

Some unions are a legal no-no in Idaho

By Bob Evancho

To shack up or not to shack up: That is the question for some unmarried Idaho couples in the wake of a new law enacted by the 1995 state Legislature.

That's because Section 32-201, Idaho Code decrees that common-law marriages "entered into, on or after Jan. 1, 1996" are no longer recognized by the state. In addition to invalidating common-law marriage, new language in 32-201 also prohibits gay and lesbian marriages where before there might have been a loophole to allow such unions. (The new statute, however, does not nullify valid common-law marriages that originated outside of Idaho. Furthermore, common-law couples in Idaho who have been together before Jan. 1 are grandfathered in.)

Idaho didn't always look askance at common-law marriage. Once considered an ad hoc solution borne out of the hardscrabble existence of the state's early settlers, it was an accepted part of life in Idaho for several decades. The validation of common-law marriages "came about in the Western states because there just

weren't many ministers around to marry the people," explains attorney Jane Newby, an adjunct instructor in Boise State's legal assistant program.

As the years passed, common-law marriage gained legal acceptance in Idaho because "the law presumes morality and the law presumes marriage," says Newby. "This is a conservative state, and they wanted to make sure that people were married, even if it's common-law, rather than just shacking up in sin."

But that was then. Idaho has retained its conservative tendencies, and the argument to recognize common-law marriage, which may have seemed valid at the turn of the century, apparently doesn't cut it in 1996.

Nevertheless, Newby says the new statute was enacted more to facilitate jurisprudence than for any moral crusade.

"Trying to determine what is and what isn't a common-law marriage can be a big pain at times," she says. "There are a lot of misconceptions. The new law should make it easier for judges and lawyers as the years and the decades go by."

The new law, however, now makes it difficult, if not impossible, for gays and

lesbians to officially exchange wedding vows in Idaho. State law written in 1877 defines "what constitutes a valid marriage" but makes no mention of gender. The new language added to 32-201, however, now specifies that "marriage is a personal relation arising out of a civil contract between a man and a woman."

It's unlikely Idaho's lawmakers would admit to purposely enacting anti-gay legislation, but it's clear to Newby that "gay marriages are [now] prohibited by that one statute" although it ostensibly was passed to address the issue of common-law marriages. "Personally," adds Newby, "I don't think you're going to see gay marriages in Idaho for a long time, if ever."

And that, says Boise lawyer and gay-rights activist John Hummel, is unfortunate. An attorney whose practice is devoted to the legal concerns of gays and lesbians, Hummel contends "nothing is more damaging than the denial of marriage rights, even more than not having civil-rights protection."

It just goes to show that love and the law aren't always on the "same page" — especially if the book is *Idaho Code*. □



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