

PUTATIVE SPOUSES IN THE PROBATE PROCESS

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Introduction

The probate practitioner should first determine a decedent's marital status before engaging in the probate of the decedent's estate. Texas has complicated this determination by its recognition of the "common law" and "putative marriage."¹ Amazingly, the probate courts are continually confronted with decedents who leave behind multiple spouses. A decedent may die leaving both a ceremonial and common law spouse or multiple common law spouses. This article will explain the differences between a ceremonial, common law and putative spouse, and their relative inheritance rights in the decedent's estate.

Ceremonial Marriages

The requirements for a ceremonial marriage begin with obtaining a license from the county clerk.² The parties must do the following to obtain the license: (1) appear before the clerk; (2) submit proof of identity and age; (3) provide information required in the application; and (4) take the oath and sign the application.³ The clerk will issue a marriage license if satisfied the application is true and correct.⁴ Thereafter, the parties may engage any person authorized by law to conduct a marriage ceremony to solemnize their union.⁵

Texas law does not require nor suggest any particular form of solemnization.⁶ Texas law has never mandated that any particular ceremonial vows, oaths or other responses be utilized.⁷ The minister, priest, rabbi or other authorized official will complete the license with the date and county wherein the ceremony was performed, subscribe same in his official capacity, and return it to the county clerk within thirty days of the ceremony.⁸ The clerk will then record and mail the license to the address on the application.⁹

The application, ceremony and recordation process allows the probate practitioner to readily ascertain the existence of a valid ceremonial marriage of the decedent, i.e. simply obtain a copy of the marriage license. Unfortunately, few attorneys request proof of a ceremonial marriage.

Common Law Marriages

Most attorneys have a general understanding of the term and elements of a common law marriage. They understand that a spouse claiming a valid marriage under this theory of law must satisfy their burden of proof before they are entitled to inherit from a decedent's estate.

A. Requirements

The Texas Family Code sets forth the requirements for a valid common law marriage.¹⁰ The Code provides that a common law marriage may be evidenced by an executed written declaration of the parties or by satisfying all the elements of a three pronged test.¹¹ Succinctly stated, the proof presented must evidence that the parties made an agreement to be married; thereafter the couple lived together in Texas as husband and wife; and, the couple represented to others that they were married.¹²

B. Proof

The person seeking to establish the existence of a common law marriage has the burden of proving it by a preponderance of the evidence.¹³ The burden must meet the limitation imposed by Rule 601(b) Tex. Rules of Evidence. Moreover, although the three elements constituting a common law marriage may occur at different times, until all three exist, a common law marriage does not exist.¹⁴

1. Recording the Declaration of Marriage

The probate practitioner can establish a prima facie case of a valid and enforceable common law marriage by proof of an executed declaration of marriage recorded with the county clerk.¹⁵ This evidentiary proof should always be sought because many persons who execute and file the declaration do not realize that it constitutes clear and convincing evidence of the common law marriage, and simply fail to mention it to the attorney.

2. The Three Pronged Test

a. The Agreement to Be Married

The Family Code previously allowed a court to presume that the parties had agreed to be married if they lived together as husband and wife and held themselves out to the community as such.¹⁶ However, the 1989 Legislature deleted this provision and promulgated the necessity of an "agreement to be married" language which raised a new issue of proof.¹⁷ The agreement must evidence that the parties intended to have a present,

immediate and permanent marital relationship.¹⁸

The Texas Supreme Court addressed the proof issue in 1993.¹⁹ The Court determined that an agreement to be married could be established by circumstantial evidence. Hence, this portion of the three pronged test may be established by direct or circumstantial evidence. The probate courts have entertained examples of proof which include a letter addressed to "My darling wife"; a holiday card embossed with the words "For my wife"; a card accompanying flowers stating "to the best wife a man could have"; and, a note written on the backside of a grocery receipt stating "damn it wife, leave me alone."

b. Living Together As Husband and Wife

The law requires that the parties live together in Texas as husband and wife.²⁰ Living together in another state does not satisfy this element.²¹ Interestingly, the cohabitation element has been found to exist when an alleged husband acted "husbandly" by doing errands, working around the house, and generally behaving as if he were married.²² Circumstantial proof of this element includes a lease agreement; an earnest money contract or deed executed by both parties; the joint payment of home furnishings; and, the testimony of neighbors and maids.

c. Representation of Marriage

The third element of a common law marriage relates to the representation by both parties to others that they are married. Representations that they are husband and wife has been interpreted to mean "holding out" to others that you are husband and wife.²³ A recent Texas case held that a blissful three day stay in a hotel with a person of the opposite sex is not enough to establish the "representing to others" element of a common law marriage.²⁴ Essentially, this element must be proven through opinion and reputation testimony from third parties who have concluded an opinion of the couple's marital status based on their verbal representations.²⁵ The rationale underlying this requirement is to prevent a secret common law marriage. Secrecy is inconsistent with the requirement that the couple hold themselves out to be living together as husband and wife.²⁶ This requirement can be proven through executed documents to third parties and third party testimony. At the death of one spouse, Rule 601(b) of the Texas Rules of Civil Evidence, or "Dead Man's Statute," may also affect the evidence of a common law marriage.

C. Statute of Limitations

A proceeding to prove a common law marriage must be commenced not later than a year after the relationship ended.²⁷

Common Law "Divorce" Misconception

A problematic common law marriage misconception is that once the parties cease living together, a common law divorce exists. Conversely, there is no such legal remedy in Texas law.²⁸ When the parties have established a common law marriage, it may be terminated only by court decree or death.²⁹ Unfortunately, some people believe that when they cease living with their common law spouse they are divorced and proceed to create another common law marital relationship or enter into a ceremonial marriage. The second marriage is void irrespective of what the subsequent spouse may believe.³⁰ However, a putative spouse relationship may have been created. To complicate this situation, children may have been the product of one or more of these relationships.

The common law divorce misconception exemplifies the legal rationale for the recognition of a putative spouse. Grievously, the misconception causes untold problems and frustrations for the families and courts. An example commonly encountered by the probate courts is when a decedent is killed in an accident through the negligence of a third party. The court and surviving spouse generally discover the existence of an earlier spouse through the application to determine heirship process. The respective spouses are thereafter locked in legal combat over who has standing to prosecute the survival action and determination of their share in the decedent's assets.

The Putative Spouse

Texas recognizes the putative spouse doctrine to help remedy the above described situations.³¹ A putative marriage, notwithstanding its nullity because of the prior marriage, is recognized as a valid relationship based in contract law if one spouse entered the marriage in good faith.³² The critical distinction is the marriage itself is not rendered valid by reason of the putative spouse doctrine, rather, the doctrine merely gives the parties certain property rights.³³

Putative Spouse Proof Requirements

1. Good Faith Belief

A good faith belief by one or both parties that a valid marriage exists is an absolute prerequisite to recognition as a putative spouse.³⁴ Good faith consists of being ignorant of

the cause which prevents the formation of a valid marriage or the defects in its celebration which cause it to be a nullity.³⁵ Although good faith may be presumed when a spouse is unaware of a prior undissolved marriage, the question of the reasonableness of the belief may be raised.³⁶ An alleged spouse can not meet the good faith belief standard when that person suffers a legal disability preceding the marital union, i.e. underage, lack of mental capacity or an existing marriage to another person.³⁷ A meretricious union reflects these examples and the party suffering the disability is simply a meretricious partner. The good faith belief terminates upon discovery of the previous valid marriage and the accrual of marital benefits also cease.³⁸

2. Valid Marriage Presumption

There is a presumption that the most recent marriage is valid as to marriages which precede it.³⁹ The burden of proof to the contrary rests on the person attacking its legality.⁴⁰ The termination of a prior marriage may be rebutted by proof of the nonexistence of a divorce or annulment record where they should be found.⁴¹ The Texas Supreme Court addressed this public policy rationale by determining that a presumption in favor of a valid marriage is the strongest known to law; that the validity of the marriage increases over time by the acknowledgments of spouses and the births of children; and, a public policy favoring morality, innocence, marriage and legitimacy is favored over their opposite.⁴²

Dividing Estate Assets With a Putative Spouse

The patience and diplomatic skills of the probate practitioner will be continually tested when the decedent's assets are to be partitioned between persons competing to be spouses. Succinctly stated, a friendship relationship will not flower between the putative and former spouses and each will want the other to inherit as little as possible.

A. Married Decedent With Putative Spouse

1. Community Property

a. Putative Spouses Share

Texas Courts have stated that the effect of the putative spouse doctrine is to allow a spouse the same right in property acquired during the marital relationship as if she were a lawful spouse.⁴³ Early Texas court decisions concluded that the surviving spouse inherited a one-half interest and the child or children received the remainder of the community property acquired during the putative marriage.⁴⁴

Unfortunately, there is a confusion among the Courts regarding these rules of law. The Davis Court enunciated the principle above stated but gave no supporting rationale;⁴⁵ the Morgan Court stated that the putative wife should not be deprived of property acquired through joint efforts;⁴⁶ the Robertson Court closely followed the joint efforts rationale but restricted the partition of property to that which was acquired solely by joint efforts;⁴⁷ the Lee Court concluded the putative spouse was entitled to one-half of all putative marriage community property;⁴⁸ and, the Garduno Court noted that because no legally recognizable marriage existed, the property to be divided was jointly owned separate property.⁴⁹

b. Remainder Of The Community Estate

The remaining one-half of the putative marriage community property is equally divided between the lawful wife and the children from the lawful and putative marriage. The lawful and putative spouses will equally divide the decedent's estate if there are no children.⁵⁰

2. Separate Property

Texas has clearly taken the position that a putative spouse has no interest in the decedent's separate property.⁵¹ This rule applies to separate property acquired before and during the putative marriage.⁵² The view is not as clear regarding the decedent's rents, income and profits from separate property. The Family Code provides that rents and profits from separate property are community property.⁵³ Hence, one-half of rents and interest, dividends and other income revenue should be distributed to the putative spouse if we follow the Davis rationale. Conversely, the joint efforts theory embraces the concept of jointly owned separate property leaving the putative spouse with no interest.

3. Various Other Rights

a. Homestead Rights

The Texas Constitution provides that on the death of the husband or wife the homestead shall not be partitioned among the heirs of the deceased during the occupancy of the survivor.⁵⁴ The Texas Supreme Court's position in Davis that a putative spouse has the same rights in property as a lawful wife lends credibility to her obtaining survivorship rights in the homestead. A nearly century old case does, however, argue in dicta that a putative spouse cannot ascend to the homestead rights in the decedent's separate realty.⁵⁵

b. Right to Be Appointed Administrator

The Probate Code provides that upon the decedent's death the surviving spouse has first preference in receiving letters of administration.⁵⁶ Case law provides that the lawful wife has a preferential right to the appointment.⁵⁷ Therefore, the putative spouse will not control the administration of the estate from which she is seeking assets and rights.

c. Family Allowance And Exempt Property

The Probate Code requires that all exempt property be set aside for the benefit of the lawful spouse.⁵⁸ The probate court must also make an allowance for the lawful spouse should no exempt property exist.⁵⁹ There is no Texas case law regarding this rule's effect on a putative spouse. However, the issue has been addressed by analogy in the context of a wrongful death action.

The Civil Practice and Remedies Code provides that an action to recover damages for wrongful death is for the exclusive benefit of the surviving spouse, children, and decedent's parents.⁶⁰ The Texas Supreme Court has ruled that a putative spouse is not entitled to bring this action nor receive any benefits under the Workman's Compensation Statutes.⁶¹

The right of a widowed putative spouse to receive social security benefits was recently upheld in a federal court action citing the rationale in the Davis and Garduno cases.⁶²

d. Will Provisions

Problems arise when a decedent attempts to devise property by will to a putative spouse to the exclusion of the lawful spouse. A early federal case addressed the issue when the decedent bequeathed his estate to his putative spouse and children while making a separate bequest to the daughter of his lawful marriage.⁶³ The Court determined that since the first marriage still existed the lawful wife possessed an interest in the putative marriage estate. An award of a one-half interest was made to the putative spouse with the remainder being divided between the lawful wife and the children of the putative marriage.

Conclusion

Even with increased litigation and attention to the putative spouse issue, people still enter into meretricious, common law and putative spouse relationships out of ignorance or by design. Unfortunately, for the spouse and families, the case law is less than clear as to their relative rights in the decedent's estate. Hopefully, this article will guide you in the direction of a favorable conclusion to your case.

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1. Texas is one of thirteen states recognizing a common law marriage. Duke Minier & Johanson, *Wills, Trust & Estates*, 5th Edition, Little Brown & Co. (1995).
 2. Tex. Fam. Code Ann. §1.01 (Vernon 1993).
 3. Id @ §1.02.
 4. Id @ §1.07.
 5. Id @ 1.83.
 6. *Coulter v. Melady*, 489 S.W.2d 156 (Tex. App. - Texarkana 1972, writ denied).
 7. *Smith v. Smith*, 1 Tex. 621 (1846).
 8. Tex. Fam. Code Ann. §1.84 (Vernon 1993).
 9. Id @ §1.85.
 10. Id @ §1.91.
 11. Id @ §1.92.
 12. *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993).
 13. *Durand v. State*, 881 S.W.2d 569 (Tex. App. - Houston [1st Dist.] 1994, no writ).
 14. *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App. - Houston [1st Dist.] 1991, writ denied; and, *Bolash v. Heid*, 733 S.W.2d 698 (Tex. App. - San Antonio 1987, no writ).
 15. Tex. Fam. Code Ann. §1.94 (Vernon 1993).
 16. Act of June 2, 1969, 61st Leg. R.S., ch. 888, §1, 1969 Tex. Gen. Laws 2707, 2717.
 17. Tex. Fam. Code Ann. §1.91 (Vernon 1993).
 18. See endnote no. 14.
 19. See endnote no. 12.
 20. Tex. Fam. Code Ann. §1.91(a)(2) (Vernon 1993).
 21. *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App. - Houston [1st Dist.] 1991, writ denied).
 22. Id @ §647.
 23. Id @ §648.

24. Id @ §647.
25. In re: Estate of Giesel, 734 S.W.2d 27 (Tex. App. - Houston [1st Dist.] 1987, writ denied).
26. Ex parte Threet, 333 S.W.2d 361 (Tex. 1960).
27. Shepherd v. Ledford, 962 S.W.2d 28 (Tex. 1998); Tex. Fam. Code Ann.
28. Estate of Claveria v. Claveria, 615 S.W.2d 164 (Tex. 1981).
29. Id @ §167.
30. Tex. Fam. Code Ann. §2.22 (Vernon 1993).
31. Davis v. Davis, 521 S.W.2d 603 (Tex. 1975).
32. Mathews v Mathews, 292 S.W.2d 662 (Tex. App. - Galveston 1956, no writ).
33. Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n. App. 1929, judgm't adopted).
34. Dean v. Goldwire, 480 S.W.2d 494 (Tex. App. - Waco 1972, writ denied).
35. Id @ §496.
36. Whaley v. Peat, 377 S.W.2d 855 (Tex. App. - Houston [1st Dist.] 1964, writ denied); See Garduno v. Garduno, 760 S.W.2d 735 (Tex. App. - Corpus Christi 1988, no writ) at 740 allowing the reasonableness of the belief to be raised.
37. See Dean v. Goldwire @ 496.
38. Id @ §496.
39. Tex. Fam. Code Ann. §2.01 (Vernon 1996).
40. Texas Employer's Ins. Ass'n. v. Elder, 282 S.W.2d 371 (Tex. 1955).
41. Caruso v. Lucius, 448 S.W.2d 711 (Tex. App. - Austin 1969, writ denied) See Jordan v. Jordan, 938 S.W.2d 177 (Tex. App. - Houston [1st Dist.] 1997, no writ) regarding rebuttal of presumptions.
42. See Texas Employer's Ins. Ass'n. @ 373.
43. See Davis v. Davis @ 606.
44. Lee v. Lee, 247 S.W.2d 828 (Tex. 1923) and Morgan v. Morgan, 21 S.W.2d 154 (Tex. Civ. App. 1892, no writ).
45. See endnote no. 30.
46. See endnote no. 43.
47. Fort Worth & Rio Grande Railway v. Robertson, 131 S.W. 400 (Tex. 1910).

48. See endnote no. 43.
49. See endnote no. 35.
50. See endnote no. 30.
51. See endnote no's. 30, 43 and Hamond v. Hamond, 108 S.W. 1024 (Tex. Civ. App. 1908, writ denied).
52. See endnote no. 47 holding that the putative wife did not have an interest in a cause of action accruing to the husband; and, Chapman v. Chapman, 32 S.W. 564 (Tex. Civ. App. 1895) holding that the putative wife has no interest in property gifted to husband.
53. Tex. Fam. Code Ann. §5.01 (Vernon 1993).
54. Tex. Const. Art. XVI, §52.
55. Lawson v. Lawson, 69 S.W. 246 (Tex. Civ. App. 1902, writ denied).
56. Tex. Prob. Code Ann. §77 (Vernon 1980).
57. Foix v. Jordan, 421 S.W.2d 481 (Tex. App. - El Paso 1967, writ denied).
58. Tex. Prob. Code Ann. §271 (Vernon 1997).
59. Id @ 273.
60. Tex. Civ. Prac. & Rem. Code Ann. §71.003 (Vernon 1986).
61. Texas Employer's Ins. Ass'n. v. Grimes, 269 S.W.2d 332 (Rex. 1954).
62. McDonald v. Apfel, No. 4:97-CV-411-A, (N.D. Tex. Filed Dec. 1, 1997).
63. Parker v. Parker, 222 F. 186 (5th Cir. 1915), cert. Denied, 239 U.S. 643, 60 L. Ed. 483, 36 S. Ct. 164.