Traditionally, the family, often called the cornerstone of society, begins with the marriage ceremony. However, Texas law does not require any type of formal act for a marriage to commence. The Texas Family Code, Section 2.401, holds that a common-law marriage begins when three events occur:

- A man and a woman agree to be married.
- After the marriage agreement is entered, they live together in the State of Texas as husband and wife.
- They represent to others they are married.

To many couples, it matters little whether or not their relationship qualifies as a legal marriage. In fact, it makes little difference to the state (assuming there are no children) until the relationship dissolves by death or divorce. Then the division of property, the survivor's rights to a homestead, the survivor's rights to inherit property from the deceased and other legal matters become important.

The U.S. Constitution confers no power on the federal government to regulate marriages. Consequently, the validity of a marriage is determined by the law of the state where it was celebrated. Texas laws are somewhat unique because they are based on a combination of both civil law and common law.

Originally, Texas recognized the law of Mexico after the state won its independence. Mexico's laws evolved from the civil law of Europe and embodied what is known today as community property. Four years after winning independence, Texas recognized the common law of England but continued to adhere to the community property scheme of determining marital property.

The civil law did not recognize common-law marriages. The common law did. Thus, between 1836 and 1840 there were no common-law marriages in this state. Since then, they have been recognized.

The dual influence of civil law and common law had a significant impact on the concept of marriage and the sharing of wealth. A relationship recognized by common law entitles the spouses to the benefits of community property rights.

While Texas may recognize common-law marriages, it does not recognize anything akin to a common-law divorce. Only the courts may dissolve a common-law marriage. Upon dissolution, whether by death or divorce, each spouse is entitled to one half the property (including income) acquired during the marriage. The only exception is the property acquired by one spouse by gift, devise or inheritance.

This rule has given rise to cases such as the celebrated "palimony" suits against Lee Marvin and more recently actor William Hurt and baseball’s Dave Winfield. Each involved a woman claiming a common-law marriage and entitlement to one half the income accrued since the beginning of the relationship.

Texas has certain guidelines for these cases. For instance, the party asserting the common-law marriage has the burden of proof. The claim of a common-law marriage is closely scrutinized when property rights are involved.

The 71st Texas Legislature placed a one-year statute of limitation on claims arising from a common-law marriage. Effective September 1, 1989, a common-law partner has one year after the marriage dissolves, whether by death or separation, to file suit.

The wording was changed slightly by the 74th Legislature in 1995. It provides, “If a proceeding in which a marriage is to be proved (under this statute) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.”

What must be shown to prove the existence of a common-law marriage? First, the three elements required by the Texas Family Code, Section 2.401, must occur within Texas. Making an agreement to be married in Texas and then living together in New Mexico can not constitute a common-law marriage in Texas.

Second, the party asserting the validity of the marriage must show that both parties are qualified to be married. These requirements include:

- the parties are of the opposite sex;
- the parties are not ancestors or descendants by blood or adoption;
- the parties are not a parent’s brother or sister, of whole or half blood;
• the parties are not a son or daughter of a brother or sister of whole or half blood or by adoption;
• neither party is presently legally bound by a prior marriage; and
• both parties are competent and at least 18 years of age.

The three requirements constituting a common-law marriage have been clarified to some degree by Texas case law.

For instance, the agreement to be husband and wife must be unconditional and for the duration of the couple's natural lives or until legally dissolved. An agreement to be husband and wife for as long as both parties desire or on a trial basis is insufficient. Likewise, the agreement must be for the relationship to begin immediately, not at some future date such as when the Dallas Cowboys win the Super Bowl.

Once the contract is made, whether formally or informally, the couple must live together as husband and wife. The case law has construed the term living together to mean "to cohabit." No sexual relationship is required.

Interestingly, Texas case law does not specify any minimum length of time that the couple must live together. There is a general misconception that seven years is required. This is not true in Texas. One case has examined a term as long as nine years, another as short as four to five months.

However, the cases generally do not emphasize the length of time the couple lives together if, while living together, they represent themselves to others as married. As one case stated, "In common-law marriages, the agreement is fundamental and cohabitation is an element, but holding out to the public as being man and wife is the acid test." McChesney v. Johnson, 79 S.W. 2d 658.

Generally, holding out or representing to others that the couple are husband and wife involves oral comments. While the courts will examine such statements as evidence, conduct speaks as loudly as words. As one court stated, "The cohabitation must be professedly as husband and wife, and public, so that by their conduct towards each other they may be known as husband and wife." Grigsby v. Reib, 153 S.W. 1124. The assumptions and opinions of the community concerning the couple's status are important.

While isolated references to each other as being husband and wife are insufficient in and of themselves, the courts have held as relevant the:
• couple's comments to neighbors;
• way the couple introduced themselves to others;
• way others introduced the couple to third parties;
• couple's reputation in the community;
• status indicated on the couple's tax returns;
• names placed on bank accounts and safety deposit boxes;
• names placed on applications for credit cards, social security and driver's license; and
• status marked on payroll records.

Where inconsistencies exist—and generally they do or there would be no controversy—it is up to the trier of facts to resolve the issue based on the totality of the circumstances.

The court in the McChesney case summarized the three-part test for common-law marriages quite clearly. "Marriage is more than a contract, it is a status in which stability and performance are vital, and this is particularly true when dealing with common-law marriages."

Couples who wish to live together yet avoid the stigma of a common-law marriage may wish to take precautionary measures.

Some writers recommend the couple enter a written agreement stating that their cohabitation is not based on a present or future agreement of marriage. Because a common-law marriage requires three occurrences—i.e., an agreement, cohabitation and representation, the recommendation is aimed at offsetting the first.

However, the recommendation is not fail-safe. There is no Texas case law upholding the validity of such a strategy. There is nothing to keep such an agreement from being lost or informally revoked by the couple's conduct.

Perhaps the best advice is to have both the written anti-marriage agreement plus a prenuptial agreement in the event the relationship is characterized as a common-law marriage. The particulars of such an agreement are described in the Texas Family Code, Sections 4.001 through 4.006.

Two definitions were added to Section 4.001 effective September 1, 1987. The term premarital agreement was defined as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage. The term property means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

These definitions are important for several reasons. First, the agreement is effective only if the relationship is characterized as common-law marriage. It is a backup in the event the anti-marriage agreement fails.

Second, the prenuptial agreement can affect all future interests in each spouse's real property, personal property or income and earnings. Thus, the division (or nondvision) of future income streams may be addressed.

Finally, the couple should be aware of Section 4.002 that governs the formalities of execution and Section 4.003 that describes items the premarital agreement may address.