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978-0-521-86736-8 - To Have and to Hold: Marrying and its Documentation in Western Christendom, 400-1600

Edited by Philip L. Reynolds and John Witte

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TO HAVE AND TO HOLD

This volume analyzes how, why, and when pre-modern Europeans documented their marriages – through property deeds, marital settlements, dotal charters, church court depositions, and other indicia of marital consent. The authors consider both the function of documentation in the process of marrying and what the surviving documents say about pre-modern marriage and how people in the day understood it. Drawing on archival evidence from classical Rome; medieval France, England, Iceland, and Ireland; and Renaissance Florence, Douai, and Geneva, the volume provides a rich interdisciplinary analysis of the range of material customs, laws, and practices in Western Christendom. The chapters include freshly translated specimen documents that bring the reader closer to the actual practice of marrying than the normative literature of pre-modern theology and canon law.

Philip L. Reynolds is Aquinas Professor of Historical Theology in the Candler School of Theology at Emory University and a Senior Fellow in the Center for the Study of Law and Religion at Emory University. His publications include *Marriage in the Western Church: The Christianization of Marriage during the Patristic and Early Medieval Periods* (1994) and *Food and the Body: Some Peculiar Questions in High Medieval Theology* (1999).

John Witte, Jr. is the Jonas Robitscher Professor of Law and Director of the Center for the Study of Law and Religion at Emory University. A world-class scholar of legal history, marriage, and religious liberty, he has published 120 articles, 8 journal symposia, and 19 books, including *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* and *God's Joust, God's Justice: Law and Religion in the Western Tradition*. His writings have appeared in German, French, Italian, Hebrew, Spanish, Russian, Ukrainian, and Romanian translations.

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To Have and to Hold



MARRYING AND ITS DOCUMENTATION IN
WESTERN CHRISTENDOM, 400–1600

Edited by

PHILIP L. REYNOLDS

Emory University

JOHN WITTE, JR.

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PREFACE AND ACKNOWLEDGMENTS

Throughout much of the West today, marriage formation requires the execution of a written marriage contract – usually a marriage certificate that is signed by the couple and their witnesses and registered with a government official. These publicly registered marriage contracts can be anticipated by private engagement and prenuptial contracts respecting the parties' property, custodial, and other rights before, during, and after the marriage. Marriage contracts may also be accompanied by public notices and invitations; elaborate liturgies or ceremonies; ritual exchanges of promises, rings, and other property; and lavish parties and lush honeymoons. But none of this is essential to the validity of the marriage today: the properly signed marriage certificate is enough to make a marriage.

In the pre-modern West, both the documentation and the formation of marriage were considerably more complex and variegated. Most so-called marriage contracts in the Middle Ages were, in fact, primarily marriage *settlements*: they recorded agreements about transfers of marital property, and although they often referred to the mutual consent of the parties to form a marital union, they did so only to situate the settlement in its proper context. Moreover, the relationship between written marriage contracts and the contract of marriage per se varied considerably over time and across cultures. Some of the documents recorded the marriage itself; some did not. Some of them were intended for use at weddings; some were not. Some of the documents included commentary on the legal, ethical, or religious function of marriage; some did not. Finally, prior to the sixteenth century, marital liturgies, weddings, and feasts were not essential to the validity of a marriage contract, and when they did occur, they were subject to endless local variations.

This volume analyses how, why, and when pre-modern Europeans documented their marriages – through deeds, settlements, and charters, through the depositions used in episcopal and consistory courts, and through other surviving indicia of the couple's agreement to marry. We consider both the function of documentation in the process of marrying and what the surviving documents say about pre-modern marriage and about how people in the day understood it. The marital documents that have survived are a rich source of information about the marital

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norms and customs of pre-modern Europeans. They are closer to the actual practice of marrying than the normative literature of pre-modern theology and canon law, about which we have long known a good deal. Indeed, the value of marital documents surpasses that of any historical theory or generalization that we can glean from them, for they record moments in the lives of real persons. Sometimes these individuals would be well known to us in any case, but usually they would otherwise be quite forgotten or, at best, known only to biographers.

We make no pretense that this volume provides a comprehensive survey of the forms and norms of marriage formation and documentation in pre-modern Christian Europe: the surviving evidence is too scattered and spotty, and it is subject to too many different methods of interpretation, to make such a claim. Instead, the chapters that follow offer a fair representation of the range of customs, laws, and practices surrounding the formation and documentation of marriages in pre-modern Europe, and the range of legal, social, and religious modes of scholarly analysis that can be responsibly applied to the documentary evidence that has survived.

We have chosen the chronological bookends of 400 through 1600 under advisement. The theological syntheses of St. Augustine and other post-Nicene Church Fathers, and the legal syntheses of the Roman jurists working from the reigns of Constantine through Justinian, were foundational to Western marriage for more than a millennium. The chapters illustrate how this antique marriage paradigm was adopted in various eras and areas of Western Christian Europe and then adapted in response to widely variant customs, languages, liturgies, and property schemes. Though church and state battled intermittently over marital jurisdiction from the fifth to the sixteenth centuries, the basic norms and forms of marriage inherited from the fifth and sixth centuries were not seriously challenged until the eighteenth- and nineteenth-century Western Enlightenment.

The sequence of chapters takes the reader on a pleasant and instructive journey through the surviving data. In Chapter 1, “Marrying and Its Documentation in Pre-Modern Europe: Consent, Celebration, and Property,” Philip L. Reynolds provides an overview of some of the main themes, terms, and trends that readers will encounter in making this journey. He shows how the doctrine of marital consent gradually became the sine qua non of valid betrothal and marriage. He sifts through the complex marital liturgies and ceremonies that were developed in the Christian West, certain forms of which eventually were mandated by the Council of Trent in 1563 and by various Protestant civil laws. And he sketches an interdisciplinary map of the exceedingly intricate legal systems of marital property.

In Chapter 2, “Marrying and Its Documentation in Later Roman Law,” Judith Evans-Grubbs recalls the salient features of Roman marriage law in late antiquity, but she focuses in a novel way on actual written contracts, using papyrological evidence as much as possible and spreading her net over a wide geographical and cultural area within the Roman Empire (including Africa, Egypt, and the near East) to compensate for lack of surviving *tabulae nuptiales* from Europe.

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In Chapter 3, “Marrying and the *Tabulae Nuptiales* in Roman North Africa from Tertullian to Augustine,” David G. Hunter analyzes the Roman dotal instrument, which was the precursor of the dotal charters on which several later chapters focus. He also shows that in Augustine’s Christian world, domestic wedding ceremonies (which often included the reading and signing of *tabulae*) were customary steps in the process of getting married, but that church liturgies were not. The varying relation between dotal instruments and nuptial liturgies is a thread running through the collection.

In Chapter 4, “Dotal Charters in the Frankish Tradition,” Philip L. Reynolds focuses on the formulae for dotal charters in the standard collection of Merovingian and Carolingian formulae by Karl Zeumer. They range from the sixth to the eleventh centuries. Reynolds first considers the Frankish dowry and its place in the nuptial process; next, he analyzes the diplomatic form of the charters; then, in the main part of the article, Reynolds focuses on eleven “sacred” formulae, which include (chiefly in preambles) an account of the sanctity of marriage and its place in God’s plan. Such formulae are witnesses to a robust theology of marriage that is closely allied to liturgical ministry (the blessing of “rites of passage”). By including within the scope of the study some actual Northern-French dotal charters (rather than formulae) from the late eleventh through twelfth centuries, Reynolds tentatively outlines the evolution of the sacred dotal charter in Northern France.

In Chapter 5, “Marriage and Diplomats: Five Dower Charters from the Regions of Laon and Soissons, 1163–1181,” Laurent Morelle meticulously analyzes the diplomatic form and the religious message of the charters, which churchmen used to express their own concerns about marriage. He then applies his expertise in biographical research to identify the spouses and the signatories and to suggest the significance of the marriages in relation to lineage and to the spheres of influence of different castellannies.

In Chapter 6, “Marriage Agreements from Twelfth-Century Southern France,” Cynthia Johnson focuses on seven marriage charters, dating from 1127 to 1197, which she puts in the context of some sixty comparable texts. She shows the standard and variable elements in these documents, particularly in their discussion of property transfers by both gift and devise. She also points to evidence that developments in civil law influenced the texts and that the spouses did not consider themselves to be actually married until they began to live together (or at least until the gifts had become truly the property of the recipient).

In Chapter 7, “Marriage Contracts in Medieval England,” R. H. Helmholz outlines criteria for what should be counted as marriage contracts. Helmholz distinguishes between two sorts of marriage contract: secular marriage contracts (of which ten examples, from the eleventh through fifteenth centuries, appear in an appendix) and the religious marriage contracts that came before and were enforced in ecclesiastical courts. The former were written, the latter oral. Helmholz finds that, at least in medieval England, the two sorts were usually analogous but independent instruments that often did not mention each other.

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In Chapter 8, “Marriage Contracts and the Church Courts of Fourteenth-Century England,” Frederik Pedersen analyzes the documentary evidence of marriage from English consistory courts, especially York. He observes how lay people were able to exploit canonical procedures for their own personal ends, and he notes the respective roles of clergy and notaries in the formation of marriage and the interaction between religious and civil authorities.

In Chapter 9, “Marrying and Marriage Litigation in Medieval Ireland,” Art Cosgrove focuses on depositions presented in Irish church courts dealing with marriage litigation in the late Middle Ages. He conveys a vivid sense of the (mainly quite ordinary) people named in the documents and their lives, values, and expectations. Cosgrove’s study reveals the kinds of complaints that the laity brought to court, the grounds cited in depositions as evidence of marriage contracts, and the social attitudes presupposed thereby.

In Chapter 10, “Marriage Contracts in Medieval Iceland,” Agnes S. Arnórsdóttir observes the form and evolution of marriage settlements beginning from the twelfth century (when written contracts first appeared). She considers the written contracts in relation both to the Icelandic and Norwegian legal codes and to the influence of European canon law. In their older form, these contracts were between the kinsfolk on both sides as well as between the partners themselves; the partners retained separate ownership of their respective properties and the bond was soluble. After the twelfth century, there was more emphasis on the agreement of the partners themselves; they held the property in common and the bond was indissoluble. She also notes that church weddings and the involvement of clerics in nuptials were neither legally necessary nor universally observed.

In Chapter 11, “Contracting Marriage in Renaissance Florence,” Thomas Kuehn begins with the famous clandestine union of Giovanni della Casa and Lusanna di Benedetto, using that as a foil to examine typical marriage contracts in Florence. Marriages there usually ran through a three-step process: betrothal (*sponsalitium*), exchange of vows (*matrimonium*), and delivery of dowry, and each step might be recorded in a distinct notarial document. This process, along with the public transport of the bride to her husband’s house (*traductio*), ensured that the marriage was distinguishable from clandestine unions and concubinage. In that regard, Florentines, even those of fairly modest circumstances, contracted marriages in a remarkable written form, whereas clandestine unions like that of Giovanni and Lusanna remained entirely oral. Kuehn finds that most Florentine marriages prior to Trent were little influenced by ecclesiastical forms and rules (other than the clear written assertion that marriage was contracted *per verba de praesenti*), and that churches and clergy had only an ancillary role in the formation of marriages.

In Chapter 12, “Marriage Property Law as Socio-Cultural Text: The Case of Late-Medieval Douai,” Martha C. Howell considers marriage as a property arrangement. Viewing property law as a witness to the social and cultural meanings of marriage, Howell exploits the unusual wealth of matrimonial documents from Douai, an important French-speaking city in the medieval county of Flanders. The laws and

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customs of Douai, Howell argues, shed light on other regions of the North (where the evidence is usually more patchy) and on the differences between the North and South. Howell focuses on a form of marriage settlement known as the *ravestissement*, whereby the spouses became a single social unit and had equal rights to matrimonial property. She contrasts the *ravestissement* with the more detailed (and male-centered) marriage contract that eventually superseded it.

In Chapter 13, “Marriage Contracts, Liturgies, and Properties in Reformation Geneva,” John Witte, Jr., considers some matrimonial documents from John Calvin’s Geneva, including the new marriage liturgy, several new statutes, and two marriage contracts, and he sets these in the context of contemporaneous developments in Reformed marriage law and theology. Both of the marital contracts analyzed in his chapter are essentially property transfers, with only incidental reference to the theology and law of marriage. Witte emphasizes the interplay of secular and religious concerns in the new marriage liturgy of Geneva and outlines the archaic gifts and other tokens of betrothal and marriage that, while ancient, were still customary in this period.

Most of the chapters conclude with an appendix of specimen documents. Here, one hears echoes of what pre-modern individuals said, heard, and negotiated in the process of getting married. The appendices are not an afterthought but were an essential component of the project from the beginning. Even narrative summaries would have lost the immediacy and verisimilitude of the original texts. To save the immediacy of such material, as well as to make it more accessible, we have translated the appended documents into English (although we have reproduced the original text when it is not available in a printed edition). To be sure, translation puts the reader at one remove from the original texts (most of which are in Latin), but today one cannot assume that every interested reader will be able to read the original texts fluently. Moreover, although most of these texts are rudimentary on a merely grammatical and syntactical level, their correct construal requires specialist expertise and familiarity with the material. Translation has the advantage, too, of bringing problems of interpretation to the surface and requiring the historian or commentator to be explicit about what the text means in his or her judgment.

Three of the chapters included herein are versions of previously published articles and appear by kind permission of the publishers. Chapter 3 is a revised version of David G. Hunter, “Augustine and the Making of Marriage in Roman North Africa,” *Journal of Early Christian Studies* 11:1 (2003): 63–85, © The Johns Hopkins University Press. Chapter 5 is a translation of Laurent Morelle, “Mariage et diplomatie: Autour de cinq chartres de douaire dans le Laonnois-Soissonnais 1163–1181,” *Bibliothèque de l’École des chartes* 146 (1988): 225–84. Chapter 9 is a revised and augmented version of an article first published as “Marriage in Medieval Ireland” in Art Cosgrove (ed.), *Marriage in Ireland* (Dublin: College Press, 1985), 25–50.

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the documents appended to Chapter 10. We are grateful to Professor Stephen D. White at Emory University for helping us find English equivalents for some French feudal terminology. We are grateful, too, for the frequent and generous counsel of Professor David Bright at Emory University and Professor Joseph Goering at the University of Toronto regarding the correct translation and interpretation of passages in several of the Latin texts and manuscripts analyzed throughout this volume. And we give thanks to the sharp-eyed Emory doctoral students who checked the sources and citations in the chapters: Tracey Billado, Claire Bischoff, Colleen Flood, Mark DelCogliano, Andrew Gallwitz, and Jennifer Thompson.

This anthology is one of a series of new volumes to emerge from the project called “Sex, Marriage, and Family & the Religions of the Book,” undertaken by the Center for the Study of Law and Religion at Emory University. The project seeks to take stock of the dramatic transformation of marriage and family life in the world today and to craft enduring solutions to the many new problems it has occasioned. The project is interdisciplinary in methodology: it seeks to bring the ancient wisdom of religious traditions and the modern sciences of law, health, public policy, the social sciences, and the humanities into greater conversation and common purpose. The project is interreligious in inspiration: it seeks to understand the lore, law, and life of marriage and family that are characteristic of Judaism, Christianity, and Islam in their genesis and in their exodus, in their origins and in their diasporas. The project is international in orientation: it seeks to place current American debates over sex, marriage, and family within an emerging global conversation.

We wish to express our deep gratitude to our friends at The Pew Charitable Trusts in Philadelphia for their generous support of our Center for the Study of Law and Religion. We are particularly grateful to Pew’s President Rebecca Rimel and program officers Luis Lugo, Susan Billington Harper, Diane Winston, and Julie Sulc for masterminding the creation of our Center, along with sister “centers of excellence” at ten other American research universities – a bold and visionary act of philanthropy that is helping transform the study of religion in the American academy. We also wish to express our deep gratitude to our Emory Center colleagues April Bogle, Eliza Ellison, Anita Mann, Amy Wheeler, and Janice Wiggins for their extraordinary work on this project, which is scheduled to yield thirty other volumes besides this one.

We wish to express our gratitude to Dr. Craig Dykstra and his colleagues in the Lilly Endowment, Inc., for a generous grant that provided John Witte, Jr., with release time and research support to work on his contribution to this volume.

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LIST OF ABBREVIATIONS

CCL	<i>Corpus Christianorum, series latina</i> (Turnhout, 1953–)
CCM	<i>Corpus Christianorum, continuatio medievalis</i> (Turnhout, 1966–)
CP	York Cause Papers, Borthwick Institute, York
CSEL	<i>Corpus Scriptorum Ecclesiasticorum Latinorum</i> (Vienna, 1866–)
MGH	<i>Monumenta Germaniae Historica</i>
PL	J. P. Migne (general editor), <i>Patrologia Latina</i> (Paris, 1844–64)
X	<i>Liber extra</i> (Decretals of Gregory IX), in Emil Friedberg (ed.), <i>Corpus Iuris Civilis</i> , 2 vols. (Leipzig, 1879–81), vol. 2