

**Dear Reader:**

**This report from the Ecclesiastical Marriage Task Force is made available to the CRC congregations and classes for discussion and careful review. Due to the cancellation of Synod 2021, the deadline for responses to this report, in the form of an Overture or Communication, has been extended to be considered by Synod 2022. Such documents must be processed through a church council and then through classis and then be received by the Synodical Services Office by March 15, 2022, in order to be included on synod's agenda in 2022.**

**If you have any questions regarding proper procedures, please refer to the Rules for Synodical Procedure (pp. 9-11) available at [crcna.org/SynodResources](http://crcna.org/SynodResources), or you may contact the Synodical Services Office or the executive director of the CRCNA. Thank you!**

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### I. Background, mandate, and methodology

#### A. Background

Mandating a committee to study some aspect of marriage is not new to the Christian Reformed Church in North America. Several study committees have been appointed in the past in order to articulate the essence, nature, and purpose of marriage as well to grapple with questions related to divorce, remarriage, and the distinctive character of Christian marriage. Recently, though, churches across the denomination are being confronted with questions that the CRC's previous statements and studies on marriage address only indirectly or not at all. The new questions are being driven by complexities involved in an increasing number of late-in-life second marriages, other unique life situations such as increased immigration, and a growing divide between civil and religious definitions of marriage. In brief, the new questions concern the advisability and legality of performing ecclesiastical (non-civil) marriages and how pastors and elders should respond to situations in which a couple specifically requests an ecclesiastical marriage only, apart from any civil obligation. Synod 2019, in response to an overture from Classis Georgetown, mandated an "Ecclesiastical Marriage Task Force" to address these questions and to articulate a biblically grounded, theologically informed, and pastorally nuanced response. Acceding to the overture, synod identified the need to study the advisability, legality, and morality of ecclesiastical marriage on the following grounds:

- a. Churches are being confronted with questions and situations related to specifically ecclesiastical (non-civil) marriages.
- b. Pastors and elders need guidance on how to respond to these questions.
- c. The current CRCNA position on marriage does not specifically address the relationship between civil and ecclesiastical marriage.

*(Acts of Synod 2019, p. 791)*

#### B. Mandate

On these grounds Synod 2019 mandated this task force to study and address, but not be limited to, the following:

1. Is it legal in the various states, provinces, and territories of Canada and the United States to perform an ecclesiastical (non-civil) wedding ceremony?
2. What implications do the current CRCNA position on marriage and the Church Order have on ecclesiastical (non-civil) weddings and marriages?
3. Is it morally legitimate to perform an ecclesiastical (non-civil) wedding in order to avoid the financial costs and obligations of a civil marriage?
4. If people are declared married in a non-civil ceremony in a home country outside the United States or Canada, should that marriage be recognized by the CRCNA?
5. What are the implications for the church with regard to a specifically ecclesiastical marriage?
6. What are the implications of ecclesiastical (non-civil) marriages for senior citizens, including such matters as pensions and end-of-life care issues?
7. What, if anything, have other faith communities done with regard to this issue?
8. Consult with the Committee to Articulate a Foundation-laying Biblical Theology of Human Sexuality for insights that might be beneficial to this task force.

*(Acts of Synod 2019, p. 792)*

### C. Methodology

To fulfill this mandate, the task force undertook the following approach. First and foremost, the task force listened to the stories of people seeking or raising questions about ecclesiastical (non-civil) marriages so that we could understand their stories and identify the kinds of situations that pastors and elders are facing. Second, having listened to some of the stories and having read through the mandate, the task force developed a working definition of *ecclesiastical marriage*. The task force recognized that the definition of *ecclesiastical marriage* was often assumed, and thus remained implicit rather than explicit, in the synodical mandate and in people's minds. As a result, the task force sought to develop a clear and concise definition of *ecclesiastical marriage* that would help provide clarity and coherence to the questions surrounding ecclesiastical marriage. The task force also realized that their conclusions and pastoral recommendations would depend on what is and is not considered an ecclesiastical marriage. Third, the task force studied the biblical, theological, and legal aspects of ecclesiastical marriage with an emphasis on understanding the feasibility or nonfeasibility of ecclesiastical marriage from a scriptural and up-to-date legal perspective. Fourth, the task force approached other denominations to see if they have grappled with the issues and might have some wisdom to share. In its consultation, the task force found that other denominations had not addressed the question and were interested in the CRC's study. Finally, the task force thought through recommendations concerning the advisability of ecclesiastical marriage as well as how to provide pastoral care to those seeking such a marriage because of unique or challenging situations.

## II. Hearing the stories: Listening to couples in unique and challenging situations<sup>1</sup>

As the task force listened to stories, it realized that there were many situations in which couples considered entering into an ecclesiastical marriage or thought they had obtained one. The following is a sample of the kinds of stories the task force heard. Each story here raises certain questions about marriage pertinent to the work of the task force.

### A. Late-in-life couple finding love after each lost their spouse

Denise and John are lifelong friends in their late sixties who have each lost their spouse to a serious illness. Sometime after grieving their spouses' deaths, Denise and John begin to spend significant time together and to bond with one another in surprising and unexpected ways—so much so that they begin to talk seriously about getting married to one another. Eventually they get engaged. But as they begin to plan their wedding, they start to ask questions about whether or not it is possible to get married in the church and by the church. This will be their second marriage, and civil marriage comes with all sorts of implications—especially with regard to financial matters. John and Denise both have adult children and are concerned about the implications for their children if they enter into a civil marriage. So they go to meet with Denise's pastor to ask about the possibility of an ecclesiastical marriage. In their conversation they mention how they do not want the entanglement

<sup>1</sup> The names of the individuals in these stories are pseudonyms.

of a civil marriage and that they just need the blessing of the church, which they believe would be the simpler solution in their situation. They want to care for each other and be the companions that they both now feel they need. They also raise the point that if civil authorities allow for common-law marriage, how would an ecclesiastical marriage be any different? Beyond the matter of similarities and differences in civil and ecclesiastical marriages, Denise and John's story raises several questions: Can an ecclesiastical marriage be a way to avoid the legal entanglements of a civil marriage? Should the church perform a marriage that is never going to be solemnized by the state (civil government)? How should the pastor of the church approach Denise and John in terms of pastoral care?

*B. Immigrant couple straddling two cultures*

Joseph and Ruth are a Sudanese couple who have been married for ten years. They met in a refugee camp in Kenya prior to immigrating to the United States. After coming to the United States, Joseph and Ruth decided that they wanted to get married. Desiring to maintain and honor their cultural customs, the couple began the process of getting married according to their tradition in Sudan. This meant that even while Joseph and Ruth were far away in the United States, their families in Sudan participated in the process and enacted the marriage customs, after which Joseph and Ruth were pronounced married—and they moved into an apartment together. Today, Joseph and Ruth still have not completed one important part of the marriage custom, however: according to their local tradition, Joseph's father and Ruth's father are to give their blessing to the couple in person. But expenses and difficulties with visas have prohibited them from doing so.

After 10 years of marriage and living in the United States, Ruth and Joseph have not obtained a civil marriage in the state in which they live, and they have no intention of doing so—for two reasons. First, they want to honor their customs and family by saying that what their family did is sufficient for them and should be sufficient for anybody else. Though they have been accused by some in their church as not being married but simply living together, they vigorously contest that accusation. The second reason is that they see no value in a license to help them stay together. They argue that the divorce rate is exceedingly high among couples who have marriage licenses, but separation is almost unheard in their tribe. The entire family has a stake in their marriage, and their honor of their culture gives them great strength in keeping their marriage intact.

Joseph and Ruth's story raises legal and pastoral issues. How should the church embrace and celebrate the marriage customs of Joseph and Ruth's culture? Should a pastor offer legal advice about getting married or recommend that Joseph and Ruth get legally married in the United States? If Joseph and Ruth do not desire to get legally married in the United States, does that make a difference in how the church should engage them as a couple? What can the church learn from Joseph and Ruth's cultural understanding of marriage and its relationship to the community?

*C. Young couple worried about debt*

Tim and Angie are recent college graduates and are engaged. Tim, however, has significant school debt. As they learn that getting married means that the couple will bear the burden of Tim's debt together, they begin to

wonder if there is a way to get married without Angie accruing and bearing Tim's debt. They seek advice and hear their grandparents talking about something called an ecclesiastical marriage, which could help them avoid the implications of a civil marriage. Tim and Angie bring it up to their pastor at their next marriage counseling session. Tim and Angie's story is raising concerns similar to those in Denise and John's story, showing that these kinds of questions are not just related to late-in-life second marriages. Is marriage intended to be a full joining of lives with its joys and responsibilities?

#### *D. Couple kept apart by COVID-19 restrictions*

Peter and Kate are both anxiously awaiting their wedding. They found each other late in life after each had lost their spouse to illness. Their wedding plans, however, have been postponed because of the coronavirus pandemic. They are unable to get a marriage license due to the closure of government offices, and they are not sure when the offices will reopen. Peter and Kate both live alone at their own residences in a senior-living complex, and they were planning to move in together as soon as they got married. With the onset of a strict quarantine in their residential complex, they want to get married as soon as possible so as not to be apart for months. They approach their pastor to see if she is willing to perform a wedding ceremony even though they do not have a marriage license. They tell their pastor that they are going to obtain a license as soon as they are able, but they would like to get married as soon as possible so that they can live together during quarantine.

Should the pastor perform an ecclesial ceremony for Peter and Kate so that they can live together during quarantine? When are they really married? Who needs to be involved in the marriage for a couple to be fully married? Must all the parties (state, couple, witnesses, church community) be present at only one ceremony for the marriage to be considered valid? Or is it acceptable to perform separate ceremonies in extenuating circumstances, provided the intent is to have both a civil ceremony and a religious ceremony?

#### *E. Couple with cross-border connections*

Jennifer and Jared meet at Dordt University, date, and eventually become engaged. Jennifer is a Canadian citizen, and Jared is a United States citizen. Since Jared has a job lined up in the U.S. and Jennifer has already been accepted into a graduate program near his job location, the couple are planning to settle there, and it would make the most sense for them to get legally married in the U.S. However, Jennifer's extended family members all live in Alberta, where she grew up, so she and Jared decide to have a large church wedding and reception in Alberta several weeks before they move to settle in the U.S. together. Jennifer then crosses the border into the U.S. with her student visa. They also have a small commitment ceremony and get legally married before a judge in the U.S. several weeks after their church wedding date, thus separating the civil and ecclesiastical marriage ceremonies. When are they really married? Again, is this acceptable because the intent is to have both a religious ceremony and a civil ceremony, even if the two events cannot take place at the same time and location?

Listening to these and other stories, the task force recognized that there are many questions to be answered. The task force also recognized that the

stories they heard are not exhaustive and that many other possible stories include scenarios that these accounts do not capture.

### III. Definition of *ecclesiastical marriage*

For the content of this study we are particularly interested in knowing (1) what “makes” a marriage, (2) what the life implications of such a relationship are in terms of its purposes and mutual responsibilities by the parties, and (3) what the church’s obligations are toward the state (civil government) in our North American context.<sup>2</sup> Knowing the reasons why people may want to bypass state involvement, both intentionally and perhaps unintentionally, is also an important consideration. Since the CRC has considered the matters of marriage and divorce in some depth previously in several reports and has dealt with individual cases, it seems unnecessary to cover all of that ground again. Instead, the main focus of this task force is on delineating, as far as possible, the relationship between the church and the state in the matter of marriage.

In determining the first point—what “makes” a marriage—the task force is concerned particularly with what parties are required to solemnize a Christian marriage. More specifically, the questions under consideration deal with what the respective roles are of both church leadership and the state, considering our current North American context.

Some might argue that marriage is simply a commitment rite between two people, with God as their witness. In their view, such a private ceremony of covenant vows should be enough to be considered married in the eyes of God.

Some might argue that for a marriage to be Christian, these commitments need to be solemnized and validated by a pastor or other certified officiant.

Some would add that, in addition, these vows or commitments need to be witnessed by others. In this view, there needs to be a public rite of commitment. As with baptism, the public nature of the ceremony invites witnesses to support and pray for the couple making commitments, and the witnesses can participate in holding the marriage partners accountable to their vows.

Finally, in recent centuries it has also become the norm to cooperate with the state in solemnizing such a marriage commitment. Marriages are registered with the state, and certain obligations are followed in order for a marriage to be considered legal. In fact, in North America ministers are licensed to formalize marriage on behalf of the state.<sup>3</sup>

One of the primary questions before this task force is this: Must the marriage ceremony be approved and cemented by the state, or can a Christian marriage be considered solemnized without that? Behind this lie questions about what joining one’s life with that of another means concretely in terms of shared relationships, goods, income, pension, property, duty of care, and so on. Does the state have the authority and right to regulate these matters if the need arises? Further, our denomination asserts that, aside from being a personal commitment, marriage is also “a structure that enriches society

<sup>2</sup> See Report 29, *Acts of Synod 1980: “What is marriage? What is its essence, its purposes, and its obligations?”* pp. 468ff.

<sup>3</sup> It should be noted that in his theology of what “makes” a marriage, John Calvin identifies each party (God, couple, pastor, witnesses, and magistrate) as essential components to the solemnization of marriage. See Section III, B (“Historical/theological”) of this report for further information.



and contributes to its orderly function.”<sup>4</sup> How does that assertion affect our understanding of the state’s role in solemnizing marriage?

As this task force considered these questions, it developed a definition of ecclesiastical marriage in order to provide clarity and consistency in its responses to these questions and pastoral care issues. It is hard to respond to a question about whether a pastor should perform an ecclesiastical marriage when the definition of ecclesiastical marriage is unclear. Using the synodical mandate and the original overture, the task force developed a definition of ecclesiastical marriage. For the purposes of this report, an *ecclesiastical marriage*, therefore, is a marriage sanctioned and solemnized solely by the church to the exclusion of the state (civil government) whereby a couple is considered “married in the eyes of the church but not in the eyes of the state.”<sup>5</sup> By this definition, then, ecclesiastical marriage should be differentiated from religious marriage or even from a religious service / ceremony / celebration because ecclesiastical marriage intentionally excludes the state as a sanctioning or governing authority.

For many, as evidenced in the stories in section II of this report, ecclesiastical marriage seems like a plausible solution to a myriad of distinct problems. It could be seen as a way to avoid the legal and financial implications of civil marriage, particularly in late-in-life second marriages like Denise and John’s. Similarly, ecclesiastical marriage could be a way to help or aid immigrant couples who were married ceremonially in their home countries—and yet for one reason or another their marriage is not recognized or they cannot obtain a civil marriage in their new country. Alternatively, ecclesiastical marriage could serve as a way to protest against the state’s redefinition of marriage insofar as an ecclesial marriage refuses to participate in or seek a marriage sanctioned by the state. Further, as definitions of civil and religious marriage diverge, many proponents of ecclesiastical marriage seem to argue that if a couple can get legally married without the church, should the reverse not also be the case? Why can’t a couple receive a Christian marriage without the state? And, if that is the case, then why not allow the church to perform ecclesiastical marriages? These are the kinds of situations and questions that pastors and elders are facing in their local contexts.

The answers to these questions, as our task force discovered, are not simple, and they require addressing complex issues about the legality of ecclesiastical marriages in Canada and the United States. They also require thoughtful reflection within a larger scriptural and theological framework concerning the relationship between the church and the state with regard to marriage. The complexity extends to considering any unintentional legal consequences to the parties, the officiant, and the church as a result of entering into or performing an ecclesiastical marriage.

#### A. *Biblical background*<sup>6</sup>

Within our denominational context, any discussion of marriage will necessarily begin with a biblical consideration of the topic. As previous CRC studies have covered the nature, essence, and purpose of marriage in Scripture, our task force focused on biblical material pertinent to the

<sup>4</sup> CRC Form for the Solemnization of Marriage (1979).

<sup>5</sup> *Agenda for Synod 2019*, Overture 14, p. 518.

<sup>6</sup> Unless otherwise noted, all scriptural references are from the *New International Version* (2011).

question of ecclesiastical marriage. While no biblical accounts explicitly spell out stipulations about marriage ceremonies and relative obligations, we can nonetheless glean answers and implications from various texts and accounts. Consideration of Christian marriage begins, of course, in the opening chapters of Genesis. Relying simply on that narrative, it would seem that what happens is only between the marriage partners and God. There is only one man and one woman. God created them to be fitting complements to each other, and that is God's design. The man rejoices that he has found a suitable partner. Genesis 2:24 then adds, "That is why a man leaves his father and mother and is united to his wife, and they become one flesh." There is no state license needed; no publication of banns; no cleric; no witnesses; and no signing of forms. Yet we understand this to be a marriage in which "a man and a woman covenant to live together in a lifelong, exclusive partnership of love and fidelity."<sup>7</sup> However, the "leaving" part also indicates that there is something public and formal about this relationship, with a shifting of allegiances and responsibility from one household to another relationship that is publicly acknowledged and recognized.

Information about Old Testament marriage customs, ceremonies, and obligations has been deduced from some of the biblical narratives and the Mosaic legal code concerning betrothal, marriage, and divorce, as well as from material recorded about other civilizations in the ancient Near East.<sup>8</sup> Although these texts do not provide a full picture of what is involved in arranging a marriage, it "seems likely that there was a formal set of rites and procedures that accompanied the arrangement of a marriage alliance."<sup>9</sup> Marriage in the Old Testament was not without its rules and protocols: intentions were declared, parents were asked for permission, a bride price was paid, a sort of contract was entered into, and there would be a brief ceremony before the couple would live together.<sup>10</sup> David W. Chapman asserts that during the Second Temple period (roughly 516 B.C. to 70 A.D.) the formal union of marriage "was generally preceded by a betrothal and often vouchsafed by a marriage contract obligating certain financial arrangements."<sup>11</sup> The woman might also be given a significant gift by her father with the understanding that it could provide for her if the marriage was dissolved. In addition, in the case of Rebekah leaving her parental household to "marry" Isaac, her family also formalized matters by sending her off with a blessing (Gen. 24:60).

<sup>7</sup> CRC Form for the Solemnization of Marriage (1979).

<sup>8</sup> "We recognize the wide variety of literary genres that yield information on ancient family life: laws, narratives, polemical prophetic texts, songs, didactic wisdom compositions, etc.;" Daniel I. Block, "Marriage and Family in Ancient Israel" in *Marriage and Family in the Biblical World*, ed. Ken M. Campbell (Downers Grove, Ill.: IVP, 2003), p. 34.

<sup>9</sup> Victor H. Matthews, "Marriage and Family in the Ancient Near East" in *Marriage and Family in the Biblical World*, ed. Ken M. Campbell (Downers Grove, Ill.: IVP, 2003), p. 7.

<sup>10</sup> We see some of these elements in Genesis in the marriage arrangements between Rebekah with Isaac, and then Jacob with Rachel and Leah. "For a marriage to be arranged, the groom's family must provide a bride price, while the bride's family provides a dowry"; John H. Walton, *The NIV Application Commentary: Genesis* (Grand Rapids, Mich.: Zondervan, 2001), p. 531.

<sup>11</sup> David W. Chapman, "Marriage and Family in Second Temple Judaism" in *Marriage and Family in the Biblical World*, ed. Ken M. Campbell (Downers Grove, Ill.: IVP, 2003), p. 184. "Certainly some marriage and family practices could be left to custom, but other aspects of family life required legal discussion—especially when money was involved"; Chapman, p. 239.



Indeed, phrases referring to parents “giving” sons and daughters in marriage (cf. Deut. 7:3) “suggests that the institution itself involved more than the mere union of one man and one woman; this was a momentous occasion uniting families.”<sup>12</sup>

Another consideration is that throughout the Old Testament we see God’s care for vulnerable people, especially in a patriarchal society in which women had few rights and could be economically destitute without a male (father, husband, brother, or son) who would provide and care for them. As Daniel Block explains,

Practically, in the ancient context, unless a woman was taken in by her father or brothers, divorce put her in extremely vulnerable economic protection. Like the widow or the orphan, she would be without male provision and protection, and in many instances would turn to prostitution simply to earn a living.<sup>13</sup>

Witness, for example, God’s continued concern for “the widow and the orphan,” as well as protections for women in cases where they had been taken advantage of sexually, legally, by divorce or otherwise.<sup>14</sup> Protocols, regulations, and provisions were a necessary part of regulating sinful society and protecting persons with lower social status. By supplying procedures and a legal code, God was at work enacting his plan for maintaining some order, right relationships, and justice in society.

In the New Testament we can see that again more is assumed about marriage than is explained. The Old Testament theme of God in relationship with his people, as in a covenant of marriage (in Hosea, for example), is expanded in the New Testament in an extended metaphor of the church as the bride of Christ. Thus marriage is held in high regard as something to be regulated and guarded. Infidelity and divorce were not matters to be taken lightly, since the marriage covenant was representative of God and his people. In fact, Jesus intensifies the teaching on divorce, saying that God had allowed it because of hardness of heart but that it was not God’s original intent (Matt. 19:8).

It is not possible to ascertain from the New Testament alone exactly what the relationship between Christians and the state was in terms of legalizing a marriage. Peter Coleman says that in the Second Temple period (up to 70 A.D.), “the actual procedures for marriage were largely the same in Palestine as in other parts of the Near East, unchanged for centuries.”<sup>15</sup> He adds that the Jewish marriage ceremony itself was a simple procedure that “did not involve a visit to the synagogue nor the presence of a rabbi, but this did not mean it was a civil rather than a religious ceremony. Prayers and blessings would be said by senior members of the families. . . .”<sup>16</sup> It seems that early Christians continued wedding practices unattached to church authorities. In researching marriage rites during the New Testament and the early centuries of Christian practice, Willy Rordorf found that marriages proceeded “according to the contemporary laws” and that “the first generation of Christians

<sup>12</sup> Block, “Marriage and Family in Ancient Israel,” p. 56.

<sup>13</sup> *Ibid.*, p. 51.

<sup>14</sup> Deut. 24:1-4.

<sup>15</sup> Peter Coleman, *Christian Attitudes to Marriage: From Ancient times to the Third Millennium* (London: SCM Press, 2004), p. 86.

<sup>16</sup> *Ibid.*, pp. 86-87.

gave no additional juridical or liturgical form. . . . It is only from the fourth century onwards that we begin to see the clergy participating in marriage festivities.”<sup>17</sup> Rordorf summarizes his findings about early Christian marriage conventions in a manner that is worth quoting at length:

First, we have to admit that the Early Church did not conceive a new form of marriage; it simply took over and conventionalized those local rites which it found. Secondly, we see that it is not an ecclesiastical act of blessing which makes a valid Christian marriage, but each marriage, contracted by either Christian or non-Christian according to the ordinary civil laws of a given time and place, is recognized as valid by the Church. In reality, during long centuries, the religious ceremony of marriage was considered optional rather than obligatory.<sup>18</sup>

Surprisingly, then, the conclusion here is that the early church abided by state regulations and practices regarding marriage, and only later did some ecclesiastical oversight or involvement become an optional convention.

On the other hand, given the New Testament’s silence on the matter, perhaps this conclusion is not surprising. The New Testament is simply assuming that people will follow the customs of the day to solemnize a marriage. There does not seem to be any discussion or argument about how such a Christian marriage should be solidified. In addition, the fact that writers such as Paul address divorce as a procedural reality means that it was also a formalized possibility, not only under rabbinic teaching but also for Christians.

Attending to the more general topic of the relationship of Christians to the state, the New Testament is not ambiguous, even in a time when, under Roman rule, that relationship was detrimental to Christians in many instances. This is most clearly addressed in the letter of Romans, where Paul says, “Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God” (Rom. 13:1). Paul asserts that, on the whole, government has been instituted for the good of citizens and has been given authority to regulate and enforce orderly judgment of right and wrong in society, a theme that we find in God’s expectations of rulers in the Old Testament also. Paul then goes on to spell out respect for government in more concrete terms as well, saying, “This is also why you pay taxes, for the authorities are God’s servants, who give their full time to governing. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor” (Rom. 13:6-7). Respect, honor, and obedience to governing authorities was and is expected of Christians.

Further, writers of the New Testament were pretty clear about the importance of how believers interacted with, and were perceived by, their unbelieving family, colleagues, civil authorities, friends, and neighbors. Part of this obligation involved obeying authorities that were placed over them. In 1 Peter 2:13-17, for example, the apostle Peter exhorts believers this way:

<sup>17</sup> Willy Rordorf, “Marriage in the New Testament and in the Early Church,” *Journal of Ecclesiastical History* (20:2; Oct. 1969), p. 209.

<sup>18</sup> *Ibid.*

Submit yourselves for the Lord's sake to every human authority: whether to the emperor, as the supreme authority, or to governors, who are sent by him to punish those who do wrong and to commend those who do right. For it is God's will that by doing good you should silence the ignorant talk of foolish people. Live as free people, but do not use your freedom as a cover-up for evil; live as God's slaves. Show proper respect to everyone, love the family of believers, fear God, honor the emperor.

Such teaching applies to the whole life and practice of the Christian and should also be taken seriously in relation to marriage. Andreas Kostenberger comments: "Marriage, as well as other human relationships, is thus set in the framework of a believer's Christian testimony in the surrounding unbelieving world."<sup>19</sup> In our North American contemporary context, where marriage commitments are often treated lightly or disregarded altogether, this is an area where Christian commitment and fidelity can speak volumes.

Summarizing, then, what we might ascertain of the biblical witness, it seems that God's people in the Old Testament acted within certain accepted procedural parameters for marriage that included a contract of some sort and the exchange of a dowry or similar payments. A marriage was understood to include mutual obligations, and there was also a legal code surrounding divorce. The New Testament does not expressly address the matter of how a marriage was constituted and what the relative involvement of religious or civil authorities was. So it is safe to assume, as scholars do, that in this era, as well, believers adhered to local customs and cooperated with civil authorities to ratify a marriage, however that was done in their region. What is clear is that in both the Old and New Testaments God intends law as a benefit to regulate society in a sinful world. In the New Testament believers are clearly instructed to respect and honor governing bodies. As we shall see, this is a theme that continues in the Reformed tradition through its leaders, particularly John Calvin.

### *B. Historical/theological*

Although there is ample scriptural evidence that marriage is a God-ordained institution and a societal norm, Scripture does not dictate that the civil authorities must be involved in the solemnization of marriage. It does, however, teach that marriage is a creational and societal good with benefits beyond the married couple. Further, there are no scriptural grounds claiming that the solemnization of marriage belongs solely to the church, meaning that the state does not usurp ecclesiastical authority if it claims marriage as its own.<sup>20</sup> In summary, there is no set marriage form or ceremony in Scripture, and yet that does not mean that any kind of ceremony or understanding of the parties involved in a marriage is allowed. Scripture provides guidance, guidelines, and an underlying logic concerning marriage and the parties involved in "making" a marriage. As mentioned above, the goal of this report is not to cover this ground again but to focus on the specific question of whether or not the CRC's scriptural, theological, and historical understanding of marriage would allow for its pastors to perform ecclesiastical marriage.

<sup>19</sup> Andreas Kostenberger, "Marriage and Family in the New Testament" in *Marriage and Family in the Biblical World*, ed. Ken M. Campbell (Downers Grove, Ill.: IVP, 2003), p. 254.

<sup>20</sup> *Acts of Synod 1955*, p. 247.

## 1. The CRC's forms and statement on marriage guidelines

While the institutional shape and practices of marriage have differed throughout history and throughout many cultures, in the Reformed tradition both the church and the state are considered to have a God-given, relative authority with respect to marriage. In most cases this means that the state is considered to have authority over the governance, regulation, and registration of marriages, and that the church has authority over the spiritual and moral aspects of marriage. These exist side by side, with each having its own role to play on the basis of its sphere of authority. Such an approach of granting dual yet relative authority to church and state is rooted in the tradition's theology of marriage, particularly its identification of marriage as a divinely ordained institution established at creation, its conception of marriage as a covenant, and its commitment to marriage as a good because it serves as a foundation for society. These aspects of marriage are evidenced in the CRC's forms for the solemnization of marriage as well as its 1980 statement on marriage guidelines. In the 1912 Form for the Solemnization of Marriage, marriage is described as "instituted by God himself at the very dawn of history," "a divine ordinance intended to be a source of happiness," and "an institution of the highest significance to the human race." The 1979 Form for the Solemnization of Marriage explicitly describes marriage as a covenant "instituted by God" in creation and "a structure that enriches society and contributes to its orderly function." In addition, synod's study and statement on marriage in 1980 affirms marriage as a foundational creational structure,<sup>21</sup> a covenant, and a vital relational and societal reality.<sup>22</sup>

While affirming marriage as a creational reality, covenant, and societal good, the forms and the 1980 statement often assume or allude to a particular understanding of the authority of the church and state in relation to marriage. The 1912 and 1979 forms recognize the minister as an agent of the church who is at the same time vested by the authority of the state. Thus the minister serves as an agent of the church and the state in the solemnization of a marriage, and marriage is presented as both an ecclesial and civil institution. The forms also clearly identify that in the case of marriage, the pastor's authority to solemnize the marriage is tied to the state and the church. The pastor's authority from the church is granted by virtue of his or her ordination, while the capacity to solemnize the marriage is granted to the pastor by the state. As the 1979 form states:

As a minister of the church of Christ and by the authority which the state has vested in me, I now pronounce you, (name) and (name), husband and wife, in the name of the Father, Son, and Holy Spirit. Amen. "Therefore what God has joined together, let man not separate" (Matt. 19:6).

The Synod 1980 statement similarly reaffirms the essence, purpose, and obligations of marriage as it identifies changing societal norms and

<sup>21</sup> *Acts of Synod 1980*, pp. 468-69: "Marriage was instituted by God at creation. Declaring that it was not good for the man to be alone, God created woman as a helper fit for him (Gen. 2:18). Man and woman, created in the image of God, were made for each other to become one flesh in marriage. Thus marriage is not a human invention nor an experiment in social relationships which can be altered or abandoned at will. It is a God-ordained, monogamous structure, requiring faithful commitment on the part of husband and wife."

<sup>22</sup> *Ibid.*, pp. 469-71.

discusses divorce and remarriage. While the 1980 statement does not specify the roles or authority of the church and the state in relation to marriage, it does not respond to changes in societal norms by resituating marriage within the jurisdiction and authority of the church alone.

## 2. Church Order Article 69 (formerly Art. 70)

A similar approach is evident earlier in the CRC's history, when societal norms regarding marriage and divorce were changing. Between 1947 and 1955 the CRC debated whether or not Church Order Article 70 (now Art. 69),<sup>23</sup> regarding marriage, should be removed or changed. Article 70 at that time read, "Since it is proper that the matrimonial state be confirmed in the presence of Christ's Church, according to the Form for that purpose, the consistories shall attend to it."<sup>24</sup>

The question of whether this article belonged in the Church Order arose for discussion in 1947 when Peter Van Dyken submitted an overture to synod requesting that Article 70 be removed. While recapitulating the entire overture is unnecessary, some of Van Dyken's grounds in the overture are pertinent. First, Van Dyken argued that

*there is . . . nothing spiritual or ecclesiastical in a marriage. The married state as such and its consummation are matters in the realm of common grace. Whereas God solemnized the first marriage, it is proper, that God's representative in the territory of common grace, which is our civil government, now performs this rite.*<sup>25</sup>

He also argued that the CRC Church Order represented the cultural context of the Netherlands. Van Dyken maintained that the language of confirmation was not valid because a marriage solemnized by the state did not need confirmation by the church in the United States. He claimed that in the Netherlands such a practice was a "relic" of Roman Catholicism. Further, he noted that within the United States the government grants judges and ministers of the gospel the power to solemnize marriages. In other words, ministers are agents of the state when they solemnize a marriage, acting on behalf of the civil government, not the church. To Van Dyken, including an article on marriage in the Church Order causes confusion by presenting marriage as "semi-civil" and "semi-ecclesiastical," when in reality the solemnization of a marriage properly belongs to the state as an "authoritative representative of God's justice."<sup>26</sup>

In summary, Van Dyken argued on the basis of common grace and the God-ordained role of civil government that an article on marriage does not belong in the CRC Church Order. In response to Van Dyken's overture, Synod 1947 commissioned a study to determine if the article should be removed, retained, or changed.

Synod discussed these issues until 1955 and ultimately decided to retain but change Article 70 (now Art. 69). For the purpose of this report, while it is not necessary to trace the discussion from 1947 to 1955 in full,

<sup>23</sup> At the time of discussion, the Church Order article regarding marriage was Article 70 (now Art. 69). The numbering of this article changed after Synod 1965 adopted a revision of the Church Order.

<sup>24</sup> See *Agenda for Synod 1947*, p. 181.

<sup>25</sup> *Agenda for Synod 1947*, p. 181.

<sup>26</sup> *Ibid.*, pp. 181-82.

it will be helpful to highlight some of the arguments given by the Church Order Revision Committee to Synod 1955 for retaining but changing the Church Order article. First, they acknowledged the authority of the state in marriage. They wrote, “Ministers of the Gospel, when they solemnize marriages, act upon a prerogative attributed to them by the civil government.”<sup>27</sup> However, the Church Order Revision Committee also highlighted that pastors “have received this prerogative because the churches ordained them.”<sup>28</sup> Drawing a balance between the role of the state and the church, the committee argued that the church should retain an article on marriage and recommended that it be rewritten as follows:

Consistories shall instruct and admonish those under their spiritual care to marry only in the Lord. Christian marriages should be solemnized with appropriate admonitions, promises, and prayers, as provided for in the official Form. Marriages may be solemnized either in a worship service or in private gatherings of relatives and friends. Ministers shall not solemnize marriages which would be in conflict with the Word of God.<sup>29</sup>

By adopting the revised version of Article 70 (now Art. 69), Synod 1955 highlighted the pastor’s role in solemnizing marriage, which is a role granted to them by the state. But in acknowledging that civil and religious definitions of marriage may differ, they also required pastors to solemnize marriages in line with the Word of God.

The CRC’s discussion of this Church Order article shows that the CRC has engaged in discussions regarding the relationship between the state and the church. Further, throughout this discussion the CRC affirmed the role of the civil government in marriage, sometimes even going so far as to claim that the civil government has sole jurisdiction over marriage. However, the question remains whether the references and allusions to the roles of the church and the state in the CRC’s forms and statements on marriage are a result of the CRC’s context, or if they are rooted deeper in the CRC’s theology regarding marriage itself. Simply affirming marriage as a creational, covenantal, and societal reality does not necessarily imply that the church and the state should be granted relative authority with respect to marriage. It is possible and could be argued that these realities could be identified and maintained within an ecclesiastical marriage. To be clear, the CRC’s current forms and statements are certainly influenced by its cultural context. The legal structures of Canada and the United States, in which ministers are granted the authority of the state to perform legal marriages, allow for one ceremony to be both civil and religious.

### 3. Reformed theology of marriage

For the Reformers, issues related to marriage and marriage reforms were not peripheral concerns. Rather, they were rooted in and were an expression of the theological and societal concerns of the Reformers. As historian Joel Harrington asserts, marriage “stood by implication at the heart of almost every major legal, religious, and social reform of the period.”<sup>30</sup>

<sup>27</sup> *Acts of Synod 1955*, p. 251.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. 250 (cf. Article 69 in the current Church Order).

<sup>30</sup> Joel F. Harrington, *Reordering Marriage and Society in the Reformation* (Cambridge: Cambridge University Press, 1995), p. 26.



Concerned with the medieval Catholic Church's practices and abuse of marriage, the Reformers accepted the traditional church's teaching of marriage as a divinely ordained institution rooted in creation, but they rejected the sacramental model of marriage and the Catholic Church's jurisdiction over marriage. John Witte, Jr., articulates in his book *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* that the Reformers saw the "Catholic Church's jurisdiction over marriage [as] . . . a particularly flagrant example of the church's usurpation of the magistrate's authority."<sup>31</sup> For the Reformers, marriage was a creational, God-ordained, human institution and as such could not fall under the jurisdiction of the church alone. In fact, for Luther, marriage was an institution of the earthly kingdom alone, meaning that the proper jurisdiction of marriage belonged to the magistrates (the state). The church, according to Luther, should not have formal legal authority over marriage but should serve the Christian magistrate as a pastoral aid. While following Luther's early theology of marriage, Calvin developed his mature theology of marriage around the idea of marriage as a covenant. For Calvin, the covenant of marriage was grounded in the order of creation and was a public and God-ordained human institution whose formation involved the whole community. As Witte articulates,

Marriage . . . was . . . a covenantal association of the entire community. A variety of parties participated in the formation of this covenant. The marital parties themselves confirmed their engagement promises and marital vows before each other and God—rendering all marriages triparty agreements, with God as a third-party witness, participant, and judge. The couple's parents, as God's lieutenants for children, gave their consent to the union. Two witnesses, as God's priests to their peers, served as witnesses to the marriage. The minister, holding God's spiritual power of the Word, blessed the couple and admonished them in their spiritual duties. The magistrate, holding God's temporal power of the sword, registered the couple and protected them in their person and property. Each of these parties was considered essential to the legitimacy of the marriage, for they each represented a different dimension of God's involvement with the covenant. To omit any such party was, in effect, to omit God from the marriage covenant.<sup>32</sup>

According to Calvin, the formation of the God-ordained covenant of marriage involved the minister, the magistrate, the couple, and the community. As all of these parties participated in the formation of the marriage covenant, the marriage itself was both private and public, a civil and ecclesial reality. The magistrate's role was to register the couple and protect their person and property. The minister's role was to bless the couple and remind them of their spiritual duties as a married couple. The magistrate and the pastor served different roles, pointing to different aspects of marriage—the spiritual and the social. Therefore, by highlighting the different parties, Calvin affirmed that marriage was under the dual yet relative authority of both the church and the state.

<sup>31</sup> John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville, Ky.: Westminster John Knox, 2012), p. 113.

<sup>32</sup> *Ibid.*, p. 8.

While the working out of Calvin's covenantal theology of marriage in Geneva represents a unique practical example of his theology that the church today need not nor should not try to emulate, his teaching about marriage as both civil and ecclesial has shaped the Reformed tradition and the Western legal tradition. The state or civil government is considered to have rightful authority and governance over the registration of marriage. It is also called on to protect the persons entering into the marriage relationship. The church is considered to have authority not as the body that registers or protects the persons and property in marriage but in the spiritual health and care of the marriage partners, admonishing and encouraging the couple to embody the biblical conception of marriage. Calvin's teachings were carried forward by other Reformed thinkers, such as Herman Bavinck, and Calvin's understanding of marriage can be found in the CRC's teachings about marriage and its marriage forms. Thus, while the CRC's forms are representative of their North American context, their affirmation of marriage as an institution of the state and of the church—each with its own respective and God-given authority—is rooted in the CRC's Reformed theological heritage.

4. The relationship between the church and the state in other CRC reports

Interestingly, the CRC's affirmation of marriage as civil and ecclesial is evidenced by Appendix C in the majority report to Synod 2016 by the Committee to Provide Pastoral Guidance re Same-Sex Marriage.<sup>33</sup> While the whole report was only received as information, Appendix C grappled with the relationship between the church and state regarding marriage, identifying four different options that it had earlier asked delegates to Synod 2015 (in a listening session) to consider regarding the church-state relationship:

- a. Marriage is fundamentally a religious institution. The state should recognize the religious nature of marriage and only authorize marriage as understood by religious authority.
- b. Marriage as the covenantal union of a man and a woman is grounded both religiously and by proper recognition of the created order. The state, even if it attempts to be religiously neutral, makes a profound error when it ignores what nature itself teaches. . . .<sup>34</sup>
- c. Both the state (civil government) and the church have a direct interest in family structure and well-being, but these interests are not identical. Both the state and the church have latitude (within limits) to define marriage to pursue their legitimate interests, even though those interests may not be the same. The state and the church may end up with different definitions of marriage.
- d. The church does not tell civil authority what to do. The church simply defines marriage as it finds itself compelled by Scripture and orders its internal life as Scripture and the gospel requires. What the state does is the state's business.

(*Agenda for Synod 2016*, p. 421)

<sup>33</sup> See *Agenda for Synod 2016*, pp. 421-25.

<sup>34</sup> This option has been modified for the purposes of this report. The modification was made in order to focus this section of the report on the relationship between the church and the state outside of the question of same-sex marriage, which this task force was not commissioned to study.

Appendix C identifies the first option (marriage as fundamentally a religious institution) as corresponding to the medieval Roman Catholic view and the fourth option (separation of church and state) as “expressive of an Anabaptist approach.”<sup>35</sup> Appendix C also reports that the majority of delegates to Synod 2015 identified the second and third options as fitting within a Reformed framework. The study committee’s minority report—received for information as well—also affirmed the second and third options as two different ways of applying a Reformed understanding of the relationship between the church and the state. However, the minority report implicitly argued that option 2, wherein marriage is described as a covenantal union grounded religiously and by proper recognition of the created order, is closer to the historic Reformed position. Thus, while option 3, wherein marriage is a concern and a legitimate but distinct interest of the state and the church, may represent some voices within contemporary Reformed theology, option 2 is closer to the historic position developed by Calvin and his followers. Further, the minority report highlighted the role of the state as a God-ordained yet relative authority that is called to discern the patterns of creation with regard to marriage. What is important here is not to rehash the debate surrounding the 2016 report or to enter into a discussion on the redefinition of civil marriage and its attendant issues. What is important is that both options 2 and 3 point toward the role of the church and the state in the Reformed tradition’s theology of marriage.

To reiterate, it would be impossible to address all the attendant issues related to our current context regarding the societal redefinition of marriage. However, it is important to note that when considering the definition of ecclesiastical marriage, one could identify it with either option 1 (medieval Roman Catholic) or option 4 (Anabaptist) but not option 2 or 3 (Reformed), both of which can be considered variations of the Reformed approach to the relationship between the church and the state in relation to marriage.

Recognizing options 2 and 3 as Reformed does not mean that a couple who has been married by a civil magistrate must have a religious ceremony upon coming to faith in Christ. This is an essential point that highlights the central role the Reformed tradition grants to the civil government in authorizing, solemnizing, and legally registering marriages. As long as the marriage in question is in line with the Word of God as articulated in the CRC’s forms and synodical decisions, Christian churches recognize a couple as married even if they have had only a civil ceremony.<sup>36</sup> Rather, upon coming to faith in Christ, the couple enters into the rich theological conception of marriage that the CRC teaches.

Further, the CRC’s understanding of the relative relationship between the church and the state means that even though the church has a vested interest in the health and vitality of the marriage and has some measure of ecclesial authority over the marriage, it does not have the power to grant a

<sup>35</sup> *Agenda for Synod 2016*, p. 422.

<sup>36</sup> This statement is made so that no couple who comes into the church will have to go through the process of having a “religious ceremony” to make their marriage “valid.”

divorce. That power belongs to the state. This is one of the challenges presented by the idea of ecclesiastical marriage. If there were such a thing as an ecclesiastical marriage regulated only by the church, would the church then also have to regulate an ecclesiastical divorce? The church continues to deal with marriages that break down and end in divorce. This simply begs the question, *What will the church do with an ecclesiastical marriage that breaks down?* Not only does the idea of ecclesiastical marriage contradict the CRC's theological understanding of the relationship between the church and state in relation to marriage, it also presents practical problems.

#### IV. Legal issues

##### *Civil and legal implications of marriage and ecclesiastical marriage*

We begin with two caveats. The first is that this report is absolutely not intended as legal advice for any specific persons or situations. Across all of the states of the U.S. and the provinces and territories of Canada, there is no common approach to the set of questions raised by ecclesiastical marriage that can be definitively spelled out.<sup>37</sup> This is because so much is contextual, and in both Canada and the U.S. each province and state has its own set of regulations and laws. Further, the case law that has interpreted the legal code in each jurisdiction is widely varied. It is therefore not possible or advisable for this task force to gather legal advice from each different locale. Instead, we looked at some broader issues and their consequences in terms of considering whether the denomination could bless ecclesiastical marriage. The second caveat, therefore, is that this material, while pertinent, is decidedly not exhaustive or even comprehensive. It is only intended to give a taste of some of the possible implications.

As the task force began to research the implications of pursuing ecclesiastical marriage as a valid option, it became increasingly clear how complex the issue is, and that a myriad of complications and possible consequences, whether intended or unintentional, exist. This is partly because, despite views to the contrary, governments in both of our nations take the marriage relationship seriously. There is an expectation that certain commitments and responsibilities are to be upheld in a marriage partnership, and in some jurisdictions this applies even if it is a common-law relationship.<sup>38</sup> Such commitments and responsibilities are especially pertinent to matters of financial support and have specific implications, even if the common-law marriage breaks down or if one partner in the relationship dies.

There are some major differences between Canadian and American law and practice that make the repercussions of this discussion even more complicated. The most prominent difference is whether or not there is a legal

<sup>37</sup> For more information on the Canadian context, see the Appendix to this report.

<sup>38</sup> Common-law marriage is rooted in the British common-law tradition. An early example of common-law marriage in the British commonwealth legal tradition in North America was the 1730 union of Benjamin Franklin and Debbie Read in Boston. The thread of this cultural practice runs through the shared fabric of U.S. and Canadian marriage laws and customs. See H.W. Brands, *The First American: The Life and Times of Benjamin Franklin* (New York: Anchor Books, 2010).

recognition of common-law spouses and common-law partnerships with some rights and duties afforded such spouses. Such official recognition of common-law relationships is central to this discussion because the task force assumes that ecclesiastical marriages (done outside of any civil contract) would be considered common-law relationships or marriages wherever such a designation would apply.

In Canada there is a widespread legal recognition of common-law partnerships, even if they are not officially recorded legal marriages; whereas less than a dozen U.S. states presently recognize any aspect of such a common-law relationship. A relationship is considered common-law in Canada when someone is living with a person who is not his or her spouse but is having a conjugal relationship with that person. In addition, at least one of the following situations also needs to apply to that relationship—namely, that (1) the parties have been living together in a conjugal relationship for at least twelve continuous months, (2) the parties are the parent of a child by birth or adoption, and /or (3) the parties have custody and control of a child (or had custody and control immediately before the child turned 19 years of age) and the child is wholly dependent on that person for support.

In the U.S. only seven states have legislation describing and accepting a common-law marriage. They are Colorado,<sup>39</sup> Iowa,<sup>40</sup> Kansas,<sup>41</sup> Montana,<sup>42</sup> New Hampshire,<sup>43</sup> Texas,<sup>44</sup> and Utah.<sup>45</sup> Two other states—Rhode Island<sup>46</sup> and Oklahoma<sup>47</sup>—and the District of Columbia<sup>48</sup> have created common-law marriage (and still recognize it) via case law only.<sup>49</sup> Despite some recognition of common-law marriage, most state courts do not favor it, preferring parties to be “legally” married for cases of dividing property, settling estates, receiving Social Security benefits, and so on. The elements that define a common-law marriage can have slight variations from state to state, but the generally recognized elements in the U.S. are these:

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<sup>39</sup> C.R.S 14-2-109.5.

<sup>40</sup> IA Code Ann. §595.1A. It should be noted that this portion of the Iowa Code does not expressly reference common-law marriage (and thus neither prohibits nor endorses common-law marriage). However, Iowa courts, as recently as 2019, have noted that Iowa does recognize common-law marriage.

<sup>41</sup> Kan. Stat. §23-2502 (parties must be over 18 for the state to recognize common-law marriage); Kan. Stat. §23-2714 (in a dissolution action, testimony regarding common-law marriage is admissible).

<sup>42</sup> Mont. Code Ann. §40-1-403.

<sup>43</sup> N.H. Stat. §457:39. New Hampshire requires that the parties cohabitated for at least three years prior to the death of one of the parties. New Hampshire has very limited case law regarding common-law marriage; it seems to be only for probate/inheritance purposes.

<sup>44</sup> Tex. Family Law §1.101; Tex. Family Law §2.401-402.

<sup>45</sup> Utah Stat. §30-1-4.5. Utah requires a court order to establish the validity of a common-law marriage. If a relationship terminates, then the parties must petition for recognition of the marriage within one year of the end of the relationship.

<sup>46</sup> See, e.g., *Luis v. Gaugler*, 185 A.3d 497, 502–03 (R.I. 2018), *as corrected* (June 21, 2018).

<sup>47</sup> *Brooks v. Sanders*, 2008 OK CIV APP 66, 190 P.3d 357, 358.

<sup>48</sup> See, e.g., *Coates v. Watts*, 662 A.2d 25, 27 (D.C. 1993) (“The District of Columbia has long recognized common law marriage. . .”).

<sup>49</sup> Since only seven U.S. states explicitly recognize common-law marriage, there is also far less case law to study in order to ascertain the implications.

- present agreement to be married;
- living together as husband and wife after the agreement; and
- representations to others that the couple is married.<sup>50</sup>

Additionally, though not explicitly stated in all the common-law states, a fourth element should be included—that of competency / capacity. Courts will not recognize a common-law marriage if one of the parties is not competent or does not have capacity to enter into the marriage (i.e., a minor at the time of the marriage).<sup>51</sup>

We will now proceed to spell out some of the intended but also unintended complications that may arise from an ecclesiastical marriage, particularly in jurisdictions that legally accept common-law marriages. As will be explained, though, while a common-law partnership is excluded from some marital obligations, many of these responsibilities still do apply to the partners in case of death or a breakdown of the relationship. If, as the task force surmises, those who enter an ecclesiastical marriage are considered as having a common-law marriage, that does not nullify some of the legal and financial responsibilities the parties would have to each other, some of which the parties might think they could avoid.

Although many of the complicating issues surrounding ecclesiastical marriage might only apply in situations where difficulties arise (incapacitation, expensive care or financial obligations, death, or the dissolution of the relationship), these nonetheless need to be taken seriously. In a legal marriage there are certain rights and obligations that the partners have toward each other. Laws guard matters such as the rights to spousal support, division of family property, the right to benefit from increased property or business value, and the right to occupy the family residence. The rights to these are prescribed in law (depending on the circumstance), and some have also applied in cases of common-law relationships. Thus ecclesiastical marriages would not be exempt from some of these same responsibilities, even if the couple intended to bypass them by means of a nonlegally compliant marriage.<sup>52</sup>

More serious, perhaps, are the many issues related to end-of-life situations. Late-in-life ecclesiastical marriages present parties and their families with additional complications and concerns. Where persons fail to plan for end-of-life issues, there are numerous instances when the law intervenes to provide guidance in relation to a person's estate. In the province of Ontario, for example, a will is automatically revoked once a person gets married.

<sup>50</sup> See, e.g. *Martinez v. Furmanite Am. Inc.*, 2018 WL 4469973, at \*3 (Tex. App. Sept. 19, 2018), review denied (Mar. 29, 2019). See also *In Re Dallman's Estate*, 228 N.W.2d 187, 189 (Iowa 1975); *Budd v. Tanking*, 425 P.3d 373 (Kan. Ct. App. 2018), review withdrawn (Apr. 17, 2019); *In re Estate of Ober*, 62 P.3d 1114, 1115 (Mont. S. Ct. 2003).

<sup>51</sup> *Estate of Ober* at 1115.

<sup>52</sup> In Canada, ecclesiastical marriages as we have defined them would generally be regulated by the body of law that governs common-law marriages. That body of law may make one party subject to an obligation to provide financial support for the other party after the relationship ends, whether by death or by separation. While there is no statutory protection for ecclesiastical marriage partners with regard to the division of family assets, this has not stopped the courts from intervening in situations where one partner has benefited from the union more than the other has.



This means that the entire will is canceled unless it was made with the new marriage in mind. However, if parties engage in ecclesiastical marriage, would their last will be revoked? What if the last will benefits persons other than, or not including, the ecclesiastical marriage partner, such as a former partner or their children, without accounting for the present partner? Or what if the ecclesiastical marriage lasts for fifteen years with one partner bearing a considerable burden of caring for the other? None of that would matter. The ecclesiastical marriage would not revoke the previous will, whereas a legally compliant marriage would. Thus the surviving ecclesiastical marriage partner would have little recourse to access from the estate—no matter what the couple might have lived through, or no matter what the surviving spouse might have contributed through personal and financial support.

There are, however, also instances in which an estate can be challenged, since some places have laws to ensure that an individual who provided support for dependents while alive must continue to provide adequate and proper support after death. Ecclesiastical marriage partners could meet the definition of a spouse for purposes of a dependent's relief claim in some jurisdictions, since, in such a case, the definition of the spouse would include a common-law spouse who had lived with the deceased continuously for a period of at least three years, or a person with whom the deceased had a relationship of some permanence and with whom the person had a child. Thus, again, ecclesiastical marriages might in fact lead to some consequences that a partner might think they could avoid.

Canadian law also provides another instance in which an ecclesiastical marriage partner would be treated in the same manner as a legal marriage partner. This would be in regard to being executor of a will if no executor has been appointed or if the named executor is unable or unwilling to act. Canadian succession law generally attributes the right to administer an estate to the deceased's spouse, legal or otherwise. In Ontario, for example, the Estates Act, R.S.O. 1990, Chapter E.21, provides at section 29(1) that where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Superior Court of Justice firstly to "the person to whom the deceased was married immediately before the death of the deceased or person with whom the deceased was living in a conjugal relationship outside marriage immediately before the death." In this regard, it appears that an ecclesiastical marriage partner would have no different rights than a legal spouse, even if the partners entered an ecclesiastical marriage thinking they might avoid this complication.

If a person dies without leaving a valid will (thus dying "intestate"), Canadian provinces have different approaches to whether a common-law partner could inherit (and thus be considered as a legal partner for the sake of the inheritance). Eastern provinces (from Ontario to the east coast) do not consider such partners to be eligible for the estate in cases of intestacy, while western provinces (Manitoba to British Columbia and north) do. The western provinces have a broad definition of the term *spouse*, which includes common-law partners (as defined by each province). Thus common-law partners in these provinces will have a statutory entitlement to the estate in the event that their partner dies intestate.

Common-law marriage in the U.S., though recognized in some states, may still be difficult to prove upon the death of one of the common-law partners

because courts are concerned about fraud when examining a claim for common-law marriage. Thus, when the first person in a common-law partnership dies, the living party has the burden of proving that a common-law marriage existed. The elements to establish the existence of a common-law marriage, as defined by Iowa courts for example, are as follows: (1) intent and agreement to marriage (by both parties) together with continuous cohabitation and public declaration that the parties are husband and wife; (2) burden is on the party asserting the claim; (3) all elements of relationship as to marriage must be shown to exist; (4) claim of marriage is regarded with suspicion and will be closely scrutinized; (5) when one party is deceased, the essential elements must be shown by clear, consistent, and convincing evidence.<sup>53</sup>

Ecclesiastical marriages, as defined in the Classis Georgetown overture to Synod 2019, which cites the example of a marital union officiated by clergy and in which the process has been designed by the parties and the officiant to be deliberately noncompliant with local marriage legislation, are not legally valid. These would eventually be considered as any other common-law relationship in locales that recognize such, but it is not lawful for a minister to conduct them. In both the U.S. and Canada, officiants who solemnize marriages in churches claim to do so, saying, for example (as in the CRC's 1979 marriage form), "As a minister of the church of Christ and by the authority which the state has vested in me, I now pronounce you . . . husband and wife . . ."—thus clearly acknowledging that their state authority to do so is dependent. Officiants are required by law to register marriage ceremonies that they lead, just as couples must get official marriage licenses. The state thereby assures that the people are not barred from legal marriage (by close familial relationship or because they are still legally married to someone else, for example). For a minister to perform an ecclesiastical marriage is, by this very reason, quite simply against the stated law of the land.

In the U.S., state regulation of marriage is assumed, and very little case law exists regarding state recognition of "ecclesiastical marriage." However, Illinois tackled this exact issue, releasing an opinion in 1991 regarding a marriage that had been conducted in a church and "without a marriage license."<sup>54</sup> In that case, the state criminally prosecuted the defendant for conducting a marriage ceremony "knowing that his performance was not authorized by law, in that the celebrants had not obtained a marriage license. . . ."<sup>55</sup> In Canada, likewise, officiants who lead ecclesiastical marriage ceremonies stand open to penalization for abuse of relevant marriage legislations. In addition, it is possible that churches might leave themselves open to legal proceedings, as well, if a party of such a marriage might become aggrieved.

Where disputes have arisen between people who deliberately avoided a legal marriage, the record shows a lack of legislative certainty as well as inconsistent judicial interpretations of such situations. This is especially so in contexts where it appears that the participants tried to manipulate or avoid the application of law that would otherwise apply if they were legally

<sup>53</sup> *In re Dallman's Estate*, 228 N.W.2d at 189.

<sup>54</sup> *People v. Schuppert*, 577 N.E.2d 828 (Ill. 1991).

<sup>55</sup> *Ibid.* at 829.

married. These examples should warn the church of the risks that ecclesiastical marriage participants and officiants would assume if they actively engaged in such ceremonies without expert legal counsel regarding the impact of the union. In light of the complexity and uncertainty of existing laws, participants would be well advised to seek legal advice about entering into future partnerships if they wish to have a more reliable understanding of the legal impact such a relationship would have upon them and their estates. The task force can foresee situations in which pastors or churches could become liable if they enthusiastically supported and conducted an ecclesiastical marriage but then the couple later became disgruntled at not having understood all the legal implications and then held the pastor or church responsible for not informing them properly. For these matters alone, we would deem it ill-advised to pursue ecclesiastical marriage as a valid option.

In addition, the task force can foresee many possible scenarios in which ecclesiastical marriage could make matters messy, particularly in the event of a radical change in the relationship, such as the incapacitation or death of one partner or the dissolution of the conjugal relationship.<sup>56</sup> What if a partner from an ecclesiastical marriage went into an expensive care home or medical facility—would their “spouse” then use their own savings to pay for that? What if the spouse’s adult children protested such an arrangement, claiming that the savings were their inheritance and were not to be used to support a partner in a nonlegal marriage? The reality in late-in-life marriages in particular is that children of the unions also have a vested interest in property rights and distribution of assets, and that they may interfere and pursue legal action even if the partners in the ecclesiastical marriage have intended something different. Laws have been written to protect people from unjust situations, and it seems exceedingly wise that any people entering a new relationship should seek legal advice and clarify all such matters so as to avoid future possible litigation.

Finally, if people are entering an ecclesiastical marriage explicitly in order to avoid certain obligations of a civil union (i.e., the requirement to give up benefits from the pension or social security plan of a deceased spouse), is the church not simply aiding in perpetuating fraud? Such action cannot be condoned, since it would be deceptive and unlawful. If God’s intention is for people to become “one” in marriage, then people must assume a new relationship with new loyalties and responsibilities. The task force would advise this high view of marriage, even if, as in some late-in-life marriages, no conjugal relations are intended.

## **V. Pastoral care for people who might contemplate entering into a non-civil marriage**

### *A. General considerations*

In stating what pastoral care and advice we would give to churches, pastors, and constituents, we want to follow the biblical and historical advice in this report, along with the wisdom of adhering to established laws. Each situation and circumstance can be very different; however, there is enough guidance already given to propose this counsel to the churches.

<sup>56</sup> Would the church then also have to consider granting an ecclesiastical divorce?

First, we advise all couples thinking of marriage to consider seriously not entering into an ecclesiastical marriage as defined in this report. Based on the biblical and historical information as well as the legal matters mentioned here, we cannot condone an ecclesiastical marriage. Though the Bible does not seem to clearly anticipate such a thing as an ecclesiastical marriage, it does show that the early church submitted to the authority of the civil government, even allowing it to regulate both marriage and divorce. Historically, the Reformed tradition has given a prominent place to the role of the state regarding marriage. Additionally, if one considers the legal considerations already noted, there could be serious legal implications for all parties involved in conducting an ecclesiastical marriage.

As shown in the stories we told at the beginning of the report, people of all ages might try to avoid certain financial complications and feel that an ecclesiastical marriage is the answer. However, a deeper question needs to be asked, and it has to do with the depth of commitment expected of a couple entering into a Christian marriage. A Christian marriage has long been understood as a couple coming together and covenanting to live together, come what may. Through tough and trying times they promise to stay with each other and to care for each other with the help of the Lord. Married couples face difficult times with confidence in the Lord's provision. In fact, times of difficulty can often strengthen a marriage. In contrast, an ecclesiastical marriage could well begin with the assumption that the parties would not share in life's difficulties and trials with the same level of commitment.

#### *B. Possible temporary exceptions*

In defining ecclesiastical marriage here as intentionally excluding the state as a sanctioning or governing authority, we want to allow for possible temporary exceptions in which the state would not initially be involved but would be involved later. Here are a couple of examples.

A young woman from the United States is engaged to be married to a man from Canada. They intend to settle down and live in Canada, but they want to get married in the U.S. at the woman's home church. So instead of getting a marriage license in a state in the U.S., they perform the wedding ceremony at her church in the U.S. and, after moving to Canada, they proceed to get a marriage license from the province in Canada where they go to reside. From the time of the ceremony in the U.S. until they are married in Canada there has been a lapse of two months. However, during that intervening time, they and the church have considered the couple married.

Or let's say a young couple has been planning their wedding day for over a year. They have the details worked out, and the date is set. However, due to the coronavirus pandemic, they are unable to follow through with their plans. They, along with their church and pastor, decide to go ahead with a simple wedding in the church with only immediate family. They have not been able to obtain a marriage license because in their area the county clerk office has been closed. However, they have gone through with the ceremony with the intention of obtaining a marriage license and getting legally married in their state when possible. In this case, the church has considered them married ever since the wedding service took place in the church.

In both of these cases (and potentially others), the couples are not seeking an ecclesiastical marriage because they are not intentionally excluding the state.

Their intentions include both the church and the state in “making” their marriage. However, for one reason or another, they have stretched the process and included a religious ceremony at a time different from that of the civil ceremony. A religious ceremony in such a situation is distinct from an ecclesiastical marriage insofar as it is not done to the exclusion of the state. In fact, most religious ceremonies in the U.S. and Canada include the state as the minister acts as an agent of both the state and the church. In these special circumstances, the religious ceremony does not include the state, but the couple still intends to obtain a legal marriage. The task force does recommend that if a couple wishes to extend the process in a way like this or to have a separate religious ceremony to celebrate the marriage with a particular community, it would be best to obtain the civil marriage first. However, it may be that, as in circumstances such as those described above, such a process may not be possible. The task force also recommends that pastors seek legal advice from an expert before engaging in an exclusively religious ceremony. We recommend this because of the legal context of the U.S. and Canada in which the pastor is vested with the power of the state to solemnize marriages. The pastor’s dual role as an agent of the state and of the church in marriage is something that should not be overlooked even in these types of circumstances in which there could be legitimate reasons to extend the marriage process or have multiple ceremonies.

#### *C. Special circumstances that seniors can face*

People who have been widowed can become lonely for companionship and may wish to enter into a marriage with someone with whom they have developed a loving relationship. As previously mentioned, some people in situations like this do not want the involvement of the civil authorities because of pension or social security issues. These couples do not want a situation in which they would lose significant financial benefits from the pension or social security plan of a deceased spouse.

However, as our legal research has shown, if people want to be married and still keep the financial benefits from a previous marriage, they could be committing fraud, and the pastor and local church could be accomplices in such cases. This is not something that the pastor and church should take lightly. As we have noted above, the church has biblically and historically been very careful about submitting and honoring our governing authorities because they are seen to have been instituted by God. It would be very unfortunate if churches in general and pastors in particular disregarded this understanding by officiating at an ecclesiastical marriage that is designed to exclude the authority of the state.

#### *D. The value of maintaining a strong commitment to marriage*

We have to acknowledge the need for companionship for people of all ages, but we should not diminish what the church has determined to be expected in a marriage bond. Marriage values the idea that we are totally committed to each other and are willing to sacrifice for each other. We put it all on the line together. An ecclesiastical marriage seems to amount instead to a “marriage lite.” Sanctioning such a marriage, which is distinct from the civil marriage recognized both by the church as well as the state, would bring the church into a dangerous situation whereby we would be serving as arbitrators of quasilegal relationships that could easily put us in legal conflict with the states and provinces in which we reside.



Because of the possible legal consequences and the different types of legislation in states and provinces, pastors should recommend that couples seek independent legal advice—especially if there are estates and children from previous marriages involved. Seeking such advice could allow for couples to think through ways to care for children from a previous marriage and for each other in the marital relationship. Pastors can walk couples through spiritual and ethical questions that may arise as they work with independent legal experts, but pastors should never consider themselves legal experts or let their congregants presume that they are. Rather, pastors have the wonderful role of working with a couple to enrich their relationship and to walk with them as they ask spiritual and ethical questions.

#### *E. Cultural considerations*

Culture and context play a large role in shaping understandings and traditions. While the CRC was first considered an immigrant church in North America, it is now itself also continually welcoming a diversity of new immigrants into its fellowship. Every different immigrant group brings new life, color, culture, and customs, as do Indigenous peoples who were present before European immigrants settled here. As there has been in the past, there is now a great opportunity to learn from our immigrant sisters and brothers with regard to marriage. After all, many aspects of the marriage ceremony and the marriage itself are heavily steeped in cultural background.

An increasingly common situation today with many immigrants coming to North America is that the persons have spent considerable time in refugee camps. In such camps many immigrants have grown up and even married, often without being able to obtain a state certificate of marriage. Others have obtained certificates of marriage so as to be able to immigrate as a couple or as a family at the same time and to the same place. Additionally, there are people who have come to North America having a “common-law” marriage because getting a marriage certificate is a hardship in their home country due to geographic isolation or cost. How is the church to respond to these situations and others like it with people who have immigrated to North America?

Our advice is that the church recognize such marriages regardless of the authorizing body. This approach respects the couple’s commitment to each other and their intention to establish a family in their new homeland. Certainly care should be taken to evaluate and encourage their commitment to each other and their desire to establish a Christian home. Additionally, care should be taken in their assimilation process to meet the expectations of their host country, state, or province with regard to marriage regulations. But this should be done in a way that does not imply the immigrant couple has a deficient marriage. However, at the same time, care should be given to help them understand the marriage laws of their new home and, in the event that there needs to be a recognition of their marriage by the state, to help them move in that direction. Again it is advisable to gain legal advice as warranted.

We must also be mindful that there are immigrant couples who do not feel a need to obtain any type of recognition by the state regarding their marriage. For them to do so would almost serve as an insult to their families, who sanctioned the marriage and gave them their blessing in the first place. For them to think that their marriage was not complete would be to imply that their family’s blessing was insufficient. They might even add that, as far



as they know, marriages from their culture end in divorce much less frequently than marriages solemnized legally in churches in North America—and they might be correct in that view. They might also know that the tribal/familial/cultural marriage that they are privileged to be a part of might not be something their children will participate in, at least not entirely. In such situations we must use care and understand that, as the church helps immigrants assimilate into their new homeland, it would be a shame to lose their culture, beauty, customs, and traditions that in so many ways can help us understand how the gospel has flowered in other contexts. We should look for ways in which we can learn from the strong social and familial ties that have brought immigrant couples together and have kept them together in loving relationships. We can and should learn from our brothers and sisters who have come to us as blessings from God to enrich us by demonstrating the gospel as it has grown and flourished in their cultural context. It is important to remember that we are not the proverbial melting pot in which any variety is destroyed and blended into one metal. Instead it is better to see the church as a stew pot in which each element adds its own unique flavor, color, and texture to a meal that becomes more delicious with each addition.

## VI. Recommendations

A. That synod grant the privilege of the floor to Gerry Koning (chair), Gayle Doornbos (reporter), and Loren Veldhuizen when the report of the Ecclesiastical Marriage Task Force is discussed.

B. That synod instruct the executive director to disseminate the report on ecclesiastical marriage to the churches of the CRC to serve as guidance regarding the issue of ecclesiastical marriage.

C. That synod strongly advise pastors of the CRC not to solemnize ecclesiastical marriages (as defined in this report) as sanctioned and solemnized solely by the church to the exclusion of the state (civil government) whereby a couple is considered “married in the eyes of the church but not in the eyes of the state.”<sup>57</sup>

### *Grounds:*

1. The biblical record clearly teaches us to submit to the governing authorities in all matters that do not conflict with the Word of God.
2. Historically, Reformed churches have acknowledged the role and right of civil authorities to regulate marriage in their jurisdictions.
3. In both the United States and Canada there could be negative legal consequences for the participants and/or for pastors who solemnize a non-civil or ecclesiastical marriage.

D. That synod encourage the churches to respect and honor the marriages of immigrants who did not obtain a civil marriage prior to arriving in Canada or the United States and counsel them in the understanding of Christian marriage and its relationship to civil authority in our countries.

<sup>57</sup> *Agenda for Synod 2019*, p. 518.

*Grounds:*

1. It is not the case that in every country where immigrants have come from that the civil authorities regulate marriage, so it might not have been possible for a civil marriage to occur.
2. In the interest of grace and acceptance, we want to acknowledge the beautiful Christian marriage traditions that have developed in various cultures.
3. The law is permissive but not prescriptive in this regard.

E. That synod caution pastors against acting as legal experts or offering legal advice, especially with regard to the issue of ecclesiastical marriage, and that synod encourage pastors to advise couples to seek independent legal counsel as necessary.

F. That synod accept this report as fulfilling the mandate of the Ecclesiastical Marriage Task Force and dismiss the task force.

Ecclesiastical Marriage Task Force  
Bernard T. Ayoola  
Joan DeVries (reporter)  
Henry Doorn, Jr.  
Gayle Doornbos (reporter)  
Gerry Koning (chair)  
Loren Veldhuizen  
David van der Woerd  
Lis Van Harten (staff adviser)

## **Appendix**

### **Ecclesiastical Marriages—A Canadian Legal Perspective Memorandum from Legal Counsel, David van der Woerd**

#### **I. Introduction**

Synod 2019 of the Christian Reformed Church in North America considered an overture submitted by Classis Georgetown and appointed a committee to study the morality and advisability of ecclesiastical (non-civil) marriages. Classis Georgetown believed that this type of study committee would assist congregations and pastors in their ministry to couples seeking to be united in marriage where they requested the omission of the registration of the marriage with the relevant governing authorities for reasons to avoid the financial entanglements that are associated with civil marriage unions. Classis Georgetown posed a number of questions relating to the topic.

In acceding to the overture, Synod 2019 acknowledged that churches are being confronted with questions and situations related specifically to ecclesiastical (non-civil) marriages and that pastors and elders need guidance on how to respond to these questions. Synod also observed that the CRCNA position on marriage does not specifically address the relationship between civil and ecclesiastical marriage. Synod 2019 declared that the synodical task force's mandate was to include, among other things, what the law of various states, provinces, and territories of Canada and the United States had to say

about performing ecclesiastical (non-civil) wedding ceremonies. This memorandum provides a Canadian legal perspective.

Among other things, this memorandum asks the basic question whether ecclesiastical marriages are even recognized in Canadian law. On its face this question may seem puzzling, because in this memorandum an ecclesiastical marriage is a marriage that is deliberately not registered with the relevant governing authorities. That, of course, is not the end of the analysis. In this memorandum the term *ecclesiastical marriage* is sometimes also interchanged with other terminology, such as *non-civil marriage* or *non-compliant marriage*. These types of unions have found their way into the Canadian court system on many occasions.

There are many instances in which couples have sought to unite with one another in a marriage-type relationship that is established by a form of a ceremony but have deliberately, inadvertently, or otherwise not registered the union with the government. That may be to avoid the financial entanglements of civil marriage, as Classis Georgetown points to in the rationale for their overture. Such couples may seek to unite as couples in a committed relationship in which all the attributes of a traditional marriage are present, while not wishing to be encumbered by the legal implications that are associated with civil marriage, such as the establishment of spousal support obligations or entitlement to a division of property. Some may do it for religious reasons, such as wishing to be married to more than one person at the same time, but are unable to do so in Canada, which does not recognize polygamous marriages or polyamorous unions. Others may desire to marry but for practical or other reasons have been unable to register with the governing authorities for the marriage. Some may have intended to marry civilly but failed to complete the formal validity requirements to have their marriage properly registered. Some religious beliefs collide with civil marriage practices. Some unite for reasons of immigration. Some desire to enter into polyamorous marriages. These are all examples of non-civil unions. Canadian law has delved into some of them, not all, but in time it likely will.

The Canadian judiciary has been asked on many occasions to adjudicate situations in which the parties have engaged in a non-civil marriage ceremony and to rule upon the legal implications of that union. In my research I have been unable to find examples of how the law treats the myriad of non-civil unions in Canada as described above, and there are likely other examples of existing non-civil unions that I have not considered or found legal authority on. This memorandum deals with the law of the courts and statutes in Canada that I have uncovered. The common law is a living organism that is prone to change, especially as societal norms evolve. This is not necessarily an exhaustive summary, but it is instructive and elucidates various principles that can be drawn from the Canadian cases that have considered non-civil unions, and it can help us to forecast how non-civil unions may legally affect people who engage in the process of them, either as participants or as officiants.

## II. Analysis

Ecclesiastical marriages are, in general, not recognized by Canadian law. What I mean by that is that generally the same rights and privileges granted by provincial statutes for parties that have met civil marriage requirements

do not apply to parties who are married only through ecclesiastical ceremonies. However, marriage legislations across Canada do allow for ecclesiastical marriages to be recognized as valid marriages if parties solemnized the marriage in good faith, intended to comply with legislation, are not legally disqualified to marry, and cohabit as a married couple after the ecclesiastical ceremony. If a marriage is solemnized in good faith, parties who have been married through an ecclesiastical ceremony will be considered to have a valid marriage and afforded the same statutory rights and privileges as traditional married couples. Furthermore, there may be a risk for a church or officiant to perform ecclesiastical ceremonies for parties engaged in these unions without registering such marriages, as provincial legislation across Canada requires officiants of ceremonies to register marriages.

*A. Instances in which ecclesiastical marriages have been recognized as valid marriages*

Ecclesiastical marriages, as defined here, are non-civil unions in which parties undergo a religious or cultural ceremony without obtaining a provincial marriage license. These unions are generally not recognized as traditional marriages because they do not comply with the relevant legislation. However, a principle that has been affirmed throughout Canada is that legislatively non-compliant marriages formed in good faith may still be recognized as valid (see the case of *Dwyer v Bussey*, 2017 NCLA 68). Many provinces, such as Ontario, Alberta, and Newfoundland have saving provisions in their marriage legislations that allow for the courts to recognize a legislatively non-compliant marriage, such as an ecclesiastical marriage, as valid if the parties intended to marry in good faith.

In Ontario, for example, section 4 of Ontario's Marriage Act, RSO 1990, c M-3, says that no marriage can be solemnized except under the authority of a license. However, under section 31 there is a saving provision that allows an ecclesiastical marriage to be recognized as a valid marriage under certain conditions. That section says, "If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act, are not under a legal disqualification to contract such marriage, and after such solemnization have lived together and cohabited as a married couple, such marriage shall be deemed a valid marriage."

The case of *Isse v Said*, 2012 ONSC 1829 is an example in which the courts recognized a religious marriage as a valid legal marriage, having been solemnized in good faith—and because of that, the legal implications of a validly registered marriage were attributed to the couple. In *Isse v Said* the parties had participated in an Islamic wedding ceremony with an officiant who had the authority to perform civil marriages in Canada. After a breakdown of the union, the respondent filed for equalization of marital property. The court deemed the marriage to be valid under section 31 because the respondent was found to have had an honest but mistaken belief that the marriage was valid in Canada. The court found therefore that the parties were married in good faith and, as such, recognized the respondent's claim for a division of marital property after the breakdown of the relationship.

In comparison, consider the case of *Debora v Debora* [1999] 116 ONCA 196, 167 DLR (4th) 759. In that case the parties engaged in an ecclesiastical ceremony but deliberately failed to comply with provincial marriage laws (in this case in Ontario). They participated in a Jewish religious ceremony in

1987. They later became married in a civil ceremony in 1994. The marriage then broke down. They disputed over whether the equalization date for the division of assets was to be 1987 or 1994. The husband had acquired significant assets after the ecclesiastical marriage in 1987 and before the civil ceremony in 1994. However, the parties wanted the husband to continue to receive his widower's pension under the Canada Pension Plan Act, so they deliberately avoided the registration of their religious marriage with authorities in 1987. The court concluded that the 1987 religious marriage was therefore not solemnized in good faith and was found to be invalid. The equalization date for the division of property was therefore set at 1994, when the parties entered into legal marriage. With the benefit of 20-20 retrospect, it seems puzzling that the court decided that where the parties together colluded to obtain pension benefits and that during the same time frame one of the parties enjoyed a disproportionate increase in wealth, that the determination of the religious marriage's validity was such to benefit only one of the colluding parties.

Nevertheless, a principle can be announced that a party that is seeking relief from a court will likely bear the burden to prove that they intended to comply with the relevant laws of the jurisdiction and were ignorant of any non-compliance if they hope to succeed in upholding a legislatively non-compliant marriage. This issue also arose in the case of *Alspector v Alspector*, [1957] 9 DLR (2d) 679, OR 454. This decision established the notion that has been affirmed as a Canada-wide principle, that the burden of proof for a party to prove an ecclesiastical marriage to be valid lies on the party seeking relief on a balance of probabilities. In another case, *Lin v Re*, (1999) Carswell Alta 200, [1993] AWLD 081, 99 DLR (4th) 280, the applicant attempted to prove that his marriage to the respondent was valid although they had only engaged in a traditional Chinese ceremony in Alberta and did not obtain a marriage license. This is an Alberta case, and the Alberta Marriage Act, similar to the Ontario statute, contains a saving provision at section 23 that provides that a marriage will not be invalidated by reason of non-compliance with that Act if the courts find the marriage to be lawful. In that case the marriage was found not to be lawful due to the fact that both parties understood the requirements of the statute but made no effort to comply with them and only completed their Chinese ceremony.

The previously referred to Newfoundland case of *Dwyer v Bussey* established that Canadian courts have consistently followed the policy that an invalid marriage was formed in good faith if parties thought it would be legally valid, but any instance of fraud is not considered to be good faith. There are many reasons that couples may avoid the legal consequences of marriage, such as difference in ages, values, stages of life, or aspirations, so "good faith" must be interpreted as an intention to be legally married. This principle should resolve any confusion, clarifying that only couples who believe they are legally married will be considered to be legal spouses when they are found to have a valid marriage. Thus, ecclesiastical marriages will generally only be found to be valid if it is proven on a balance of probabilities that the parties intended to validly marry in good faith.

#### *B. Statutes that are applicable to ecclesiastical marriages*

When parties have engaged in an ecclesiastical marriage in good faith and their marriage has been deemed valid by courts, then provincial legislation

regarding the equalization of property, the treatment of the matrimonial home, and support obligations will apply. In Ontario, the Debora case referred to above established that the definition of a spouse under the Ontario Family Law Act does not extend to individuals that have only been married through religious ceremonies in place of civil marriages. Spouses under Ontario's Family Law Act are defined parties that have been married under the laws of Ontario; however, marriage under the Marriage Act gives purpose to the definition of a spouse consistent with the Family Law Act. Where parties recognized that their religious marriage ceremonies would not be recognized in Ontario, then they would not be spouses within the Family Law Act.

*C. The application of support obligation provisions to ecclesiastical marriages*

When parties are found to be married in good faith, then they will also be considered spouses under the federal Divorce Act (see *Nafie v Badawy*, 2015 ABCA 36). This principle is demonstrated in the case of *Javed v Kaukab*, 2010 ONCJ 606, in which the parties had been married in a Muslim religious ceremony instead of a legal marriage. Upon a breakdown of the relationship the applicant claimed in court for spousal support. The court found that there was a genuine marriage between the parties even though it was non-compliant with the statute. The marriage had been recognized in order for the respondent to sponsor the applicant to enter into Canada, so the court would not allow the respondent to argue that she was not his legal spouse to avoid paying him spousal support. The respondent was therefore found to have support obligations to the applicant.

By contrast, consider the case of *Harris v Godkewitsch* [1983] 41 OR (2d) 779, 20 ACWS (2d) 107. This case shows that parties may not always be considered spouses for the purpose of support obligations. In this case the parties chose not to be married under Ontario law but instead to be committed to each other spiritually through a Jewish ceremony. The court said that extending the definition of spouse under the legislation to cover a person who has participated in a religious ceremony in good faith in the non-legal sense of a moral and religious commitment would create confusion, so in that case good faith was defined as the intention to comply with the relevant law. The support claim was denied.

*D. Equalization of property, the matrimonial home, and ecclesiastical marriages*

Parties that have been married through ecclesiastical ceremonies may still be subjected to equalization depending on whether their marriage is deemed valid and whether they are considered spouses. Courts will look to the evidence, such as how the parties coexisted after their ecclesiastical ceremony or where they lived or how they presented themselves to others, and whether they had joint bank accounts and/or joint status on their tax returns, to determine the validity of their ecclesiastic union.

As with support, in order for a property to qualify as matrimonial property, both parties must be spouses as defined by the relevant legislation. Once the parties separate, in the case of the matrimonial home, the property must also have been occupied by both parties as a family residence prior to separation (see *Kanafani v Abdalla*, 2010 ONSC 3651). In the *Isse v Said* case already referenced above, the parties were found to have a valid marriage although they were married under Sharia law and the marriage did not comply with Ontario law. Nevertheless, the court observed that after their



religious ceremony they cohabitated, went on vacations together, maintained joint bank accounts, and stated that they were married on their tax returns. So the court concluded that they were spouses for the purpose of equalization of assets, and their residence was declared to be a matrimonial home.

However, the case of *Kanafani v Abdalla* exemplifies an instance in which a joint residence between parties who engaged in an ecclesiastical ceremony was not to be considered a matrimonial home. In that case the respondent asked the court to declare that the condominium the parties resided in was not to be considered to be a matrimonial home. The parties had been married in an unregistered religious ceremony in Toronto by a religious leader under Sharia law. The judge observed that the parties made no attempt to comply with Ontario law and therefore found that it was not a valid marriage, so the property was not considered to be a matrimonial home.

Ultimately, it appears that when parties deliberately avoid the legal consequences of marriage, it is unlikely that they will fall within matrimonial property regimes. Nevertheless, this analysis demonstrates that there are many conflicting cases in point. Cases are often fact driven, and one cannot count upon any particular interpretation by the courts. In many cases the determination of the validity of the marriage is not germane to the issues between the parties or a stepping stone or link in a chain of logic that allows the court to achieve a particular result. There is an inherent risk in relying upon any principles that may become apparent from the case law.

#### *E. Common-law principles and ecclesiastical marriages*

Religious marriages that do not meet the civil requirements for marriage are not generally sufficient to consider the parties legal spouses, but they are likely sufficient for them to be considered to be common-law spouses. That is especially so where the parties have cohabited or had children together.

In the aforementioned *Dwyer v Bussey* case, the judge, in finding that no valid marriage existed, said, “There are only two categories of conjugal relationships outside of marriage in compliance with the Ontario Marriage Act, one where the parties intended to comply but for some technical reason failed to comply with local legislation, and a common-law union.” In *Dwyer*, the parties began cohabiting with one another in 2006 and separated in April 2014. Ms. Dwyer said that they had gone through a “form of marriage” in July 2008 in a private ceremony in Mr. Bussey’s home, in which Mr. Bussey quoted a passage from the Bible often used at weddings. The parties had exchanged rings, and that had been blessed by their pastor. Thereafter they referred to each other as husband and wife. Mr. Bussey, however, said that he never intended to be married, they never applied for a marriage license, there had been no officiant or witnesses present at the ceremony, and their relationship was not subsequently registered at any church or public registry. It was determined that there was no valid marriage for the purpose of property division. The rules about dividing property, including the matrimonial home, do not apply to common-law couples. The property the parties bring into the relationship, plus any increase in its value, typically continues to belong to the property owner. Upon separation there is no automatic right to divide property or to share in its value. Ownership usually determines entitlement to property.

Ultimately, the conclusion is that anything that does not reach the standard of an intended legal marriage will likely lead to a common-law union. While parties in common-law unions are not entitled to access the statutory property equalization provisions, property of division can sometimes be addressed by back-door means through use of equitable concepts such as constructive trusts or compensation for unjust enrichment. Courts have been known to utilize such principles to allocate an advantage realized by one party to another or for recompense to a disadvantaged party relating to contributions during the relationship or inequities arising from it. The case of *Chhokar v Bains*, 2012 ONSC 6602, is an example of parties that underwent an ecclesiastical ceremony who were not considered to have a valid marriage but instead were deemed to have a common-law union. The parties had gone through a Sikh wedding ceremony but never applied for a marriage license. Throughout their relationship, they lived separately but stated that they were common-law on their tax returns. After consideration of all the evidence, the court concluded that the parties were not legally married but instead had a common-law relationship in which common-law principles would be applicable.

*F. Risks involved in solemnizing ecclesiastical marriages*

There are typically three parties to an ecclesiastical marriage ceremony, the two parties seeking to be married and the officiant. As shown above, there are risks for the marrying parties if they seek an ecclesiastical marriage to avoid legal responsibilities. There may also be risks for the officiant.

In British Columbia, when a marriage is solemnized, it must be registered by either the religious representative or the marriage commissioner. In Alberta, Manitoba, and Saskatchewan, every person who is authorized to solemnize marriages is required to register marriages in accordance with the provincial vital statistics legislation. More particularly, the Alberta Marriage Act specifies that “no person shall solemnize a marriage except for under the authority of a marriage license or within 3 months after the date that the license is issued.” Furthermore, in Alberta and Saskatchewan, the church or marriage commissioner is required to provide a certificate of marriage to the parties. Likewise, in Ontario, after a person has solemnized a marriage, they are required to make an entry in the appropriate registry and, if requested, give a record of the marriage.

Since those who solemnize marriages are required to register the marriages, it therefore stands to reason that officiants who participate in legislatively non-compliant marriage ceremonies may create risks for themselves if they do not comply with governing legislation. In the case of *Upadyhaha v Sehgal*, [2000] OJ 3508, [2001] WDFL 71, 11 RFL (5th) 210, a priest performed a marriage ceremony between the parties on the basis that they would later apply for the necessary marriage license as soon as possible. However, the parties did not apply for a marriage license, and performing the ceremony was referred to by the court as “an egregious breach of the Marriage Act.” The *Lin v Re* case describes policy reasons for legislating the registration of marriage, since the legislature has contemplated the issues in which an officiant may fail to issue a license or comply with provincial legislation. In this scenario, if the parties truly believe they have a valid marriage and the marriage is invalid by error of the officiant, the marriage may still be declared lawful.

Performing such ecclesiastical ceremonies without registering the marriage as a legal marriage carries penalties that can vary by province. In Alberta and Saskatchewan, anyone who solemnizes a marriage in contravention with their respective Marriage Act is guilty of an offense and liable to a fine. Similarly, in Manitoba and Ontario anyone who violates the Marriage Act will be liable to a fine. There are no other penalties provided. Ultimately, conducting ecclesiastical ceremonies in contravention with the Marriage Act could carry the risk of a fine and may compromise the officiant's ability to perform future marriage ceremonies. It would also seem that where an officiant has enabled a non-compliant marriage ceremony, the legal effect of which later proves to disappoint one or both of the participating parties, the officiant may be civilly liable for damages.

### III. Conclusion

This memorandum provides a glance at law in Canada that has touched upon ecclesiastical marriages. It should be noted that in most of the cases referred to in the memorandum where ecclesiastical marriages have been considered by the Canadian courts, the fact and consideration of the ecclesiastical marriage has been mostly in the nature of *obiter dicta* in the ultimate decision of the court. *Obiter dicta* is Latin phraseology for incidental remarks that are made by a judge in the course of making a decision. *Obiter dicta* does not refer to the main thrust of the case, instead *obiter dicta* are additional observations or remarks or opinions expressed by the court on other issues made by the judge which often explain the court's rationale in coming to its final decision. *Obiter dicta* may offer guidance in similar matters in the future, but they may not be binding upon future decisions by the court. As such, the principles that may have been pronounced in this memorandum need to be read in that context and need to be reviewed with a certain degree of apprehension. The law is not clear or settled.

Nonetheless, there are patterns that can be identified in the cases referred to in this memorandum and which will be included in summary below. Ecclesiastical marriages may be recognized in Canada as valid marriages if an applicant can prove on a balance of probabilities that the parties intended to comply with provincial legislation when undergoing an ecclesiastical ceremony. Provincial legislation gives jurisdiction to the judiciary to determine whether parties have intended to comply with marriage legislation when engaging in ecclesiastical ceremonies, and to deem these marriages valid. However, if these marriages are not deemed valid, they will likely be considered to be a common-law union in which common law principles will be applicable. The church and marriage commissioners should be cautioned from performing such ecclesiastical marriage ceremonies, because legislation across Canada requires officiants to register any marriage that they perform and a fine could be applicable if they fail to comply with legislation.

A final remark relates to the limitation of this memorandum. It should be apparent to the reader, but it is worth a reminder that this memorandum is restricted to the legal treatment of ecclesiastical marriage in Canada. It is, quite frankly, only one factor (and likely one of the less interesting factors) that the task force will consider in its report. There are broader, more compelling biblical, theological, cultural, or policy questions that Synod 2019 has asked the task force to comment upon regarding ecclesiastical marriage, and that this memorandum does not address in a fulsome manner.