

**THE UNEXPECTED FAMILY:  
LITIGATING THE DETERMINATION OF A  
PURPORTED COMMON LAW SPOUSE**

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## **LAW RELATED PUBLICATIONS AND SPEECHES**

Role of Attorney and Guardian Ad Litem; Advanced Guardianship Course, March, 2006

Underutilized Probate Code Provisions; South Texas College of Law Wills and Probate Institute; September, 2004

Dependent Administration Can Be Your Friend; South Texas College of Law Wills & Probate Institute; September, 2003

2003 Legislative Update; Attorneys in Tax and Probate; September, 2003

Out of the Woodwork: An Update on the Law Regarding Common Law Marriage, Putative Spouses and Adoption by Estoppel; Houston Bar Association; May, 2003; Disability and Elder Law Attorney's Association; February, 2001

Update From the Probate Staff Attorneys; Houston Bar Association; August, 2001

Jurisdictional Issues in Guardianship Law; Guardianship and Elder Law Issues for the Practitioner and Ad Litem; Houston Bar Association; October, 2000

## I. SCOPE OF ARTICLE

This article is intended to assist an attorney with the requirements of trying a contested determination of heirship in which the main point of contention is the existence of a common-law or informal marriage. The first half of the article will explore the legal requirements to establish an informal marriage with a discussion of the legal rights of a putative spouse. The second half of this article explores some evidentiary and practical issues that should be considered regarding such litigation.

## II. INTRODUCTION

Our modern world is full of “mixed families” having multiple spouses and children from current and prior marriages. In these situations, probate can be very complicated and litigious. Irrespective of current family harmony, if one combines an intestate estate with the issue of an informal or “common-law” marriage, litigation is almost guaranteed to follow.

Fortunately for probate litigators, Texas is one of the twelve states that currently recognize common-law marriages. Attempts to abolish the recognition of a common law marriage in Texas have consistently failed. The last attempt to abolish common-law marriages in Texas was through House Bill 16 in the 76<sup>th</sup> Legislature, in 1999, wherein, the bill never emerged from committee. Texas has codified the requirements for a common-law marriage in Texas Family Code § 2.401, entitled “Proof of Informal Marriage.”(Vernon’s Supp. 2005) Whereas a ceremonial marriage is easy to enter into and to prove, a common law marriage requires the movant to establish the requirements set forth under Texas Family Code § 2.401.

## III. THE REQUIREMENTS OF AN INFORMAL MARRIAGE PURSUANT TO TEX. FAM. CODE § 2.401

### A. LEGAL CAPACITY TO MARRY

In order to enter a valid common law marriage in Texas, the parties must possess the requisite legal capacity to marry. In order to establish a valid common law marriage, the parties in Texas must meet the following requirements:

- (1) be a man and a woman Tex. Fam. Code § 2.001 and § 2.401(a)(2);
- (2) not be presently married to a third party. Tex. Fam. Code § 2.401(d);
- (3) be 18 years of age (Tex. Fam. Code § 2.401(c)); and,
- (4) not be related as an ancestor or descendant, related by blood or adoption, nor be siblings by whole, half blood or by adoption, nor may either be a parent’s brother or sister by whole or half blood or by adoption, nor be the son or daughter of

a brother or sister by whole or half blood or by adoption, nor be a current or former stepchild or stepparent. Tex. Fam. Code § 2.402(a)(4) and § 6.201.

Interestingly, the final prohibition against marriage to a current or former stepchild or stepparent appears to only apply in regard to a declaration filed pursuant to Tex. Fam. Code § 2.402 (a)(4)(E). Essentially, the parties to an informal marriage, like a ceremonial marriage, must be of the opposite sex, of legal age and possess no legal impediments, such as those concerning kinship or the existence of a current marriage.

Historically, a marriage by a minor was merely voidable, not void. Therefore, the parents would have to petition the court to annul the marriage of their underage child. The trial court found in Husband v. Pierce, 800 S.W.2d 661 (Tex. App.—Tyler 1990, no writ), that the fifteen year old girl in question had been married both ceremonially in Mexico and by common law in the state of Texas. The court stated that as the legislature had made marriage by a minor merely a voidable marriage rather than void, the parents only remedy was to petition for an annulment. Husband at 664. This case would be decided differently today for the following reasons.

The legislature amended Tex. Fam. Code § 2.401 in 1997 to restrict any person under the age of 18 from being a party to an informal marriage or executing a declaration of informal marriage. Therefore, the marriage would now be void. This is especially important in probate proceedings as a marriage is no longer voidable or subject to challenge in any proceeding instituted after the death of either party to the marriage. Tex. Fam. Code § 6.111 Subsequent cases have found that the explicit provision of § 2.401 (c) eliminates any ability for a person under the age of eighteen to enter into an informal marriage, regardless of the case law prior to the 1997 amendment. Kingery v. Hintz, 124 S.W. 3d 875 (Tex. App.—Houston [14<sup>th</sup> Dist.], 2003, no writ), and, Creel v. Martinez, 176 S.W.2d 516 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2004, no writ.

Both to inform and relieve parental fears, § 6.205 was added to the Family Code in 2005. This section voids any marriage void if a party to the marriage is younger than sixteen years of age. However, parents will still have to seek annulment of a marriage where the parties are between sixteen and eighteen years of age. Tex. Fam. Code § 6.101-6.102. Unfortunately, the legislature failed to omit this reference to the annulment of a minor who enters into an informal marriage in Tex. Fam. Code § 6.102 (a). The Creel and Martinez holdings would still prohibit a minor from entering into an informal marriage because of the express language of § 2.401 (c).

Lastly, the legislature also amended Tex. Fam. Code § 2.401 in 2005 to add subsection (d). This subsection applies to all informal marriages regardless

of when entered into or when the declaration executed. § 2.401(d) Tex. Fam. Code states that a person may not be a party to an informal marriage or execute a declaration of same if that person is presently married to a person who is not the other party to the informal marriage or to the declaration of an informal marriage, as applicable. The commentary in Sampson & Tindall's Texas Family Code Annotated (August 2005), suggests that the legislature felt compelled to add this provision as an effort "to prevent alleged polygamy within the State." Because Tex. Fam. Code § 6.202 declares a marriage void if entered into by a party having an existing marriage that has not been dissolved by divorce or terminated by the death of a spouse, one could assume that the issue is resolved. (See Villegas v. Griffin Industries 975 S.W.2d 745 (Tex. App.—Corpus Christi 1998, writ denied), which found that no informal marriage could result when one of the parties was still married to a third person). However, does Tex. Fam. Code § 2.401 (d) somehow eliminate the effect of § 6.202 by allowing a void marriage to become valid when the prior marriage is dissolved if, after the date of dissolution, the parties satisfy the requirements of a common law marriage? The appellate courts have not addressed the issue, but it does not appear that there is any prohibition to entering into an informal marriage after the impediment is removed.

## **B. EXECUTION OF A DECLARATION OF INFORMAL MARRIAGE**

The execution of a declaration of marriage is the preferred method to evidence the establishment of an informal marriage. Tex. Fam. Code § 2.401(a)(1). The statutory requirements of the written declaration are set forth in Tex. Fam. Code § 2.402. The county clerk of each county must provide a pre-printed form that includes a declaration and oath of the parties that states "I solemnly swear (or affirm) that we, the undersigned, are married to each other by virtue of the following acts: On or about (date) we agreed to be married, and after that date we lived together as husband and wife and in this state we represented to others that we were married. Since the date of marriage to the other party I have not been married to any other person. This declaration is true and the information in it which I have given is correct." This statement incorporates the three-prong evidentiary test necessary to establish a common law marriage: 1) Co-habitation; 2) An agreement to be married; and, 3) Holding out or representation to others that the parties are married.

The declaration must be executed by the parties and recorded pursuant to Tex. Fam. Code § 2.404. The statute requires that the clerk shall administer the oath, have each party sign the declaration in the clerk's presence (The parties cannot pick up the form and return it later. It must be completed in front of the clerk.); and, execute the clerk's certificate thereon. Upon proper execution, the

county clerk shall record the original declaration and send a copy to the bureau of vital statistics. Tex. Fam. Code § 2.404 (c). This declaration is prima facie evidence of the marriage of the parties. Tex. Fam. Code § 2.404 (d). Attachment A is a Declaration and Registration of Informal Marriage that was filed in Harris County.

The declaration constitutes prima facie evidence of the common law marriage, but this presumption can be overcome if there is evidence that one of the three requirements was not actually met. See Colburn v. State, 966 S.W.2d 511, 514 (Tex. Crim. App. 1998), wherein the court found that although the trial court may find the existence of a common law marriage based upon the declaration alone, evidence may be offered rebutting the existence of the marriage as sworn to or stated in the declaration. In other words, the trial court is not bound to find a marriage as stated in the declaration when there is evidence to the contrary, which in this case, included evidence that the parties had never lived together and that their agreement was to be married at some point in the future.

## **C. ESTABLISHING THE THREE PRONG TEST**

Another method to establish an informal marriage is to present evidence that the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married. Tex. Fam. Code § 2.401 (a)(2). All of these factors must occur contemporaneously to establish a common law marriage. Gary v. Gary; 490 S.W.2d 929 (Tex. Civ. App.—Tyler, 1973, writ ref'd n.r.e.); Winfield v. Renfro 821 S.W.2d 640 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1991, writ denied). Additionally, pursuant to Tex. Fam. Code § 2.401 and applicable case law, the elements of "holding out" or representation to others and the cohabitation of the parties must occur in Texas. Texas Employers' Ins. Ass'n v. Borum; 834 S.W. 2d 395 (Tex. App.—San Antonio, 1992, no writ). The agreement is the only element that is not required to occur in this state. However, as all three elements must exist at the same time, the "agreement" must continue in the state; and, the other two elements must occur in Texas.

### **1. AGREEMENT TO BE MARRIED**

The first requirement and probably the most difficult prong to establish is that the parties entered into an agreement to be married. It may be an express or an implied agreement. Shelton v. Belknap, 282 S.W.2d 682 (Tex. 1955). Although an express agreement is not required, there must be evidence of the agreement. Obviously, in an heirship proceeding to determine a common law marriage, one of the parties to the agreement is always deceased.

Prior to 1989, pursuant to statute, the agreement to be married could be inferred from the fact that the

parties lived together and represented to others that they were married. However, in 1989, the legislature amended the Family Code prohibiting the agreement from being inferred from a finding that the other two elements existed. After a period of confusion, the Texas Supreme Court finally clarified the issue stating that although the agreement could no longer be inferred, just like any other ultimate fact, it could be proven by circumstantial evidence. Russell v. Russell 865 S.W.2d 929 (Tex. 1993). The court further pointed out that the prior statute presumed an agreement upon the establishment of the other two prongs; whereas after the 1989 amendment, the evidence of holding out must be far more convincing to compensate for lack of direct evidence of an agreement. Russell at 932-933. Citing Professor Joseph McKnight, the Supreme Court stated, "In a society in which non-marital cohabitation for extended periods of time is far more common than it once was, the fact-finder will have to weigh the evidence of a tacit agreement more carefully than in the past. As the statute now reads, an occasional uncontradicted reference to a cohabitant as "my wife" or "my husband" or "mine" will not prove a tacit agreement to be married without corroboration. Such a reference by the contestant of the union will, of course, be stronger evidence of an agreement than such a statement by the proponent....A forthright assertion of marriage with the consequence of liability (as when the alleged spouse seeks admission of the other to a hospital) may, on the other hand be far more probative of a tacit agreement to be married. Russell at 932.

An agreement to be married must evidence that the parties intended to have a present, immediate, and permanent marital relationship; and, that they did in fact agree to be husband and wife. Winfield v. Renfro 821 S.W.2d 640 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1991, writ denied). It is almost impossible to prove an agreement without circumstantial evidence of holding out unless there is another witness to the agreement. This is a rare event. Unless two people profess their immediate desire to be married to each other in the presence of others (while currently cohabitating and holding each other out as husband and wife), proof of the agreement will come through direct testimony from the surviving "spouse" and circumstantially with evidence of holding out and cohabitation. Realistically, it is odd that so many people propose to enter into a ceremonial marriage in front of witnesses, but parties to an informal marriage tend to reach that agreement in private.

The testimony of the party seeking to establish the marriage will be considered as direct evidence of the agreement. Testimony from a party that she and the decedent "agreed to be married in God's eyes" was found by the court to be direct evidence of the agreement. In Re Estate of Giessel, 734 S. W. 2d 27 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, writ ref'd n.r.e). However, direct evidence will not always prevail in the

face of controverting circumstantial evidence. Testimony that the party contesting the marriage had told the other party, "Baby, we don't have to get married to be married...Let's get your debts straight and then we'll do it right." Although this was more than a scintilla of direct evidence of an agreement to be married, it was not enough to overcome the lack of persuasive evidence of the couple holding themselves out as man and wife. Eris v. Phares 39 S.W.2d 708 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2001, writ denied.) The complications of Tex. Rule of Evid. § 601 (b), otherwise known as "the Dead Man's Rule" regarding the hearsay nature of a surviving spouses testimony are addressed later in the paper.

## **2. COHABITATION OR "LIVING TOGETHER AS MAN AND WIFE"**

The second prong that must be proven to establish a common law marriage is that the couple were living together as man and wife in the state of Texas. In general, the proof of this particular prong is fairly straightforward. In one case, evidence that a man kept his belongings at a woman's house, sent his bed there, "acted husbandly" doing errands, working around the house and generally behaving as though they were married was factually sufficient to support a finding of cohabitation, although other evidence showed that he had only stayed there for fourteen days. Winfield v. Renfro, 821 S.W.2d 640 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1991, writ denied.) Hence, sporadic living arrangements can satisfy the cohabitation requirement. In another case, testimony that the parties lived together each time the purported spouse returned to this country was sufficient to show living together as man and wife. Bolash v. Heid, 733 S.W.2d 698 (Tex.App.—San Antonio 1987, no writ). Lastly, a man and woman living together for merely two months was adequate to satisfy the requirement in Tompkins v. State, 774 S.W.2d 195 (Tex.Crim.App. 1987)(en banc) cert. granted, 486 U.S. 1004 , amended, 486 U.S. 1053, judgmt aff'd, 490 U.S. 754 (1989).

There are a limited number of cases in which the marriage has failed for want of living together as husband and wife. However, the cases are clear on the point that that the parties cannot merely intend to cohabitate in the future; and, if so, no common law marriage is created. See Canady v. Russell 138 S.W.3d 412 (Tex.App.—Tyler, 2004, no writ) and Colburn v. State, 966 S.W.2d 511 (Tex.Crim.App. 1998). Neither statute nor case law has established a bright line test as to how long the parties must live together as husband and wife. The following time situations have not constituted living together as husband and wife: A fifteen year old girl who never spent an entire night with her purported spouse, Ex Parte Threet, 333 S.W.2d 361 (Tex. 1960); and, three days together at a hotel. Winfield at 651.

### 3. “HOLDING OUT” OR REPRESENTING TO OTHERS THAT ONE IS MARRIED

Most decisions regarding whether or not an informal marriage exists are based upon the adequacy of evidence of the final element of Tex. Fam. Code § 2.401. This provision requires that the parties represent to others that they are married in the state of Texas. This “holding out” prong requires not only that both parties represent to third parties that they are husband and wife, but case law appears to require a finding that there is a general reputation in the community that the couple are married. Eris v. Phares 39 S.W.3d 708 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2001, writ denied). The “holding out” evidence must be very persuasive because it often is utilized to support direct or circumstantial evidence of the agreement to be married.

Texas law does not recognize a “secret common law marriage” because of the requirement that the parties publicly hold themselves out to the community as husband and wife. Ex Parte Threet, 333 S.W.2d 361 (Tex. 1960). A common-law marriage is more than a contract. It is a recognized public status. Winfield v. Renfro, 821 S.W.2d 640 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1991, writ denied.) Occasional introductions as husband and wife are legally insufficient to establish the element of holding out. Winfield at 651. In situations where there is absolutely no evidence of a woman introducing the man as her spouse; that there is no general reputation in the community that are married; and, even if the purported husband occasionally introduced her as his wife without objection, such evidence is factually insufficient to support a “holding out” finding. Eris at 716. The occasional reference to a former spouse as “my wife” during continued cohabitation after their divorce is legally and factually insufficient to support a “holding out” finding. Flores v. Flores 847 S.W.2d 648 (Tex.App.—Waco 1993, writ denied). Case law has held that reference to a purported spouse as “my friend” in a decedent’s will, coupled with representations in their tax returns and other records by both parties to the purported marriage that they were single, mirrored against one instance only of the one of the parties introducing the other as a spouse was legally insufficient evidence of a common law marriage. Mills v. Mest, 94 S.W.3d 72 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2002, writ denied). Also, not taking the husband’s last name combined with filing tax returns as a single person and signing the visitor’s book at his funeral in the section reserved for “Friends” instead of “Family,” created a fact scenario insufficient to support the finding of a common law marriage in Gary v. Gary, 490 S.W.2d 929 (Tex.Civ.App.—Tyler 1973, writ ref’d n.r.e.).

The following situations illustrate adequate evidence of the holding out element. A man who adopted two children with his purported spouse and failed to correct the attorney, the social worker or the

adoption court that he was not married to the purported spouse (because he did not feel that it was important or relevant) was found to have satisfied the element. Lewis v. Anderson 173 S.W.3d 556 (Tex.App.—Dallas 2005, writ denied). Again, Mr. Lewis did not help his cause when he fail to clarify his marital status at their church, or by living with Ms. Anderson for twenty years, and inadvertently filing his tax return on one occasion as married. Representations in tax returns and other attendant documents do not conclusively establish or negate a common law marriage. They merely go to the weight of the evidence. In Re Estate of Giessel, 734 S. W. 2d 27 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, writ ref’d n.r.e). In Giessel, many witnesses testified that they had always believed that Ms. Kuchera was married to Mr. Giessel. Mr. Giessel had introduced her as his wife and she had introduced him as “her old man.” These disinterested witnesses’ testimony outweighed other testimony that he never represented her as his wife to his family members (who stood to inherit if the marriage was not established); and, that she filed her taxes as being single, maintained a separate bank account, did not jointly own any property with him, and never adopted his name. Giessel at 30. Testimony from only interested witnesses can also support a common law marriage finding. Dalworth Trucking Co. v. Bulen 924 S.W.2d 728 (Tex.App.—Texarkana 1996, no writ). However, testimony from truly disinterested persons is always more compelling.

### D. PRESUMPTION AGAINST AN INFORMAL MARRIAGE

You have been retained to contest the existence of a common law marriage. Aside from attacking the above-listed three-prong elements, what other tools are available to the practitioner to defeat an informal marriage? Tex. Fam. Code § 2.401(b) establishes the closest thing to a statute of limitations for establishing a common law marriage. This section requires that if a proceeding in which a marriage is to be proved (using the three prong test) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married. If the parties were living together on the date of a purported spouse’s death, then the operative date will be the date of death.

What constitutes the commencement of a proceeding? Obviously, filing an application to determine heirship or a declaratory judgment action would suffice. Interestingly, the filing of an application for widow benefits with the Social Security Administration the month after the decedent died was sufficient because her application contained the elements required to establish an informal marriage. Nava v. Reddy Partnership/Quail Chase 988 S.W.2d 346 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999, no writ). This court distinguished a prior case that found that

filing for widow benefits did not constitute “commencing a proceeding” because that woman’s application did not contain statements satisfying all three elements of a common law marriage. Nava at 350 referencing Villegas v. Griffin Indus., 975 S.W.2d 745 (Tex.App.—Corpus Christi 1998, writ denied).

If the purported common law spouse fails to commence a proceeding within two years, does that they are thereafter barred from instituting an action? Alas, no! A statutory presumption is a rule of law requiring a trier of fact to reach a particular conclusion in the absence of evidence to the contrary. Temple I.S.D. v. English, 896 S.W.2d 167 (Tex. 1995). The effect of a presumption is to force the party against whom it operates to negate the presumption; and, the presumption has no effect on the burden of persuasion General Motors Corp v. Saenz, 873 S.W.2d 353 (Tex. 1993). The presumption may dissuade some parties from proceeding with arguably frivolous cases, but, a party with adequate evidence may still be able to establish an informal marriage.

#### **E. AND THEY WERE COMMON LAW DIVORCED???**

Scenario:

You are a party to an informal marriage and your wife has started to act, well, too much like a wife. You want out of the relationship, and you want your attorney to tell you how. You suggest that since this is a marriage created by the common law, why shouldn’t you be able to obtain a common law divorce? He politely informs you of the following. A common law divorce is simply not recognized in the State of Texas. Estate of Claveria v. Claveria 615 S.W.2d 164 (Tex. 1981). You cannot merely walk away and start again. (The attorney explains that a court has recognized that a marital status in Mexico, referred to as “concubinage,” not there being unlawful, could be terminated without the other party’s consent or resort to the courts. Gonzalez v. Gonzalez 466 S.W.2d 839 (Tex. Civ.App.—Dallas 1971, writ ref’d n.r.e.) However, in Texas, an informal marriage can only be terminated by filing for a divorce or through a party’s death. Therefore, any other marriage subsequent to an informal marriage that is not terminated by divorce or death is void pursuant to Tex. Fam. Code § 6.202. He concludes with the rule of law that although the most recent marriage is presumed valid, that presumption will be denied by proof of a prior valid marriage; and, if the other spouse has no knowledge of an impediment to their marriage, such as a pre-existing marriage, they may have property right claims as a putative spouse. See Davis v. Davis, 521 S.W.2d 603 (Tex. 1975); Mathews v. Mathews, 292 S.W.2d 662 (Tex.App.—Galveston 1956, no writ).

#### **IV. THE PUTATIVE SPOUSE**

Texas has historically recognized the putative spouse doctrine to help remedy the multiple-marriage situation. Davis v. Davis, 521 S.W.2d 603 (Tex. 1975). A putative marriage, notwithstanding its nullity because of the existing prior marriage, is recognized as a valid marriage based in contract law, if either spouse entered the marriage in good faith without knowledge of the impediment. Mathews v Mathews, 292 S.W.2d 662 (Tex. App. - Galveston 1956, no writ). The critical distinction is that the marriage itself is not rendered valid, rather, the doctrine allows the innocent party certain property rights in the estate created during the relationship. Davis v. Davis, 521 S.W.2d 603 (Tex. 1975).

#### **A. 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. Dean v. Goldwire, 480 S.W.2d 494 (Tex. App. - Waco 1972, writ denied). Good faith consists of one or both parties being ignorant of the cause that prevents the formation of a valid marriage or the defects in its celebration that cause it to be a nullity. Dean at 496. Good faith may be presumed when a spouse is unaware of a prior undissolved marriage; however, the question of the reasonableness of the belief may be raised, especially if a putative spouse is aware that a former marriage existed at one time. Garduno v. Garduno, 760 S.W.2d 735, 740 (Tex. App. - Corpus Christi 1988, no writ). In Dean, the court found that the putative spouse’s belief to be reasonable that her prior marriage had been dissolved when she received what her purported spouse knowingly misrepresented to be a valid Mexican divorce decree. Conversely, in Garduno, the court held that the purported putative spouse had a duty to investigate further when the couple was notified by a Mexican lawyer that his Mexican divorce decree had been set aside. A party may not simply ignore reliable evidence that some legal impediment exists. There is a duty on the putative spouse to investigate the facts that might substantiate an impediment to the marriage. Garduno at 740. The good faith belief terminates upon discovery of the previous valid marriage and the accrual of marital benefits also ceases. Garduno v. Garduno, 760 S.W.2d 735, 740 (Tex. App. - Corpus Christi 1988, no writ)

A meretricious union will result if the good faith belief standard cannot be met by the alleged putative spouse; and, the party suffering the disability, or with knowledge of the impediment is simply a meretricious partner. Dean v. Goldwire,

480 S.W.2d 494 (Tex. App. - Waco 1972, writ denied). If the relationship is meretricious, then each party would own the property acquired during the relationship in proportion to the value contributed to the acquisition of such property. Dean at 496.

## **2. VALID MARRIAGE PRESUMPTION**

There is a presumption that the most recent marriage is valid as to marriages that precede it. Tex. Fam. Code §1.102 The burden of proof to the contrary rests on the person attacking its legality. Texas Employer's Ins. Ass'n. v. Elder, 282 S.W.2d 371, 374 (Tex. 1955). However, the presumption that the most recent marriage is the valid one only continues until a party proves an impediment, such as a prior marriage, at which point the responsibility falls on the proponent of the marriage to prove that the legal impediment to the establishment of a valid marriage has been removed. Villegas v. Griffin Industries, 975 S.W.2d 745 (Tex App--Corpus Christi 1998, writ denied). 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. 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. The Texas Supreme Court found that the presumption in favor of a valid marriage should be the strongest known to law in Texas Employer's Ins. Ass'n. The court stated 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. Texas Employer's Ins. Ass'n. v. Elder, 282 S.W.2d 371 (Tex. 1955).

## **B. DIVIDING ESTATE ASSETS WITH A PUTATIVE SPOUSE**

### **1. COMMUNITY PROPERTY RIGHTS OF A PUTATIVE SPOUSE**

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. Davis v. Davis, 521 S.W.2d 603 (Tex. 1975). Early Texas court decisions have consistently concluded that the surviving spouse inherited a one-half interest in all of the community property acquired during the putative marriage. Lee v. Lee, 247 S.W.2d 828 (Tex. 1923). The remaining one-half of the putative marriage community property is equally divided between the lawful wife and the twice-married spouse Caruso v. Lucius, 448 S.W.2d 711 (Tex. App—1970, writ ref'd n.r.e.).

## **2. SEPARATE PROPERTY**

Texas has clearly taken the position that a putative spouse has no interest in the decedent's separate property. Hammond v. Hammond, 108 S.W. 1024 (Tex. Civ. App.—1908, writ ref'd). This rule applies to separate property acquired before and during the putative marriage. The view is not as clear regarding the decedent's rents, income and profits from separate property. Tex. Fam. Code § 3.002 provides that rents and profits from separate property are community property. 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.

## **3. VARIOUS OTHER RIGHTS**

### **a. HOMESTEAD RIGHTS**

The Texas Const. Art. XVI, § 52 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. The Texas Supreme Court's position in Davis which holds that a putative spouse has the same rights in property as a lawful wife lends credibility to her also 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. Lawson v. Lawson, 69 S.W.246 (Tex. Civ. App.—1902, writ den'd).

### **b. RIGHT TO BE APPOINTED ADMINISTRATOR**

Tex. Prob. Code § 77 provides that upon the decedent's death the surviving spouse has first preference in receiving letters of administration. Case law provides that the non-putative wife has a preferential right to the appointment. Foix v. Jordan, 421 S.W.2d 481 (Tex. App.—El Paso, 1967, writ denied). 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**

Texas Probate Code § 271 requires that all exempt property be set aside for the benefit of the lawful spouse. The probate court must also make an allowance for the lawful spouse should no exempt property exist pursuant to § 273. 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 § 71.004 provides that an action to recover damages for

wrongful death is for the exclusive benefit of the surviving spouse, children, and decedent's parents. The Texas Supreme Court has ruled that a putative spouse is not entitled to bring this action. Villegas v. Griffin Industries, 975 S.W.2d 745, (Tex. App.—Corpus Christi, 1998, writ denied).

#### IV. EVIDENTIARY ISSUES

Most informal marriages, although very fact specific, involve the same types of evidence in every case. There is testimony as to the agreement to be married and the reputation of the couple as married, there are personal and business documents, medical records, and letters and cards that are offered to evidence that the parties did or did not hold themselves out to others as husband and wife; and, there are the family photos and videos of special occasions to evidence the couple was or wasn't together in these situations. This portion of the paper will explore some of the common evidentiary issues that the attorney who chooses to litigate an informal marriage will have to address in the course of litigation.

##### A. ORAL TESTIMONY

###### 1. DEAD MAN'S STATUTE

Tex. R. Evid. 601(b) is referred to as the Dead Man's Statute. A careful analysis of the rule reveals that it is quite narrow in its application. Tex. R. Evid. 601(b) only bars testimony by a party recounting an oral statement made by a testate, intestate or a ward under the following specific circumstances:

- a. Where the suit is brought by or against an executor, administrator, or guardian; or, in an action by or against an heir or legal representative of the deceased;
- b. Where judgment may be rendered against them as such;
- c. Where the witness is a party;
- d. Where the witness is testifying against the other party or parties;
- e. Where the witness is testifying as to an oral statement made by the testate, intestate or ward that is uncorroborated; and,
- f. Where the party opponent has not waived the protection of the rule.

The circumstances that trigger the application of the rule appear to be straight forward based upon a plain reading of the rule. However, the case law paints a somewhat different picture. For example, does the rule actually require, as a condition for its application, that one of the parties, as plaintiff or defendant, be a duly qualified "executor," "administrator" or "guardian", and under what set of circumstances would the bar apply in a contested heirship proceeding that did not include any of those persons?

The application of Tex. R. Evid. 601(b) to suits involving heirship issues was addressed in Defoeldvar v. Defoeldvar, 666 S.W.2d 668 (Tex.App.—Fort Worth 1984, no writ). The original application to determine heirship was filed by the decedent's wife, who listed herself, a child of the decedent from a prior marriage, and three equitably adopted step-children as the decedent's heirs. The wife's attempts to testify at trial that the deceased expressed a desire to adopt his three step-children were barred pursuant to Tex. Rev. Civ. Stat. Ann. Art. 3716, the predecessor to the current rule. The Court of Appeals reasoned that although the wife had not yet qualified as administratrix, she was the applicant and was a potential heir. Therefore, she qualified as a "party" under the Dead Man's Statute. The Court specifically stated that a "party" under the Dead Man Statute means "...a person who has a direct and substantial interest in the issue to which the testimony relates and who is either an actual party to the suit or will be bound by any judgment entered therein." Consequently, the wife had a direct and substantial interest in the heirship determination and qualified as a "party" bound by the judgment, thereby warranting the exclusion of her testimony.

However, other appellate courts considering other contested heirship cases with similar facts have found that the Dead Man's Statute should not be applied in an heirship situation. In Smith v. Smith, 257 S. W. 2d 335 (Tex. Civ. App. — Waco 1953, writ ref'd N.R.E.), there were conflicting claims between an alleged common law wife and his siblings regarding the appointment of an administrator. Although they were fighting as to who should be appointed as administrator, the purported spouse established her marriage in the same action. The appellate court reasoned that a proceeding for the appointment of an administrator is not an action by or against executors, administrators, or guardians in which judgment may be rendered against them as such, nor is it an action by or against the heirs or legal representatives of a decedent. The Court characterized a proceeding for the appointment of an administrator as a ". . . contest between the parties for the right to administer upon the estate." The Court emphasized that the object of the lawsuit was not to divide the property of the deceased or to determine who was entitled to it, rather, which had standing to administer the estate. The Court resolved standing issues through its determination that the alleged common law wife was before the court as a "surviving wife, and not as an heir;" and, the brothers were not before the court as heirs either, but as "next of kin." Smith at 338 (Caveat: The court also found that the brothers had waived any application of the Dead Man's Statute by inquiring into the matters that they wished to exclude during their cross-examination of the widow.)

A similar result was reached in the more recent case of Cain v. Whitlock, 741 S. W. 2d 528 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1987, no writ). This case

involved a contest between an alleged common law spouse and the decedent's mother regarding the appointment of an executrix and a determination of heirship. The Appellate Court cited *Smith*, supra, and concluded that were Tex. R. Evid. 601(b) to apply to suits involving claims of common law marriage "(g)reat difficulty could result in proving whether a common-law marriage was created without allowing testimony as to the oral statements of the deceased purported spouse."

#### **a. CORROBORATING EVIDENCE LIFTS THE BAR**

The harshness of the rule is tempered by the language therein that permits a "party" to testify to a decedent's or ward's statement when it is corroborated. Corroborative evidence tends to support a material allegation or issue which is testified to by the witness. Corroboration may come from any competent witness or other admissible source, e.g. documentary evidence. Corroborative evidence need not be sufficient standing alone to support the verdict, but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth. *Quitta v. Fossati*, 808 S.W.2d 636 (Tex.App.—Corpus Christi 1991, writ denied). It is sufficient for instance, if the corroborating evidence shows conduct by the deceased that is generally consistent with the testimony concerning the deceased's statements. Corroboration virtually eliminates the applicability of Dead Man's Rule in litigation of an informal marriage, because one cannot establish the three elements without some corroborating evidence, whether it be documentary (tax records, medical admission forms, cards or letters, etc.) or oral testimony from a disinterested witness. However, one needs to understand how to respond if such an objection under the Dead Man's Statute is sustained since there is a conflict in the case law applying the rule. The following scenario demonstrates the appropriate response:

Applicant's Counsel: Mrs. Smith did you and your husband ever have a conversation about your agreement to be married?

Contestant's Counsel: Objection Your Honor. Mrs. Smith is not a competent witness under Dead Man's Rule 601(b). She is an heir and this is a contest among the decedent's heirs.

Applicant's Counsel: Your Honor, I feel that the holdings of *Smith* and *Cain* hold that the Dead Man's Rule does not apply in this situation.

Court: Overruled.

Applicant's Counsel: Then I am prepared to offer the testimony of a corroborating witness who will testify that the decedent told him that Mrs. Smith was his wife which is circumstantial evidence of the agreement to

be married. I am also prepared to offer the tax returns of the decedent filing as a married person bearing the decedent's signature. This will lift the bar to Mrs. Smith's testimony.

Court: Counsel, if this is the case, I will need to hear the testimony of your corroborating witnesses and or an offer of proof regarding documentation in support of the marriage before I will permit Mrs. Smith to testify to any oral agreement with her husband regarding a purported marriage. Mrs. Smith, you may step down.

#### **2. HEARSAY OBJECTIONS**

Once the bar of the Dead Man's Statute is passed, the hearsay objection is the next hurdle to the admission of evidence of an informal marriage. This evidence is typically replete with references to conversations with the parties to the alleged marriage. Merely to refresh the memory, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801 (d). An admission by party opponent is not hearsay. Tex. R. Evid. 801(e)(2). Therefore, if a practitioner is contesting an informal marriage, and has a witness who can testify that the purported spouse said "I just wish that we had gotten married before he died," there would be no valid hearsay objection.

Even if the testimony is hearsay, there are many exceptions to the rule. The exceptions whether or not the declarant is unavailable are found at Tex. R. Evid. 803. A frequently used hearsay exception in a contested determination of heirship is the exception as to reputation concerning personal or family history. Tex. R. Evid. 803 (19). This exception allows testimony of reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history. But, this rule only allows statements as to reputation, and does not authorize the admission of specific out of court statements concerning a family. Other useful exceptions in a contested heirship are:

1. Records of vital statistics Tex. R. Evid 803(9),
2. Family records Tex. R. Evid. 803 (13),
3. Statements in ancient documents (16), or even
4. Statement against interest (24)

Additionally, as the decedent is generally unavailable in a contested determination of heirship, Tex. R. Evid. 804(b)(3) allows testimony regarding a statement concerning the declarant's own birth, adoption, or marriage, ancestry or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated. (The decedent would obviously have personal knowledge of any informal marriage.)

Therefore, all testimony about writings or statements that the decedent made that would indicate the decedent's belief as to his marital status would be admissible.

## **B. ADMITTING DOCUMENTARY EVIDENCE**

It is important to remember that every trial exhibit must meet certain threshold requirements before it can be admitted into evidence; (1) the qualifying witness must be competent to authenticate it; (2) the exhibit must be relevant to the trial; and (3) the exhibit must be authenticated. See Texas Rules of Civil Evidence 104(b), 401, 602, 901(a). Just because an exhibit is relevant and authentic, however, does not make it admissible. The exhibit may be excluded on other grounds, e.g, hearsay. Director v. Lara, 901 S.W.2d 635, 638 (Tex. App.—El Paso 1995, writ denied). Documents are generally the most compelling evidence in the trial of a common law marriage. As different documents have different requirements, the next section will address the requirements for admission of each type of document frequently encountered in the litigation of an informal marriage. The litigator should be sure to explore these evidentiary avenues. In many cases of this nature, the attorneys will stipulate as to the admissibility and authenticity of such evidence, but the following items explore the rules of evidence that will assist the practitioner in admitting the evidence necessary to their case.

### **1. TAX RETURNS**

Although not dispositive of the existence of a common-law marriage pursuant to the court in the Giessel estate, if the parties to the purported marriage continue to file their tax returns as single individuals, it is evidence that they may not have had an agreement to be married or held themselves out as man and wife. The tax return can be authenticated either by showing that it is a copy obtained from the I.R.S. of the return that was in fact filed with the I.R.S. under Tex. R. Evid. 901(b)(7); or it may be self authenticated under T.R.C.P. 193.7 if it was produced by the opposing party. Any hearsay objection would be handled by Tex. R. Evid. 804 (b)(3) as a statement of the declarant's own marriage.

### **2. INSURANCE APPLICATIONS/EMPLOYMENT RECORDS**

Insurance applications and employment records are another gold mine of relevant evidence in litigation concerning an informal marriage. These items are also indicative of the parties' belief as to an agreement to be married and evidence that the parties held themselves out as man and wife to the community. These documents are business records that can be authenticated either by a business record affidavit the form of which is attached hereto as Attachment B pursuant to Tex. R. Evid. 902(10); or, they can be authenticated by the testimony of the custodian of

records for the insurance company or company of employment of the party pursuant to Tex. R. Evid. 803(6). See Attachment C for sample questions. The business record affidavit must be on file at least fourteen days before trial. Do not abandon persuasive documentary evidence because of a defective or late filed affidavit. If you cannot subpoena a custodian of records to prove up this document, at least attempt a request for continuance of the trial. Most judges hate to see a case decided based on the technical exclusion of probative evidence. Again, any hearsay objection would be handled by Tex. R. Evid. 804 (b)(3) as a statement of the declarant's own marriage.

### **3. LETTERS AND CARDS**

Letters and cards from the decedent to the purported common law spouse or others often indicate the true status of the relationship. Tex. R. Evid. 901(b)(2) allows the handwriting on such cards and letters to be established by any lay person familiar with the handwriting as long as such familiarity was not acquired for the purposes of the litigation.

### **4. PROPERTY TAX RECORDS**

Although probably not dispositive, but persuasive, the property tax records indicating that the parties to a purported common law marriage each maintained a home that each declared to be their homestead would be evidence against the cohabitation prong of the marriage. A certified tax record would be admissible pursuant to Tex. R. Evid. 803(8). See State v. Foltin, 930 S.W.2d 270 (Tex.App—Houston[14<sup>th</sup> Dist.]1996, writ denied).

### **5. PHOTOGRAPHS AND HOME VIDEOS**

Many times, parties in a contested heirship want to show the presence or absence of the purported spouse at family gatherings and special occasions. Generally, the most challenging evidentiary hurdle with this evidence is authenticating the photograph or video. To authenticate a photograph, the attorney must first establish: 1.) The witness is familiar with the object or scene; 2.) The witness can establish the basis for their familiarity with the object or scene, the photograph is a fair, accurate, true or good depiction of the object or scene at the relevant time. Additionally, photographs may invite a relevancy objection pursuant to Tex. R. Evid. 401, as a picture of two people together does not make the existence of any fact more probable or less probable.

Video tapes, while subject to the same relevancy objections as photographs, may capture a relevant statement by one of the parties. To authenticate a videotape, one must establish: 1.) The operator of the video camera was capable; 2.) The operator filmed a certain activity or event; 3.) The operator can account for the custody of the video; 4.) The operator recognizes the video as one that they took; and 5.) The film is still a good depiction of the activity. If the

maker of the videotape was not available, it would be possible for another witness to the scene to authenticate that the film was still a good depiction of the activity and did not appear to be altered in anyway. A lay witness may authenticate the voices of people who are not in the picture by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker pursuant to Tex. R. Evid. 901.

## V. MISCELLANEOUS ISSUES

### A. ROLE OF THE ATTORNEY AD LITEM

There is no such thing as an “uncontested” determination of a common law marriage. As the determination of a common law spouse is essentially a determination of heirship regardless of the form of the pleadings, the appointment of an attorney ad litem will be required to represent the interests of the unknown heirs, and may be appointed to represent the interests of any heirs whose whereabouts are unknown or who are incapacitated pursuant to Tex. Prob. Code § 53. The attorney ad litem’s duty is to “put the applicant to their proof”. The attorney ad litem is derelict in their duty if they do not make an independent inquiry and question the proof that the applicant is presenting. Many ad litem are hesitant to “bastardize” the minor children conceived by the parties in this union. However, it is generally in the children’s financial best interest if their parent had no surviving spouse, leaving them as the sole heirs of the estate.

### B. JURY OR BENCH TRIAL

The attorney should always attempt to be aware of the “realities” of the venue in which they are appearing. It is often advisable to seek a jury trial to determine an informal marriage if you are representing the purported common law spouse. Juries tend to be more likely to err on the side of the purported common law spouse. That can be corrected by the trial judge if the jury finds the marriage in contravention of the evidence. However, that analysis is not always clear and appellate courts tend to disfavor the trial court’s disturbance of a jury verdict.

Should you decide to proceed with a jury trial, the following instructions and jury issue may be used in a jury trial of an informal marriage:

You are instructed that a marriage is void if either party was previously married and the prior marriage is not dissolved. However, the marriage becomes valid when the prior marriage is dissolved if since that time the parties have lived together as husband and wife and have represented themselves to others as being married.

When two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that

precedes it until one who asserts the validity of a prior marriage proves its validity.

The presumption that the most recent marriage is valid as against all others is a rebuttable one, but may be rebutted only by evidence that negates every possible method by which the prior marriage could have been dissolved

Proof that a former marriage has not been dissolved without showing that it has not been annulled or dissolved by divorce is insufficient to rebut the presumption favoring validity of the second ceremonial marriage.

The State of Texas recognizes, in the absence of a ceremonial marriage, an informal or common law marriage between a man and a woman if:

- (1) they agree to be married;
- (2) after the agreement, they lived together in Texas as husband and wife; and
- (3) they represented to others that they were married in Texas.

You are further instructed that the elements that make up an informal marriage may occur at different times, but, until all three elements exist, there is no common law marriage.

Now bearing in mind the foregoing instructions and definitions, you will answer the following questions.

#### Question No. 1

Do you find, from a preponderance of the evidence, that DOROTHY JORDAN was the lawful wife of LONNIE JORDAN at the time of his death.

##### a. DOROTHY JORDAN

Answer: \_\_\_\_\_  
Answer the question “Yes” or “No”

#### Question No. 2

If you answered Question No. 1, “Yes”, then answer question No. 2. Otherwise, do not answer Question No. 2.

By a preponderance of the evidence, what date do you find that DOROTHY JORDAN and LONNIE JORDAN legally married?

Answer: \_\_\_\_\_

## **VI. CONCLUSION**

Most probate practitioners, whether they are litigators or not, will encounter a marital case involving common law issues. Hopefully, this paper will assist you in identifying the requirements of the substantive law, the necessary evidence and general considerations that you must be mindful of in litigating the issue of an informal marriage.

# ATTACHMENT A - DECLARATION AND REGISTRATION OF INFORMAL MARRIAGE

MAY-01-2006 11:08 From:

To:REMOTE ID

P.1/2

## Declaration and Registration of Informal Marriage, Harris County, Texas

Sec. 2.004 of the Texas Family Code requires registrants of Informal Marriage to provide the information on this form, including their social security number. A county clerk may not issue a license unless all information is provided.

3948  
436.00

**Man**

**Woman**

02/10/06 600144286

Marriage License Informal

First Name: **DEMETREUS** Middle Initial: **A**  
Last Name: **ATSESSIS**

First Name: **GAYL** Middle Initial: **K**  
Last Name: **BRADLEY**  
Maiden Surname If different:

Social Security Number: **449-41-4894** Date of Birth: **05/15/1976** Age: **29**

Social Security Number: **629-14-2130** Date of Birth: **08/17/1976** Age: **29**

City of Birth: **LAKE CHARLES, LA** County: State:

City of Birth: **CORPUS CHRISTI, TEXAS** County: State:

Street Address Name and Number: **1419 HYDE PARK BLVD HOUSTON, TX 77006** City: State:

Street Address Name and Number: **1419 HYDE PARK BLVD HOUSTON, TX 77006** City: State:

The other applicant is not related to me as an ancestor or descendant, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; a parent's brother or sister of the whole or half blood or by adoption; a son or daughter of a brother or sister of the whole or half blood or by adoption; a current or former stepchild or stepparent; or a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption.  True  False

The other applicant is not related to me as an ancestor or descendant, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; a parent's brother or sister of the whole or half blood or by adoption; a son or daughter of a brother or sister of the whole or half blood or by adoption; a current or former stepchild or stepparent, or a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption.  True  False

I solemnly swear (or affirm) that we, the undersigned, are married to each other by virtue of the following facts: on or about **FEBRUARY 14, 2006**, we agreed to be married, and after that date we lived together as husband and wife in this state we represented to others that we were married. Since the date of marriage to the other party I have not been married to any other person. This declaration is true and the information in it which I have given is correct.

Applicant Signature: *[Signature]*  
PDL 15876682  
Document Of Identity/Age

Applicant Signature: *[Signature]*  
PDL 16263245  
Document Of Identity/Age

Subscribed and sworn to before me on **MARCH 10, 2006**  
County # **101**

**Beverly B. Kaufman** County Clerk **Harris** County, Texas  
By **[Signature]** Deputy CLERK

Date of Declaration: **03/10/06**

Mr. & Mrs. Demetres A. Atsessis  
1419 Hyde Park Blvd  
Apt 21  
Houston, Texas 77006



Volume Page License Number



563-56-967

This is a governmental document. Texas Penal Code, Section 37.10, specifies penalties for making false entries or providing false information in this document.

FILED  
2006 MAR 10 PM 12:27

**ATTACHMENT B: BUSINESS RECORDS AFFIDAVIT**

No. \_\_\_\_\_

IN THE ESTATE OF

IN THE PROBATE COURT

JOHN DOE,

NUMBER ONE OF

DECEASED

HARRIS COUNTY, TEXAS

**AFFIDAVIT**

Before me, the undersigned authority, personally appeared \_\_\_\_\_, who, being by me duly sworn, deposed as follows:

My name is \_\_\_\_\_, I am of sound mind, capable of making this affidavit, and personally acquainted with the fact herein stated:

I am the custodian of the records of \_\_\_\_\_. Attached hereto are \_\_\_\_\_ pages of records from \_\_\_\_\_. These said \_\_\_\_\_ pages of records are kept by \_\_\_\_\_ in the regular course of business, and it was the regular course of business of \_\_\_\_\_ for an employee or representative of \_\_\_\_\_, with knowledge of the act event condition opinion or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

\_\_\_\_\_  
Affiant

SWORN TO AND SUBSCRIBED before me on the \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Notary Public, State of Texas  
Notary's printed name:  
My commission expires: \_\_\_\_\_

**ATTACHMENT C: SAMPLE QUESTIONS FOR LAYING PREDICATE FOR ADMITTING BUSINESS RECORDS**

1. Please state your name and address.
2. By whom are you employed?
3. What is your position with that company?
4. What are your duties for your employer?
5. State whether you have in your custody or subject to your control the complete records of your company pertaining to \_\_\_\_\_.
6. Can you identify Exhibit \_\_\_\_\_ ?
7. Is Exhibit \_\_\_\_\_ a copy of certain records of your company?
8. Is your company a regularly organized business activity?
7. Are the records, of which Exhibit \_\_\_\_\_ is a copy, made in the regular course of the business of your company?
8. Please state whether it was in the regular course of the business of your company for employees or representatives of the business, with personal knowledge of acts, events, conditions, and other information contained in such records, to make such records or to transmit information thereof to be included in such records.
9. Would that be equally true of the records of which Exhibit \_\_\_\_\_ is a copy?
10. Are the entries made in the records, of which Exhibit \_\_\_\_\_ is a copy, made at or near the time of the occurrence of the acts, events, or conditions described therein or within a reasonable time thereafter?
11. Did you personally make or supervise the making of the copy which is Exhibit \_\_\_\_\_ ?
12. Does the source of information or the method of preparing these records indicate their trustworthiness?
13. By what means or method was the copy made?
14. Is Exhibit \_\_\_\_\_ an accurate reproduction of the records which you have described?
15. Where are the originals of the records of which Exhibit \_\_\_\_\_ is a copy?
16. We offer Exhibit \_\_\_\_\_ into evidence.