given the same credence as ceremonial or common law marriages for the very reason that they are putative: there exists some impediment to the marriage. There can be no legal marriage if there is a barrier.”); *Wallace*, *supra* note 3, at 96 (“Equity, not the laws of community property, govern the division, even though the result under either theory likely will be the same.”).



When determining what putative spouses should receive, courts reason that the putative spouse should be treated as well as the legal spouse would have been treated, because the putative spouse sincerely and reasonably believed that she was married to her spouse.<sup>137</sup> Such a rationale is quite persuasive if, for example, a couple mistakenly<sup>138</sup> participated in their marriage ceremony one day before one party's divorce was final.<sup>139</sup> There would be no other parties (other than the soon-to-be divorced spouse who might still have a small window during which she could appeal the divorce)<sup>140</sup> who might in good faith have expected to be treated as a spouse. But a more difficult scenario arises when there is both a legal spouse and a putative spouse at the time the putative marriage ends.<sup>141</sup>

One California appellate court reasoned that in such cases:

[T]he claim of a putative spouse must be limited to property acquired during the continuance of that relationship. It seems obvious that one-half of the property in question belongs to the putative spouse. The other half belongs to the legal community (husband and legally recognized spouse) and should be distributed as any other community property under the same

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137. *Cf.* *Brennfleck v. Workmen's Comp. App. Bd.*, 84 Cal. Rptr. 50, 53 (Ct. App. 1970) ("Logically, there does not seem to be any good reason why a putative spouse who believes that she is married and who lives with the putative husband, taking care of his household and him just as a legal wife would do, should not receive the same death benefits as a legal wife would. There is a fundamental unfairness in treating such a putative wife who has reason to believe and in good faith believes that she is the workmen's wife, as does he, differently from a legal wife.").

138. *Galbraith v. Galbraith*, 396 So. 2d 1364, 1368 (La. Ct. App. 2d Cir. 1981) ("The trial court specifically found both plaintiff and defendant to be in good faith . . .").

139. *See id.* at 1367–68.

140. *See id.* at 1368 ("Plaintiff's former wife could have appealed the judgment of divorce after the purported marriage between plaintiff and defendant since the delays for appealing would not begin to run until after the divorce judgment was signed.").

141. *See Est. of Vargas*, 111 Cal. Rptr. 779 (Ct. App. 1974) ("For 24 years Juan Vargas lived a double life as husband and father to two separate families, neither of which knew of the other's existence."); *In re Marriage of Himes*, 965 P.2d 1087, 1101 (Wash. 1998) ("If the putative spouse has valid interests, such as rights to property jointly accumulated during the putative marriage, then the trial court must shape and balance the relief to protect the interests of both the putative spouse and the legal spouse.").

circumstances.<sup>142</sup>

Here, the trial court awarded half of the property to the putative spouse and half to the legal spouse,<sup>143</sup> a distribution that was affirmed on appeal.<sup>144</sup>

Yet, at least as a general matter, it is not obvious that this is a sensible distribution rule. Consider what happens in a case where there is a legal spouse and a putative spouse, and the husband dies leaving his property to the putative spouse. The putative spouse would receive three quarters of the property (the putative spouse's half plus one half of the deceased's share), with the legal spouse receiving only one quarter (one half of the deceased's share).<sup>145</sup> Yet, even if the state has decided that the putative spouse should not be placed in a *less* advantageous position than a legal spouse, that does not mean that the putative spouse should be in a *more* advantageous position than a legal spouse.<sup>146</sup> To avoid the legal spouse being placed in a less advantageous position than the putative spouse, some jurisdictions require that the property acquired during the putative marriage be split evenly between the legal spouse and the putative spouse.<sup>147</sup>

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142. *In re Ricci's Est.*, 19 Cal. Rptr. 739, 740 (Ct. App. 1962) (quoting with approval Professor Burby (Professor of Law, University of Southern California) in *Family Law for California Lawyers*, pages 359–360); *see also* Caruso v. Lucius, 448 S.W.2d 711, 712–13 (Tex. Ct. App. 1969) (“Since Arcelia Lucius Caruso was innocent of knowledge of the pre-existing marriage, she was not a meretricious spouse, but was a putative spouse, and entitled to one-half of the ‘community’ properties acquired by herself and Pasquale Caruso during their marriage relationship. Appellant’s claims, therefore, were to one-half of Pasquale Caruso’s one-half of the properties in question, plus the net income from those properties since the date of Pasquale Caruso’s death on July 19, 1966.”).

143. *Ricci's Est.*, 19 Cal. Rptr. at 742.

144. *Id.* (“The decree appealed from is affirmed.”).

145. *See* Sousa v. Freitas, 89 Cal. Rptr. 485, 489 (Ct. App. 1970) (“Under this analysis by the recognized expert in community property law, Catherine is entitled to one-half of the property in her own right; plus the half of the community property decedent was entitled to devise, or another one-quarter of the whole; and the plaintiff is entitled to one-quarter of the whole estate only.”); Blache v. Blache, 160 P.2d 136 (Cal. Ct. App. 1945); *see also* *In re Est. of Atherley*, 119 Cal. Rptr. 41, 48 (Ct. App. 1975) (citing *Sousa*, 89 Cal. Rptr. 485 with approval).

146. *Galbraith v. Galbraith*, 396 So. 2d 1364, 1370 (La. Ct. App. 2d Cir. 1981) (“[A] putative spouse should not be placed in a more advantageous position than a divorced spouse of a valid marriage.”).

147. *See* Price v. Price, 326 So. 2d 545, 549 (La. Ct. App. 3d Cir. 1976) (“The law is settled that when a man contracts a second marriage while his first wife is living and undivorced, and dies leaving community property acquired during the

Two different scenarios might be envisioned, and the intuitions about which distribution would be fairer might depend upon which distribution one had in mind. In one, the legal spouses never divorced because of some technicality but thereafter lived separate lives, and one of the spouses entered into a putative marriage.<sup>148</sup> In the second scenario, the husband maintains relations with both his legal spouse and his putative spouse.<sup>149</sup> In the latter case, it is difficult to justify giving three-fourths or all of the estate to either wife,<sup>150</sup> at least as a matter of fairness.<sup>151</sup> Instead, an equal division would seem wisest.<sup>152</sup> In the former case, especially if there were some law specifying that property acquired would be only divided insofar as the couple was living as a community,<sup>153</sup> then there would be justification for not giving the legal spouse a share of the property that had been acquired while the couple had been living separate and apart.<sup>154</sup>

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second marriage, contracted in good faith, the estate will be divided equally by the two wives.”) (citing *inter alia* *Prince v. Hopson*, 89 So. 2d 128 (La. 1956)).

148. *See, e.g., Prince v. Hopson*, 89 So. 2d 128, 130 (La. 1956) (marriage never dissolved, although husband and wife both believed that they had divorced and each subsequently remarried).

149. *Est. of Vargas*, 111 Cal. Rptr. 779 (Ct. App. 1974) (“For 24 years Juan Vargas lived a double life as husband and father to two separate families, neither of which knew of the other’s existence. This terrestrial [sic] paradise came to an end in 1969 when Juan died intestate in an automobile accident.”).

150. *Id.* at 781 (“In the present case, depending on which statute or legal theory is applied, both Mildred, as legal spouse, and Josephine, as putative spouse, have valid or plausible claims to at least half, perhaps three-quarters, possibly all, of Juan’s estate.”).

151. *See id.* (“The court found that both wives contributed in indeterminable amounts and proportions to the accumulations of the community.”).

152. *Id.* (“[T]he probate court cut the Gordian knot of competing claims and divided the estate equally between the two wives, presumably on the theory that innocent wives of practicing bigamists are entitled to equal shares of property accumulated during the active phase of the bigamy. . . . [T]he wisdom of Solomon is not required to perceive the justice of the result.”).

153. *Seizer v. Sessions*, 940 P.2d 261, 264 (Wash. 1997) (“In Washington, when a husband and wife live separate and apart, their marriage may be defunct, and, under RCW 26.16.140, all earnings and accumulations are the acquiring spouse’s separate property. The statute contemplates permanent separation of the parties—a defunct marriage.”) (citing *Aetna Life Ins. Co. v. Bunt*, 754 P.2d 993, 995–96 (Wash. 1988)).

154. *See Patillo v. Norris*, 135 Cal. Rptr. 210, 216 (Ct. App. 1976) (“Here David lived with each wife only after he had separated from the other. The community property claims of each wife thus did not actually overlap; they merely applied to different time periods in David’s life.”). *But see In re Succession of Gordon*, 461 So. 2d 357, 365 (La. Ct. App. 2d Cir. 1984) (“However, as

Sometimes, the legal spouse is abandoned, and the abandoning spouse begins a new relationship with someone else. While in one sense the property acquired during the second relationship is a product of the efforts of the abandoner and the putative spouse, the legal spouse may continue to contribute to the assets acquired during the putative marriage. For example, the legal spouse may care for children from the marriage after receiving no help from the abandoning spouse, and fairness might require that the legal spouse receive more than half of the abandoning spouse's share of the assets acquired while with the putative spouse.<sup>155</sup>

*F. How Should the Non-Putative Spouse Be Treated?*

When a putative marriage ends, at least one of the parties must have sincerely believed in the validity of the marriage. Sometimes, both parties to the putative marriage are putative spouses because they both sincerely believed in the validity of the marriage. For example, if both parties reasonably relied on the divorce that one of the parties allegedly obtained, both parties would be putative spouses. In that event, there is no reason to treat the parties differently as a matter of fairness.

Suppose, however, that one of the spouses knows that the marriage was never valid because he knows that he never divorced his first wife. Courts and legislatures distinguish between the rights of the spouse who sincerely believed in the validity of the marriage and the spouse who did not.

In *Allen v. Allen*,<sup>156</sup> the plaintiff wished to take advantage of the putative spouse doctrine, notwithstanding his "failure to acknowledge his prior marriage on the marriage license, his failure to identify the date his 'divorce' became final, and his admission that he was married at the time of the second marriage."<sup>157</sup> The Rhode Island Supreme Court held that the evidence of his bad faith "preclude[d] the application of the putative

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decedent's first marriage was not dissolved . . . . In other words, the legal and putative community were in co-existence.").

155. See *Est. of Hafner*, 229 Cal. Rptr. 676, 688 (Ct. App. 1986) ("[E]very court which has considered the issue of succession to a decedent's intestate estate, as between a surviving legal spouse and a surviving putative spouse, has awarded one-half of the quasi-marital property to the putative spouse and the other half to the legal spouse, or spouse and children . . .").

156. *Allen v. Allen*, 703 A.2d 1115 (R.I. 1997).

157. *Id.* at 1116.

spouse doctrine.”<sup>158</sup> Basically, the marriage was void ab initio,<sup>159</sup> and neither individual was entitled to the other’s property.<sup>160</sup>

In *Allen*, the putative spouse did not wish to invoke the doctrine, and the non-innocent spouse was not permitted to invoke it. However, not all courts have precluded the non-putative spouse from invoking the putative spouse’s status and thereby benefitting.

In *In re Marriage of Tejada*,<sup>161</sup> a California appellate court explained that “even where only one party has the requisite good faith belief in the validity of the marriage, thereby qualifying as the sole putative spouse, the court’s declaration of his or her status operates as a declaration that the union itself is a putative marriage.”<sup>162</sup> The court reasoned that when the putative marriage ends, the property acquired during the relationship must be distributed, and the spouse who knew that the marriage was invalid is also entitled to a share of that property.<sup>163</sup> Refusing to permit the non-putative spouse from benefitting would in effect punish the guilty person, but “[d]isregarding guilt and innocence in property division . . . support[s] the purposes of the Family Law Act.”<sup>164</sup>

While the California Legislature eschewed considering guilt and innocence in property divisions at the end of marriages, the legislature did not adopt a similar nonjudgmental approach in the putative-marriage context. For example, the Family Law Act rejected use of fault in the context of spousal support,<sup>165</sup> but “the Legislature singled out . . . the ‘putative spouse’ in providing for support.”<sup>166</sup> Nonetheless, the *Tejada*

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158. *Id.*

159. *Id.* (“[W]e affirm the judgment that the marriage was void ab initio . . .”).

160. *Id.* (“[A]lthough plaintiff is not entitled to any assets or any portion of any assets owned individually by defendant, including but not limited to defendant’s pension plan or any future monetary award resulting from any pending litigation involving defendant, plaintiff does retain rights to all assets he owned individually prior to or during the void marriage.”).

161. *In re Marriage of Tejada*, 102 Cal. Rptr. 3d 361 (Ct. App. 2009).

162. *Id.* at 368.

163. *Id.* at 369 (discussing the equal division of the quasi-marital property).

164. *Id.*

165. *See In re Marriage of Morrison*, 573 P.2d 41, 49 (Cal. 1978) (“The major differences between former section 139 and the new section were that the new section eliminated consideration of the comparative marital fault of the parties in setting support . . .”).

166. *Tejada*, 102 Cal. Rptr. 3d. at 369; *see also* CAL. FAM. CODE § 2254 (West 2020) (“The court may, during the pendency of a proceeding for nullity of marriage or upon judgment of nullity of marriage, order a party to pay for the support of the other party in the same manner as if the marriage had not been void

court was correct when it stated that the legislature “did not limit quasi-marital property division to an innocent putative spouse, either explicitly or implicitly.”<sup>167</sup> As an additional consideration, the legislature presumably “was aware of the substantial body of decisional law providing for equal division of quasi-marital property,”<sup>168</sup> and one would have expected the legislature to expressly indicate that property was to be distributed in a different way if that had been the legislative intent.<sup>169</sup>

In *In re Marriage of Guo & Sun*,<sup>170</sup> a California appellate court disagreed with the *Tejeda* analysis, reasoning that “[t]he purpose of the doctrine is to protect the ‘innocent’ party or parties of an invalid marriage from losing community property rights.”<sup>171</sup> The *Guo & Sun* court then reasoned:

Having determined that the purpose of section 2251 is to protect innocent parties of an invalid marriage from losing community property rights, we disagree with the holding in *Tejeda*. If *Tejeda* were correct, then a party who fraudulently and in bad faith conceals his or her bigamy can reap the benefits of putative spouse status even when his or her innocent spouse does not contend that there was a putative marriage. This result is inconsistent with the equitable principles underlying section 2251.<sup>172</sup>

A few different issues should be distinguished. One involves how property should be distributed when a putative marriage ends. The *Tejeda*

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or voidable if the party for whose benefit the order is made is found to be a putative spouse.”).

167. *Tejeda*, 102 Cal. Rptr. 3d. at 369.

168. *Id.*

169. Other jurisdictions have rejected that a party must have evinced good faith in order to benefit in the property distribution. See *Cotton v. Cotton*, 44 So. 3d 371, 377 (Miss. Ct. App. 2010) (“Because we find that good faith is not required under Mississippi law to support an equitable distribution of property acquired during a void marriage, this issue is without merit.”).

170. *In re Marriage of Guo & Sun*, 112 Cal. Rptr. 3d 906 (Ct. App. 2010), *disapproved of on other grounds by* *Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211 (Cal. 2013).

171. *Id.* at 910 (citing *Schneider v. Schneider*, 191 P. 533, 534–535 (Cal. 1920)); see also *Schneider v. Schneider*, 191 P. 533, 534 (Cal. 1920) (“In four of the seven states where the community rule as to property of the character here considered prevails it has been held that where a woman is an innocent party to a void marriage she is entitled to the same interest in property acquired by the parties as if the marriage were valid.”).

172. *Guo & Sun*, 112 Cal. Rptr. 3d at 914.

court correctly explained that the non-putative spouse should receive his or her share of the quasi-marital property at the end of a putative marriage.<sup>173</sup> A different issue involves whether the “spouse” who knew all along that the marriage was void can nonetheless assert that there was a putative marriage merely because the other spouse sincerely believed in the marriage’s validity. Still another issue is whether the property must be distributed as if there was a valid marriage when the only party seeking such a distribution is the individual who knew all along that the marriage was void.

In *Tejeda*, the “innocent” spouse did not assert putative spouse status for herself.<sup>174</sup> One of the *Guo & Sun* court’s points was that the individual who knew that the marriage was invalid should not be permitted to invoke putative-marriage status by claiming that the other party sincerely believed in the validity of the marriage.<sup>175</sup> Permitting the deceitful party to do so permits that individual to take advantage of the other party twice: once when pretending to enter into a marriage that he or she knew was void and again when seeking to benefit from the distribution of quasi-marital property.

There are at least two ways to avoid the difficulty highlighted by the *Guo & Sun* court. One might adopt the *Allen* approach<sup>176</sup> and preclude the individual who knew that the marriage was void ab initio from asserting the putative marriage status. Or, one might permit a court to find that there was a putative marriage based on the relevant testimony,<sup>177</sup> but make it part of the law that only the putative spouse can trigger the provision requiring that the property be distributed as if the couple had married.<sup>178</sup>

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173. See CAL. FAM. CODE § 2251(a)(2) (West 2020).

174. *In re Marriage of Tejeda*, 102 Cal. Rptr. 3d 361, 364 (Ct. App. 2009) (“Petra clarified that she was not seeking putative spouse status for herself.”).

175. *Cf. Guo & Sun*, 112 Cal. Rptr. 3d at 910 (“The purpose of the doctrine is to protect the ‘innocent’ party or parties of an invalid marriage from losing community property rights.”).

176. See *supra* notes 155–60.

177. See CAL. FAM. CODE § 2251(a)(1) (West 2020)

If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall:

Declare the party or parties, who believed in good faith that the marriage was valid, to have the status of a putative spouse.

178. See *id.* § 2251(a)(2)

If the division of property is in issue, divide, in accordance with Division 7 (commencing with Section 2500), that property acquired during the union that would have been community property or quasi-community property if the union had not been void or voidable, only upon request of

A few points might be made about requiring the putative spouse's consent before the property will be distributed as it would have been had the couple had a valid marriage. First, both spouses might be putative spouses because both had believed the marriage valid. In that event, either party could ask that the property acquired during the relationship be distributed as if the marriage had been valid. Second, once the putative spouse requests that the property be distributed as it would have been had the couple had a valid marriage, the property will be split in light of local law, which may mean that fault will play no role in the property allocation.

#### CONCLUSION

States recognize putative spouse status to promote fairness and prevent unjust enrichment so that individuals who in good faith believed that their marriages were valid will have some protection when those relationships end. However, states have very different policies about what the putative spouse may receive, which means that such spouses may be sorely disappointed when their relationships end, justified expectations notwithstanding. Yet, it is also true that in the quest to put putative spouses on an equal footing with legal spouses, some states seem to favor the putative spouse over the legal spouse, a result that in some cases will undermine fairness and justified expectations.

States differ about the standard to be used when deciding whether a putative spouse sincerely believed the marriage valid. On the one hand, use of a reasonable person standard may exclude too many from that status merely because of naivety or a lack of education. On the other hand, states do not seem to appreciate just how open-ended the subjective standard might be. An individual might sincerely believe that he or she is married to someone else, where the latter person sincerely believes that the two do not have a relationship at all much less a marital relationship.

The subjective test incorporates reasonableness, so the trier of fact will ask whether it is credible that the individual sincerely believed that he or she was in a valid marriage, but this reasonableness limitation will not provide as much of a check as might be thought. Instead, the trier of fact will either have to recognize putative spouse status in surprising cases or will have to reject that the person has that status, even though all of the indicia of sincerity have been met to the degree that has proven sufficient in other cases. What may well happen is that the trier of act will permit other kinds of considerations into the assessment of sincerity, e.g., whether

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a party who is declared a putative spouse under paragraph (1). This property is known as "quasi-marital property."



the would-be putative spouse is likable or perhaps of the “correct” class however that might be defined, and make that judgment almost immune to reversal on appeal.

Some states require that certain conditions be met before assessing whether an individual subjectively believes in the validity of the marriage. Such a position is likely both over- and underinclusive—it may exclude the naive or uneducated who do not know which formal requirements must be met but include those who, after having met the formal requirements, have willfully blinded themselves to signs that their marriage is invalid and that would have been too obvious for a reasonable person to ignore. At the very least, states should be honest that their policy is a kind of compromise meant to promote various goals, so the results might well appear to be both under- and overinclusive when examined in light of only one of the state’s articulated goals.

States can use presumptions about good faith to help the trier of fact assess who should be considered a putative spouse. However, the current approach may overemphasize who happens to be impeded from marrying rather than other factors more closely related to whether individual beliefs are sincere.

One of the difficulties in figuring out the fair resolution of these kinds of cases is that there may be many innocent parties, especially when one considers children and other family members, and giving one person his or her due may result in another worthy individual receiving less than might reasonably have been expected. The situation is further complicated because of differences in the states about other domestic relations matters, e.g., differing policies about whether to recognize common-law marriage at all or the conditions under which such marriages will be recognized. By the same token, differing state policies about when the removal of an impediment will validate a marriage can only multiply the number and kinds of cases where individuals thought their marriages valid, provisions of local law notwithstanding.

State courts and legislatures must provide much more guidance about who qualifies as a putative spouse. Otherwise, some individuals who seem to meet the relevant criteria will continue to be excluded, and others who seem not to meet the relevant criteria will nonetheless be included. Such an approach is unfair not only because of its inconsistency but also because of the implications that these decisions have for other interested parties. States can and must do better.