

COMMON LAW, INFORMAL, AND PUTATIVE MARRIAGE

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CHAPTER 5

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State Bar Of Texas
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Pro Bono Committee, State Bar of Texas Family Law Section 2005 to present
Co-Chairman, Pro Bono Committee, State Bar of Texas Family Law Section 2010 to present
Family Law Practice Manual Revision Committee, State Bar of Texas (2006-2009)
Family Law Council of the Family Law Section of the State Bar of Texas 2006 to present
Board of Directors, Tarrant County Family Law Bar Association (2007-2009)
Supreme Court of Texas Uniform Forms Task Force 2011 to present
Director - Texas Academy of Family Law Specialists 2011 to present
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Adjunct Professor, Texas Christian University 2008 to present

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Recipient of the Eva Barnes Award, Tarrant County Family Law Bar Association 2012
Listed as a Texas Super Lawyer by *Texas Monthly Magazine* 2004 to present
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PUBLICATIONS

Mediation: When is it Really Over? (with Gary L. Nickelson) 2002 Advanced Family Law Course

Characterization and Tracing on a Budget (with Gary L. Nickelson)
2003 Marriage Dissolution Institute

Family Law for Fun and Profit (with Gary L. Nickelson) 2003 Advanced Family Law Course

Dealing with the Not So Right Client 2004 Marriage Dissolution Institute

The ABCs of Trying the Simple or Complex Case (with Gary L. Nickelson)
2005 Marriage Dissolution Institute

Evidence 2005 Marriage Dissolution Institute

Using Outside Resources (with Gary L. Nickelson) 2005 Advanced Family Law Drafting

If You Can't Get It Before the Factfinder, You Can't Win - Effective and Practical Application of
the rules of Evidence 2006 Advance Family Law Course

Summary Judgments 2007 Marriage Dissolution Institute

Possession Orders, Including Special Circumstances" (with G. Thomas Vick, Jr.)
2007 Advance Family Law Course

Evidence & Discovery 2008 Marriage Dissolution Institute

Show Me the Money" Advanced Collection Methods 2008 Advance Family Law Course

Courtroom Objections: Proper Methods of Objecting and Otherwise Protecting Your Client in
the Courtroom" (with Kimberly M. Naylor) 2009 Advance Family Law Course

Creative Possession Schedules" (with Kimberly M. Naylor)
2010 Advance Family Law Drafting Course

"Venue, Standing and Jurisdiction" 2011 Marriage Dissolution 101

Evidentiary Silver Bullets" State Bar College 13th Annual Summer School, 2011

Case Law Update - SAPCR" (with Jack W. Marr) 2011 Advance Family Law Course

"Drafting Motions and Orders in Family Law Cases" 2011 Advanced Family Law Drafting
Course

"Characterization and Tracing" 2012 Marriage Dissolution 101

"Child Support Enforcement" 2012 Advanced Family Law Course

"Cross Examination of Experts" 2013 Sex, Drugs & Surveillance

SPEAKER AND LECTURER

Speaker at Family Law Essentials Seminar, presented by the Family Law Section
September 2003, Lubbock, TX

Speaker at 2003 Family Law Seminar, presented by the Family Law Section
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Speaker at 2004 Marriage Dissolution Institute, April 2004, Fort Worth, TX

Speaker at 2004 Annual Meeting, June 2004, San Antonio, TX

Speaker at 2004 Family Law Boot Camp, presented by the Family Law Section
August 2004, San Antonio, TX

Speaker at LAU Seminar, presented by the Legal Assistants Division
September 2004, Fort Worth, TX

Speaker at Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of
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Speaker at 2005 Marriage Dissolution Institute, April 2005, Galveston, TX

Speaker at 2005 Annual Meeting, June 2005, Dallas, TX

Course Director, Family Law Basic Training, by the Family Law Section, August 2005, Dallas,
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Speaker at 2005 Family Law Seminar, presented by the Family Law Section
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Speaker at 2006 Advanced Family Law Course, August 2006, San Antonio, TX

Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono
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Speaker at 2007 Marriage Dissolution Institute, May 2007, El Paso, TX

Speaker, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of
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Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono
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Speaker at 2008 Advanced Family Law Course, August 2008, San Antonio, TX

Moderator of a panel at 2009 Marriage Dissolution Institute, April 2009, Fort Worth, TX
"Psychology of a Possession Order"

Moderator of a panel at the 9th Annual Family Law On The Front Lines, June 2009, San
Antonio, TX, "When You Play, You May Pay! Paternity Fraud – The Newest Form of Birth
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Speaker, 2009 Advanced Family Law Course, August 2009, Dallas, TX

Course Director, Pro Bono Family Law Seminar, presented by the Family Law Section
October 2009, Eagle Pass, TX

Speaker, Parent-Child Relationships: Critical Thinking for Critical Issues, January, 2010,
Austin, TX

Course Director and Speaker, Pro Bono Family Law Seminar, presented by the Family Law
Section
September 2010, Sherman, TX

Course Director, 2010 Advanced Family Law Course, August 2010, San Antonio, TX

Speaker, 2010 Advanced Family Law Drafting Course, December 2010, Houston, TX

Speaker, 2011 Marriage Dissolution 101 Course, April 2011, Austin, TX

Speaker, State Bar College 13th Annual Summer School, July 2011, Galveston, TX

Speaker, 2011 Advanced Family Law Course, August 2011, San Antonio, TX

Speaker, 2011 Advanced Family Law Drafting Course, December 2011, Dallas, TX

Speaker, 2012 Marriage Dissolution 101, April 2012, Dallas, TX

Speaker, 2012 Advanced Family Law Course, August 2012, Houston, TX

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EDUCATION

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- International Legal Fraternity-Phi Delta Phi.

MILITARY SERVICE

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PROFESSIONAL ACTIVITIES

- Director, San Antonio Family Lawyers Association, 2009;
- Board Certified in Family Law, 1997 to date;
- Past Member, Family Law Council, State Bar of Texas;
- Past Chair, Legal Assistants Committee, Family Law Section, State Bar of Texas;
- Past Member, Pro Bono Committee, Family Law Section, State Bar of Texas;
- Member, Texas Academy of Family Law Specialists;
- Past Panel Chair, District 10C Grievance Committee;
- Member, San Antonio Bar Association;
- Member, Family Law Section, State Bar of Texas; and
- Fee Dispute Committee for the San Antonio Bar Association, 1995-1996 and 1996-1997.

TECHNICAL AND PROFESSIONAL LICENSES

- Admitted to the Bar in Texas in 1990; and
- United States Federal District Court, Western and Northern Districts of Texas, 1990.

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

- Martindale-Hubbell, AV rating
- 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012 *Texas Monthly* Super Lawyer;
- 2004 Who's Who in Law & Accounting as featured in the *San Antonio Business Journal*;
- "San Antonio's Best Lawyers," as featured in *Scene in S.A.* magazine, August 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011;
- "San Antonio's Top Divorce Lawyers" as featured in *Scene in S.A.* magazine, 2003;
- 1996 Outstanding Young Family Lawyer, San Antonio, Texas;
- 1990 Outstanding Young Men in America;
- Speaker, **Temporary Orders Hearing**, 2012 Advanced Family Law Course;
- Speaker, **Valuation of Property**, 2010 Advanced Family Law Course;
- Author, Speaker, **More Money, Less Stress: Law Office Management and Technology**, 2010 Advanced Family Law Course;
- Author, Speaker, **Closing the File**, May 5, 2010 – Marriage Dissolution Institute, San Antonio, Texas;

- Speaker, **Buying a Business: Capital Intensive v. Asset Based**, March 26, 2009 – Representing Small Business Course, Dallas, Texas;
- Author, Speaker, **Valuation**, April 17, 2008 – Marriage Dissolution Seminar, Galveston, Texas;
- Author, Speaker, **How to Help the Judge Rule in Your Favor: Preparing for Temporary Orders Hearing** - May 9, 2007 - Marriage Dissolution Seminar, El Paso, Texas, Enhancing your Legal Practice with the Attorney/Paralegal Team;
- Speaker, **Maximizing the Take at a Final Property Hearing** - Family Law Essentials for \$2000 or Free-April 20, 2007, Mineral Wells, Texas - The Pro Bono Committee of the Family Law Section of the State Bar of Texas;
- Moderator/Coordinator, **Family Law Essentials for \$2000 or Free** - September 30, 2005, Eagle Pass, Texas - The Pro Bono Committee of the Family Law Section of the State Bar of Texas;
- Moderator, Speaker, **Effective Mediation at the Next Level**, April 1, 2004, San Antonio, Texas - San Antonio Family Lawyers Association;
- Author, Speaker, **Identifying, Characterizing and Valuing the Marital Estate: An Overview** - October 1, 2003, San Antonio, Texas - Legal Assistants University;
- Moderator/Coordinator, **Family Law Essentials for \$2000 or Free**, September 11, 2003, Lubbock, Texas - The Pro Bono Committee of the Family Law Section of the State Bar of Texas;
- Author, Speaker, **The Trial of a Family Law Case and Ethical Conduct**, January 31, 2001- Texas General Practice and Ethics Institute - Stromar Educational Services, Inc.;
- Author, Speaker, **The Trial of a Family Law Case and Ethical Conduct**, September 26, 2000 - Stromar Educational Services, Inc.;
- Author, Speaker, **Working with Divorce Clients and Opposing Counsel, Sweet, Nice and Polite**, January 28, 2000 - Texas Family Law Practice for Paralegals;
- Co-Author, Speaker, **The Trial of a Family Law Case and Ethical Conduct**, January 26, 2000 - Stromar Educational Services, Inc.;
- Co-Author, Speaker, **Evidence**, October 27, 1999 - Stromar Educational Services, Inc.
- Co-Author, **What they don't teach you in Law School about setting and Collecting Attorney's Fees**, 1997 Advanced Family Law Course;
- Co-Author, **Practical Tips from the Top**, 1996 Marriage Dissolution Institute; and
- Co-Author, **Express Trusts in Divorce**, 1995 Advanced Family Law Course.

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I. INTRODUCTION

Changing lifestyles in the United States have caused many of us to see a drastic increase in cases coming through our doors where the main question is whether or not there is a common law or informal marriage. We know the basic requirements necessary to establish a common law marriage, but there are many variables outside the basics that may determine the validity of such a marriage claim. This paper is intended to provide you with not only the tools, statutes, and case law you'll need to either defend or prosecute a common law marriage case; but also an overview of the changing demographics that have led to this increase. (All figures are from the U.S. Census Bureau unless otherwise noted.)

II. CHANGING DEMOGRAPHICS

A. United States Demographics

In the 1960 census there was a total of 450,000 households in the United States that were categorized as persons who were living together, but not married or related. Because this category was not broken down further, this number includes housemates/roommates, roomers or boarders, and unmarried partners.

In 1990, the category, "unmarried partner" was added to the questionnaire to measure the growing tendency for couples to live together before getting married. An unmarried partner is defined by the U.S. Census Bureau as "people who were sharing living quarters and who had a close personal relationship with each other." Contrast that with another new category; people who were sharing the same living quarters but were doing so just to share living expenses, were offered the opportunity to identify themselves as roommates or housemates.

The 1990 U.S. Census identified a total of 91.9 million households in the United States. Of those 91.9 million, 3.2 million households identified themselves under the new category as unmarried partners.

The 2000 U.S. Census identified a total of 105.5 million households in the United States. 5.5 million of those households identified themselves as unmarried partners. This was an increase of 2.3 million households in just ten (10) years. [A tenfold increase in the number of unmarried households from the 1960 census.] 4.9 million of those 5.5 million were further categorized as opposite sex households.

In 2010, the U. S. Census Bureau registered a total of 116.7 million households in the United States. 7.4 million of those households identified themselves as unmarried partner households with 6.8 million of those were further categorized as opposite sex households.

This 7.4 million unmarried household represents an increase of 1.9 million from the 2000 census and 4.2 million from the 1990 census.

B. Texas Demographics

In 2000, Texas had a total of 7,393,354 households. Of those 7.3 million households, 327,246 were classified as unmarried partner households. In other words, 7.6% of all coupled households were occupied by unmarried partners. 284,334 of those unmarried partner households were occupied by opposite sex couples.

In 2010, Texas had a total of 8,922,933 coupled households. Of those 8.9 million households, 535,376 were classified as unmarried partner households; an increase of 208,130 households. 463,993 of those unmarried partner households were occupied by opposite sex couples.

The majority of the unmarried partner households in Texas were in metropolitan areas. The average age of the unmarried couples was 35.6 for the male occupant and 33.6 for the female occupant.

C. Interesting and Relevant Facts

In 2000, Pamela Smock conducted a study of unmarried partner households and she published her findings in the *Annual Review of Sociology*. Some of her more interesting and relevant findings to our practice are as follows:

- 21 % of unmarried partner households have children together.
- 45.4% of unmarried partner households said they live with at least one biological child of either partner.
- The majority of couples who get married today cohabitated first.
- 75% of unmarried partners plan to marry their partner.
- 55% of unmarried partners do marry within 5 years.
- However, 40% of those unmarried partners break up within that same 5 year period.

Smock, Pamela 2000, "Cohabitation in the United States." *Annual Review of Sociology*.

As you can see, the number of unmarried partner households has steadily increased since the U.S. Census Bureau began tracking this category in 1990. When you combine this increase with the number of unmarried partners that have children together and that 40% of them break up after 5 years, it's easier to understand why we are seeing the increase in common law, informal, and putative marriage claims in Texas.

III. MARRIAGE

A. Every Marriage Presumed Valid

The policy of the State of Texas regarding the validity of any marriage, whether ceremonial, common law, or putative, is set forth in Section 1.101 of the Texas Family Code, which provides the following:

In order to promote the public health and welfare and to provide the necessary records, this code specifies detailed rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable. Therefore, every marriage entered into in this state is presumed valid unless expressly made void by Chapter 6 [*Suit for Dissolution of Marriage*] or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter.

B. Legal Capacity To Marry

Before anyone can enter into a valid marriage in Texas, whether ceremonial or informal, they must possess the legal capacity to marry. In order to establish a valid marriage in Texas, the parties must establish the following:

- (1) That the marriage is to be between a man and a woman Texas Family Code §2.001 and §2.401;
- (2) That neither party has been divorced within the past 30 days Texas Family Code §2.004;
- (3) That neither party is presently married. Texas Family Code §2.004;
- (4) That each party is at least 18 years of age Texas Family Code §2.101, unless the underage party has secured an order from the court granting permission to marry Texas Family Code §2.103, or has proof of parental consent Texas Family Code §2.102; and,
- (5) That the parties are not related as an ancestor or descendant, by blood or adoption; that they are not brother or sister, of the whole or half blood or by adoption; that are not related by a parent's brother or sister by whole or half blood, or by adoption; that they are not the son or daughter of a brother or sister, of the whole or half blood or by adoption; that they are not the current or former stepchild or

stepparent of the other; and lastly, that they are not a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption. Texas Family Code §2.004.

IV. REQUIREMENTS FOR ESTABLISHING AN INFORMAL MARRIAGE

Although Texas has long recognized common law marriages, the acceptance of this concept has been described as “grudging.” *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex. 1993); *see also Texas Employers’ Insurance Ass’n v. Elder*, 274 S.W.2d 144, 147 (Tex. Civ. App. – Fort Worth 1954), *aff’d* on other grounds, 155 Tex. 27, 282 S.W.2d 371 (1955) “The law does not favor, but merely tolerates ... common-law marriages ...” Therefore, although Texas has not been able to abolish common law marriages, courts closely scrutinize these claims. *See Russell*, 865 S.W.2d at 932 “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.”

Texas Family Code §2.401 establishes the requirements to prove an informal marriage. In relevant, part that section states as follows:

- (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
 - (1) a declaration of their marriage has been signed as provided by this subchapter; or
 - (2) 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.
- (b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) 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.

Thus, this subsection provides an evidentiary presumption of no marriage if no suit for divorce claiming an informal marriage is filed within two years of the parties' separation.

V. DECLARATION AND REGISTRATION OF INFORMAL MARRIAGE

The requirements necessary to establish an informal marriage pursuant by declaration as provided

in Texas Family Code §2.401(a)(1) are contained in Texas Family Code §2.402. That section provides as follows:

- (a) A declaration of informal marriage must be signed on a form prescribed by the bureau of vital statistics and provided by the county clerk. Each party to the declaration shall provide the information required in the form.
- (b) The declaration form must contain:
 - (1) a heading entitled "Declaration and Registration of Informal Marriage, _____ County, Texas";
 - (2) spaces for each party's full name, (including the woman's maiden surname, address, date of birth, place of birth, including city, county, and state, and social security number, if any;
 - (3) a space for indicating the type of document tendered by each party as proof of age and identity;
 - (4) printed boxes for each party to check "true" or "false" in response to the following statement: "The other party is not related to me as:
 - (A) an ancestor or descendant, by blood or adoption;
 - (B) a brother or sister, of the whole or half blood or by adoption;
 - (C) a parent's brother or sister, of the whole or half blood or by adoption; or
 - (D) a son or daughter of a brother or sister, of the whole or half blood or by adoption;
 - (E) a current or former stepchild or stepparent; or
 - (F) a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption."
 - (5) a printed declaration and oath reading: "I SOLEMNLY SWEAR (OR AFFIRM) THAT WE, THE UNDERSIGNED, ARE MARRIED TO EACH OTHER BY VIRTUE OF THE FOLLOWING FACTS: 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.”;

- (6) spaces immediately below the printed declaration and oath for the parties' signatures; and
- (7) a certificate of the county clerk that the parties made the declaration and oath and the place and date it was made.

VI. RECORDING OF CERTIFICATE OF DECLARATION OF INFORMAL MARRIAGE

Section 2.404 of the Texas Family Code outlines the procedures the county clerk should follow for finalization of the declaration of marriage. Section 2.404 provides as follows:

- (a) The county clerk shall:
 - (1) determine that all necessary information is recorded on the declaration of informal marriage form and that all necessary documents are submitted to the clerk;
 - (2) administer the oath to each party to the declaration;
 - (3) have each party sign the declaration in the clerk's presence; and
 - (4) execute the clerk's certificate to the declaration.
- (a-1) On the proper execution of the declaration, the clerk may:
 - (1) prepare a certificate of informal marriage;
 - (2) enter on the certificate the names of the persons declaring their informal marriage and the date the certificate or declaration is issued; and
 - (3) record the time at which the certificate or declaration is issued.
- (b) The county clerk may not certify the declaration or issue or record the certificate of informal marriage or declaration if:
 - (1) either party fails to supply any information or provide any document required by this subchapter;
 - (2) either party is under 18 years of age; or

- (3) either party checks "false" in response to the statement of relationship to the other party.
- (c) On execution of the declaration, the county clerk shall record the declaration or certificate of informal marriage, deliver the original of the declaration to the parties, deliver the original of the certificate of the informal marriage to the parties, if a certificate was prepared, and send a copy of the declaration of informal marriage to the bureau of vital statistics.
- (d) An executed declaration or a certificate of informal marriage recorded as provided in this section is prima facie evidence of the marriage of the parties.
- (e) At the time the parties sign the declaration, the clerk shall distribute to each party printed materials about acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus (HIV). The clerk shall note on the declaration that the distribution was made. The materials shall be prepared and provided to the clerk by the Texas Department of Health and shall be designed to inform the parties about:
- (1) the incidence and mode of transmission of AIDS and HIV;
 - (2) the local availability of medical procedures, including voluntary testing, designed to show or help show whether a person has AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS; and
 - (3) available and appropriate counseling services regarding AIDS and HIV infection.

VII. MEETING THE THREE PRONG TEST

A finding of the existence of a common law or informal marriage is not justified unless all three prongs of the test exist concurrently. *See Small v. McMaster*, 352 S.W.3d 280, 282-83 (Tex.App.-Houston [14th Dist.] 2011, pet. denied) "An informal marriage does not exist until the concurrence of all three elements." *See Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. App. -- San Antonio 1987, no writ). All three of these statutory requisites for a legitimate common law marriage must exist contemporaneously. *Id.* Furthermore, §2.401 precludes proof of the existence of an informal marriage if the acts occurred in a state other than Texas. *Texas Employers' Ins. Ass'n v. Borum*, 834 S.W.2d 395, 399 (Tex. App. -- San Antonio 1992, no writ).

A. Agreement To Be Married

To establish a common law marriage the evidence must show 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 presently – not in the future. *Winfield v. Renfro*, 821 S.W.2d 640, 645 (Tex.App.-Houston [1st Dist.] 1991, writ denied.) (citing *Rodriguez v. Avalos*, 567 S.W.2d 85, 86 (Tex. Civ. App. - El Paso 1978, no writ). "To establish this element, the evidence must show the parties intended to have a present, immediate, and permanent marital relationship and that they agreed to be husband and wife" *Id.* See also *Gary v. Gary*, 490 S.W.2d 929, 934 (Tex. Civ. App.-Tyler 1973, writ ref'd n.r.e.) which stated "Each of the elements is necessary, and it is particularly essential that the parties mutually agree that they would then and thenceforth be husband and wife and that the following cohabitation be on the faith of this mutual agreement and promise."

(1) Proving Intent

The intent of the parties should be clear. *Chatman v. State*, 513 S.W.2d 854, 855 (Tex. Crim. App. 1974). The agreement must be a present agreement. *Aguilar v. State*, 715 S.W.2d 645 (Tex. Crim. App. 1986)(en banc). Moreover, the agreement to be married must be evident on both sides. In contractual terms, there must be a meeting of the minds. One person's sincere belief that an agreement existed is insufficient.

An agreement to marry in the future, coupled with cohabitation, will not suffice. *Leal v. Moreno*, 733 S.W.2d 322, 323 (Tex. App. -- Corpus Christi 1987, no writ).

In addressing the issue of a party's intent, the Texas Supreme Court has provided the following guidance:

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 stands, 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. The non-social context of the contestant's reference to the proponent as his "wife" or her "husband" will also receive closer scrutiny. If the statement is made in a self-serving context, the fact finder may be expected to disbelieve the truth of the statement. A forthright assertion of marriage

with the consequences of liability (as when an alleged spouse seeks admission of the other to the hospital) may, on the other hand be far more probative of a tacit agreement to be married. *Russell*, 865 S.W.2d at 932.

Another example of a forthright representation of marriage, or non-marriage, would be the filing of income tax returns. See *Day v. Day*, 421 S.W.2d 703, 705 (Tex. Civ. App.-Austin 1967, no writ) which held that income tax returns are relevant evidence to determine whether a common law marriage exist.

(2) Express or Implied Agreement

The agreement may be expressed or implied; no words are required. *Carson v. Kee*, 677 S.W.2d 283, 285 (Tex. App. -- Fort Worth 1984, no writ).

An agreement to be husband and wife may be implied and need not be inferred from evidence establishing the other requisites of a common law or informal marriage. *Grigsby v. Grigsby*, 757 S.W.2d 163, 164 (Tex. App. --San Antonio 1988, no writ); *Carson v. Kee*, 677 S.W.2d 283, 285 (Tex. App. -- Fort Worth 1984, no writ).

(3) Direct or Circumstantial Evidence

The existence of a common law marriage is a question of fact. *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 735 (Tex.App.--Texarkana 1996, no writ).

However, as in other areas of law, a given fact may be established by circumstantial evidence where it may be reasonably inferred from other facts. "Marriage, whether ceremonial or common law, although the character of the evidence might be different, is proved as any other fact might be proved." *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987)(en banc) cert. granted 486 U.S. 1004, amended, 486 U.S. 1053, judgment affirmed, 490 U.S. 754 (1989); *Russell*, 865 S.W.2d at 933.

Direct evidence of an express agreement, corroborated by evidence of the parties' living together and holding themselves out as husband and wife, is always preferable to circumstantial evidence. See *Collora v. Navarro*, 574 S.W.2d 65, 69 (Tex. 1978). However, when there is direct evidence denying the existence of the required elements set forth in the Texas Family Code, an agreement to be married may not be implied from circumstantial evidence. See *Ex parte Threet*, 333 S.W.2d 361, 364-65 (Tex. 1960).

In situations where one of the parties is deceased, the testimony of the surviving spouse of a common law marriage will not be allowed to help establish the existence of the agreement. Allowing the testimony of the surviving spouse would violate Rule 601 (b) of the Texas Rules of Evidence. Furthermore, an agreement to be married may not be inferred from circumstantial

evidence which is contrary to any direct testimony which contradicts such a claim. *Ex parte Threet*, 333 S.W.2d 361 (Tex. 1960).

Examples of evidence which has supported a finding that the parties agreed to be husband and wife have included:

- A party who considered herself the wife in a common law marriage, had relations with her partner, was introduced on at least one occasion by the partner as his wife, partner made flight reservations for the woman as "Mrs.," and party was known to others as the stepmother of partner's son offered sufficient evidence of the parties' agreement to be husband and wife. *Durr v. Newman*, 537 S.W.2d 323, 325 (Tex. Civ. App. - El Paso 1976, writ ref'd n.r.e.).
- Raising a family together was found sufficient to prove an agreement existed between the parties to be husband and wife. *Brooks v. Hancock*, 256 S.W. 296 (Tex. Civ. App. --Texarkana 1923, no writ)
- Establishing joint accounts has been deemed evidence that the parties agreed to be husband and wife. *Rosales v. Rosales*, 311 S.W.2d 661,664 (Tex. Civ. App. - Corpus Christi 1964, no writ).
- Filing joint tax returns is prima facie evidence that the parties have agreed to be husband and wife. *Day v. Day*, 421 S.W.2d 703, 705 (Tex. Civ. App. -Austin 1967, no writ).
- Purchasing property together and executing joint secured transactions is evidence of an agreement to be husband and wife. *Rodriguez v. Avalos*, 567 S.W.2d 85, 86-97 (Tex. Civ. App. - El Paso 1978, no writ).

B. Living Together as Husband and Wife

The second prong of the test for establishing the existence of an informal marriage involves providing sufficient proof that the parties lived together in a relationship as husband and wife. *Smith v. Smith*, 607 S.W.2d 617, 621 (Tex. Civ. App. - Waco 1980, no writ). The Family Code requires that the man and woman live together **in Texas** as husband and wife. See Texas Family Code §2.401(emphasis added); *Williams v. Home Indemnity Co.*, 722 S.W.2d 786, 788 (Tex. App. -Houston [14th Dist.] 1987, no writ). It must be established separately from the other two elements that a couple has lived together. *Gary v. Gary*, 490 S.W.2d 929, 932 (Tex. Civ. App. — Tyler 1973, writ ref'd n.r.e.).

Merely living together is not enough to establish an informal marriage; the parties must live together "as husband and wife" and both must hold themselves out

to the public as being married to each other. See *Grigsby v. Reib*, 105 Tex. 587, 153 S.W. 1124, 1130 (1913); See also *Threet*, 333 S.W.2d at 364 “The living together as man and wife and the public and open holding out that the two are man and wife are as essential to a valid common law marriage as the agreement itself. Without these elements, there is no common law marriage.”

In *Gary*, the Tyler Court held “We have found no case, nor have we been directed to any, which allowed the inference of an agreement to be made solely on the basis of proven cohabitation. Agreement is fundamental and cohabitation is only one element of common law marriage, which will not suffice in itself.” *Gary*, 490 S.W.2d at 932. “An agreement to be married and cohabitation are not enough to prove an informal marriage. The cohabitation must be professedly as husband and wife, and public, so that, by their conduct towards each other, they may be known as husband and wife.” *Small*, 352 S.W.3d at 284.

Evidence of situations supporting a finding that parties lived together as husband and wife has included:

- Testimony that the parties lived together each time purported spouse came to this country was deemed sufficient to support the finding that they lived together. *Bolash v. Held*, 733 S.W.2d 698, 699 (Tex. App. - San Antonio 1987, no writ).
- Man and woman lived together for approximately two months. *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987) (en banc) cert. granted, 486 U.S. 1004, amended, 486 U.S. 1053, judgment affirmed, 490 U.S. 754 (1989).
- Common law husband supported his common law wife "by the fruits of his labor." The wife, in return, maintained a home for her husband, cooked his meals, and bore his children. *Gonzales v. Gonzales*, 466 S.W.2d 839, 841 (Tex. Civ. App. - Dallas 1971, writ refused n.r.e.).

Insufficient evidence that parties lived together as husband and wife has included:

- Merely living with a person of the opposite sex and having a sexual relationship with that person is not enough. *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987), cert. granted, 486 U.S. 1004, amended, 486 U.S. 1053, judgment affirmed, 490 U.S. 754 (1989).
- Evidence that a husband and wife continued to live together after divorce is insufficient, in and of itself, to establish an agreement to be

married if other evidence presented supports the conclusion that one or both of the parties did not hold themselves out to be married to each other. *Flores v. Flores*, 847 S.W.2d 648, 653 (Tex. App. - Waco 1993, writ denied).

C. Holding Out

The third requirement of a common law marriage in Texas is that the parties must “hold out” to the public that they are husband and wife. Texas Family Code § 2.401(a)(2). See also *Winfield*, 821 S.W.2d at 648 “The statutory requirement of ‘represented to others’ is synonymous with the judicial requirement of ‘holding out to the public.’” Holding out is required of BOTH parties, not just one. Both parties must consistently represent themselves as being married. *In re Estate of Giessel*, 734 S.W.2d 27, 30 (Tex. App. – Houston [1st Dist..] 1987, writ refused n.r.e.)

The key to holding out as being married is consistency. “Proving a reputation for being married requires evidence that the couple consistently conducted themselves as husband and wife in the public eye or that the community viewed them as married.” See *Small*, 352 S.W.3d at 285. “A couple being introduced as husband and wife to a few friends constituted no evidence of holding themselves out as being married to each other.” See *Threet*, 333 S.W.2d at 364. The court in *Winfield* held that being introduced as husband and wife on only a few occasions did not constitute having a reputation in the community for being married. *Id* at 651.

A common law or informal marriage cannot be a secret. *Ex parte Threet* at 364. A public holding out is required under this prong and must be established through the testimony of others. *Collora v. Navarro*, 574 S.W.2d 65, 69 (Tex. 1978).

Evidence supporting a finding that the parties held themselves out as husband and wife has included situations where:

- Woman testified that she kept the couple's home, cooked the food, mended her partner's clothes, paid the bills in both her and her partner's name, and was introduced by her partner as his wife and she introduced herself as her partner's wife. *Baker v. Mays & Mays*, 199 S.W.2d 279,283 (Tex. Civ. App. - Fort Worth 1946, writ dismissed).
- Insurance policy statements that the other party was the insured's spouse was prima facie evidence of holding out to the public that the parties are husband and wife. *Ortiz v. Santa Rosa Medical Center*, 702 S.W.2d 701,704 (Tex. App. — San Antonio 1985, writ refused n.r.e.).

- An acknowledged and recorded deed executed by the parties that they are husband and wife. *Claveria's Estate v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981).
- Documents signed as husband and wife by the parties. *Jackson v. Smith*, 703 S.W.2d 791, 795 (Tex. App. - Dallas 1985, no writ).
- Insurance policy statements that the other party was the insured's spouse. *Ortiz v. Santa Rosa Medical Center*, 702 S.W.2d 701, 704 (Tex. App. - San Antonio 1985, writ ref'd n.r.e.).
- The wife took the husband's surname. *In re Glasco*, 619 S.W.2d 567, 570 (Tex. Civ. App. - San Antonio 1981, no writ).

VIII. THE BURDEN OF PROOF

Under Texas law the existence of a common law or informal marriage is a question of fact and the burden of proof is on the party seeking to establish the marriage. *White v. State Farm Mut. Auto. Ins. Co.*, 907 F. Supp. 1012, 1016 (E.D. Tex. 1995); *Durand v. State*, 931 S.W.2d 25, 576 (Tex. App. - Houston [1st Dist.] 1997, pet. ref'd); *Quinonez-Saa v. State*, 860 S.W.2d 704, 710 (Tex. App. - Houston [1st Dist.] 1993, writ ref'd); *Roach v. Roach*, 672 S.W.2d 524, 527 (Tex. App. — Amarillo 1984, no writ).

The proponent attempting to establish the existence of a common law or informal marriage must establish the existence of the marriage by a preponderance of the evidence. *Hightower v. State*, 629 S.W.2d 920 (Tex. Crim. App. [Panel Op.] 1981); *Welch v. State*, 908 S.W.2d 258, 264 (Tex. App. - El Paso 1995, no writ); *Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App. - Houston [14 Dist.] 1993, no pet.); *Carson v. Kee*, 611 S.W.2d 283, 284 (Tex. App. - Fort Worth 1984, no writ).

Mere denial as to the existence of a common law marriage is not sufficient to rebut the inference that a common law or informal marriage does exist. *Reilly v. Jacobs*, 536 S.W.2d 406 (Tex. Civ. App. -Dallas 1976, writ ref'd n.r.e.). Conflicting evidence will go to the credibility of the witnesses and the weight of the evidence presented. *Reilly v. Jacobs*, 536 S.W.2d 406, 408 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.). However, whether a common law or informal marriage exists is generally determined by the fact finder, whether the fact finder is a jury or judge. To justify jury submission, all that is required of the proponent is some evidence of the marriage's existence. *Claveria's Estate*, 615 S.W.2d at 165.

A valid common law or informal marriage can be established even if one of the parties subsequently cohabitated with and ceremonially married someone else. *Rodriguez v. Avalos*, 567 S.W.2d 85, 87 (Tex. Civ. App. - El Paso 1978, no writ). However, the

presumption of the ceremonial marriage's validity will be stronger than that of the prior common law or informal marriage. *Rosetta v. Rosetta*, 525 S.W.2d 255, 261 (Tex. Civ. App. - Tyler 1975, no writ). Once the ceremonial marriage has occurred, there will be a presumption against the continued existence of the previous informal marriage. *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. Civ. App. -San Antonio 1987, no writ).

IX. THE EFFECT OF AN INFORMAL MARRIAGE ON THE PARTIES

A valid common law or informal marriage bestows upon the parties the same legal ramifications as a ceremonial marriage. Therefore, under Texas law, once it is established that a common law marriage exists, the relationship is treated with the same dignity as a ceremonial marriage and may only terminate by death, divorce, or annulment. *Claveria's Estate v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981); *White v. State Farm Mut. Auto. Ins. Co.*, 907 F.Supp. 1012, 1016 (E.D. Tex. 1995). The parties in a common law or informal marriage are husband and wife and their legal status shall be as married persons. *Baker v. Mays & Mays*, 199 S.W.2d 279, 284 (Tex. Civ. App. -Fort Worth 1946, writ dism'd w.o.j.).

In Texas there is no "common law divorce". *Claveria's Estate* 615 S.W.2d 164. The effect this has is the mere passage of time and ceasing to cohabitante will not serve to terminate the common law marriage once it exists. *Id*; *White*, 907 F.Supp. at 1016. As married persons, the parties may acquire and own community property. *Person v. Person*, 666 S.W.2d 560, 564 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Children born to a common law or informal marriage are legitimate and the parties have a duty to support them. *Boudreaux v. Taylor*, 353 S.W.2d 901, 901-904 (Tex. Civ. App. - Waco 1962, no writ). All the rights, duties and powers enjoyed by parents who were ceremonially married are also enjoyed by parents of common law or informal marriages. Texas Family Code §151.003. Therefore, the children can inherit from and through both parents. *Esparza v. Esparza*, 382 S.W.2d 162, 168 (Tex. Civ. App. — Corpus Christi 1964, rev'd on other grounds), *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975). Common law married couples have the same duty to support one another as ceremonial couples do. Texas Family Code §2.501.

X. DEFENDING A CLAIM OF COMMON LAW MARRIAGE

The petitioner, in an original petition for divorce based on an informal marriage, **must claim in their pleading** that the elements to establish such a marriage exist. Once the petition has been filed and served, the

respondent must either acknowledge the marriage or deny that the marital relationship exists. Even though the burden of proof is squarely on the party seeking to establish the marriage, (*See White at 1016*) once the respondent denies the marriage they are put in the unenviable position of proving a negative. The easiest and most efficient way to do this is to negate one of the elements required to establish an informal marriage. In other words, the respondent should focus their efforts towards proving that at least one of the requisite elements cannot be met.

Set forth below are practical tips on dealing with a groundless original petitions for divorce based on a common law or informal marriage claim:

A. Interim Motions

If possible, the respondent needs to file an answer prior to any hearing on temporary orders denying the existence of a common law marriage. If an answer cannot be filed prior to the hearing on temporary orders, respondent's attorney should raise this issue immediately upon the calling of the case.

Next, the respondent should request that the common law issue be severed from any other issues in the case. A trial court may order separate trials pursuant to Rule 174(b) with regard to any allegation of a common law marriage. *Winfield v. Renfro*, 821 S.W.2d 640, 652 (Tex. App.-Houston [1st Dist.] 1991, writ denied). The "issues concerning the existence of marriage are distinct and separate from the issue of division of property upon divorce once a marriage is established." *Id.*

In the event a hearing on temporary orders is held, the court must find that a marriage exists between the parties in order to grant temporary relief, **except for issues regarding children**. As shown in the demographics above, many of the couples who are living together without the benefit of formal marriage have children together. Thus, even if the court fails to rule on the issue of the marriage or finds that an informal marriage does not exist, the court can enter temporary orders concerning the children, including interim attorney's fees. Texas Family Code §105.001.

The parties are entitled to a jury trial on the common law marriage issue, regardless of whether the court finds that a marriage exists at the temporary order's hearing.

If the deposition of the proponent has been taken, and petitioner presented no reliable evidence that a common law marriage exists, other than their own testimony and their own acts, the next step for respondent's attorney is to file a motion to dismiss and/or a motion for summary judgment. "If the statement is made in a self-serving context, the fact finder may be expected to disbelieve the truth of the statement." *Russell*, 865 S.W.2d at 932.

Although common law marriage claims generally present questions of fact, the facts may be such as to permit a trial court to find that a common law marriage does not exist as a matter of law. *See Claveria's Estate v. Claveria*, 615 S.W.2d 164, 165 (Tex. 1981) which held that the facts did not establish a common law marriage as a matter of law, and further held that the petitioner is required to present "some evidence, more than a scintilla of its existence." *Id at 165*.

Thus, the purpose of respondent's interim motions should be to show the court that the petitioner cannot provide enough evidence to satisfy the standard of *Claveria* and therefore the case should be dismissed.

If your motion to dismiss and/or motion for summary judgment is denied, it is advisable to request a bifurcated trial on the common law marriage issue. A bifurcated trial on the common law marriage claim will allow respondent to have the case dismissed in the event it is determined that no marriage exists.

B. The Answer

Typically, the respondent will be served with an original petition for divorce that includes a request for a temporary hearing. As discussed above, before proceeding with the temporary hearing the respondent should attack the validity of the informal marriage. The respondent will need to file a complete answer setting forth not only a general denial but also all available affirmative defenses. In accordance with Rule 93 of the Texas Rules of Civil Procedure a respondent must verify an answer or pleading that contains an assertion that respondent is not liable in the capacity in which they are being sued. Respondent's pleadings should include a statement that since no marriage exists, all property in the possession of Respondent is Respondent's separate property and Petitioner is entitled to no claim for same.

C. Plea in Abatement

A plea in abatement may be used to challenge the pleadings by alleging facts outside the pleadings that prove the suit cannot go forward. Respondent may file a plea in abatement asking the Court to abate the proceedings until such time as Petitioner can prove a valid ceremonial or informal marriage between the parties. The plea may be filed in the answer or in a separate document. In either case, the specific grounds upon which a suit is improperly brought and a showing of how it should have been brought must be included.

D. Discovery

If you are representing the Respondent, you will need to use every avenue of discovery available to you and your client. Traditionally the petitioner's deposition has provided the most useful information. While it may not result in the evidence, or lack thereof, to support a

summary judgment, it may lead you to the information and documents that will. If time and money permit, the next set of depositions should be anyone the petitioner claims can support her/his claims. You should carefully craft your discovery requests towards the goal of negating each element of a common law marriage.

Respondent should request the court to abate all discovery from petitioner regarding financial information, business records and personal data unless and until the common law marriage claim is sustained. Again, this is assuming there are no issues regarding children. If the parties have minor children together, the court is most likely going to allow full discovery by the petitioner.

E. Finalizing the Case

If no marriage is found at the end of the bifurcated trial, the divorce case will be dismissed. Respondent's attorney should then seek to purge their client of any taint associated with the filing of a divorce case. The order dismissing the case should be carefully drafted to include specific findings that petitioner's common law marriage claims are *res judicata*. In addition, Respondent should ask that the file be sealed and the listing of the dismissal should be expunged from the court's computer. Respondent should file a motion to purge so that the court computer will not reference the expunged case. The motion to purge can take care of any problems which could arise with regard to respondent's future financial dealings. For example, should a financial institution investigate respondent and simply discover the granting of a motion to dismiss on a court computer, that institution might mistakenly conclude that the respondent is married, in spite of the fact that the court file itself would suggest otherwise.

Finally, Respondent's attorney may wish to file a request for declaratory judgment. This would simply state that no marriage ever existed between petitioner and respondent. This act could aid in resolving any problems which could arise in situations in which petitioner was unsuccessful at the temporary hearings stage and then non-suited the case. Under such a scenario, the court's computer records may suggest that respondent remains married, when in fact, there was never a marriage.

XI. PUTATIVE MARRIAGES

A putative marriage is a marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render the marriage unlawful.

See Whaley v. Peat, 377 S.W.2d 855, 857 (Tex. Civ. App. - Houston [1st Dist.] 1964, writ ref'd n.r.e.) Putative marriages are attempted marriages which are contracted in good faith by at least one party, but are void because of an unknown obstruction to the person

claiming to be a spouse. *Whaley v. Peat*, 377 S.W.2d 855, 857 (Tex. Civ. App. - Houston [1st Dist.] 1964, writ ref'd n.r.e.).

A. Purpose of Putative Marriage Doctrine

The "putative marriage doctrine" is used in Texas courts to correct an injustice which might otherwise occur if a marriage is believed to be valid by one or both parties, but is deemed void. As such the doctrine works as a protective mechanism for innocent persons. 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 has all the rights, incidents and privileges pertaining to a legally valid marriage, including the right to an equitable division of all property acquired during the relationship in a suit for divorce or in a suit to declare a marriage void. *Padon v. Padon*, 670 S.W.2d 354, 356 (Tex. App. -San Antonio 1984, no writ). As a putative spouse, a party has the same rights in property acquired during the relationship as a lawful spouse. *Davis v. Davis*, 521 S.W.2d 603,606 (Tex. 1975). The property rights of a putative spouse are limited to the property rights acquired during the putative marriage. A putative spouse has no right to any share of the property which their purported spouse had at the time of the putative marriage, whether the property was separate or community from a first marriage. *See Id.* However, a putative spouse has the right to assert claims of equitable reimbursement. *See Id.*

B. Conditions Giving Rise to a Putative Marriage

The question of whether a putative marriage exists most commonly arises in two circumstances:

- (1) as a result of a divorce proceeding where one spouse challenges the validity of the marriage; and
- (2) as a result of the death of a spouse where a putative spouse and a legal spouse claim survivorship rights in the estate of the decedent.

C. Requirement of Good Faith

The essential element of a putative marriage is "good faith." *Dean v. Goldwire*, 480 S.W.2d 494, 496 (Tex. Civ. App. - Waco 1972, writ ref'd n.r.e.). However, it is important to note that "good faith" is presumed. *See Christoph v. Sims*, 234 S.W.2d 901, 904 (Tex. Civ. App. - Dallas 1950, writ ref'd n.r.e.). Clear and positive evidence is required to overcome the presumption of innocence to support a putative marriage. *Boudreaux v. Taylor*, 353 S.W.2d 901, 903

(Tex. Civ. App. — Waco 1962, no writ). As long as the good faith spouse remains ignorant of the impediment, a putative marriage exists. *Dean v. Goldwire*, 480 S.W.2d 494 (Tex. Civ. App. - Waco 1972, writ ref'd n.r.e.).

Any time there is a claim for a common law marriage, it will be important to also consider the concepts of a putative marriage. An invalid common law or informal marriage, if entered into in good faith by one or both of the parties, may serve as a parties' justification in asserting rights as a putative spouse. *Esparza v. Esparza*, 382 S.W.2d 162, 165-66 (Tex. Civ. App. — Corpus Christi 1964, no writ), overruled on other grounds, *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975). Both an informal marriage and a ceremonial marriage can form the basis of a putative marriage. *Hupp v. Hupp*, 235 S.W.2d 753 (Tex. Civ. App. - Ft. Worth 1950, writ ref'd n.r.e.).

The question of "good faith" is an issue for the fact finder. *White v. State Farm Mut. Auto. Ins. Co.*, 907 F.Supp. 1012, 1016 (E.D. Tex. 1995); *Consolidated Underwriters v. Taylor*, 197 S.W.2d 216,219 (Tex. Civ. App. — Beaumont 1946, writ ref d n.r.e.). The fact finder's determination of whether good faith exists is given great deference by an appellate court. *Id. at 219*.

Instances where the fact finders found "good faith" have included:

- the assurance by the other spouse, who can read a document, that the document grants a divorce from their former husband or wife to the putative spouse. *Dean v. Goldwire*, 480 S.W.2d 494, 497 (Tex. Civ. App. - Waco 1972, writ ref d n.r.e.).
- the belief that the parties are legally able to contract for marriage and solemnization of said marriage has been deemed sufficient. *Mathews v. Mathews*, 292 S.W.2d 662, 665 (Tex. Civ. App. -Galveston 1956, no writ).
- assurances from a spouse that they had obtained a divorce from a prior spouse and that they were free to marry, as well as evidence of a ceremonial marriage and of living together as husband and wife. *Davis v. Davis*, 521 S.W.2d 603, 606 (Tex. 1975).

The following factors may be considered in determining whether a purported spouse to a putative marriage had a good faith belief in the validity of the marriage:

- the purported putative spouse's age, life experiences, level of sophistication;
- the purported putative spouse's proximity from the jurisdiction to the purported divorce;

- the purported putative spouse's citizenship status, nationality of his/her birth place;
- whether the putative spouse is pregnant;
- the purported putative spouse's understanding or familiarity with marriage and divorce requirements and laws;
- whether the putative spouse received assurances for the other spouse concerning their marital status;
- marriage documents;
- testimony; and
- whether the parties involved have been living together as husband and wife.

D. Impediments

Texas case law suggests that the most common impediment is the existence of a prior marriage of one party to a third party. If the parties each know of an impediment to the marriage, and assume marital relations in spite of this knowledge, the relationship is meretricious as to both parties. *Curtin v. State*, 238 S.W.2d 187, 190 (Tex. Crim. App. 1950). If only one of the parties is aware of an impediment that renders the marriage void, then the marriage is only meretricious as to that party. *Dean v. Goldwire*, 480 S.W.2d 494, 496-97 (Tex. Civ. App. - Waco 1972, writ ref d n.r.e.). If the union is meretricious, each party is entitled to the property accumulated during the relationship in proportion to the value that his or her labor contributed to its acquisition. *Id. at 496*.

The rules for the celebration of a putative ceremonial marriage are the same as the rules for the celebration of a valid ceremonial marriage, given the former would be valid but for an impediment existing. If the putative marriage is based upon a ceremonial union, no showing of cohabitation or "holding out" is required. If the putative marriage is a common law or informal marriage, the key requisites of a common law or informal marriage must be satisfied. *Dean*, 480 S.W.2d at 496 (i.e., the parties agreed to be married; after the agreement the parties lived together in Texas as husband and wife; and they have represented to others that they are married).

E. Termination of a Putative Marriage

As with other marriages, a putative marriage terminates by the death of either party to the marriage. *Curtin v. State*, 238 S.W.2d 187,190 (Tex. Crim. App. 1950). A putative marriage also terminates when the legal impediment to the validity of the marriage is removed.

After discovering an impediment to the marriage, the putative spouse must take some action to perfect the marital status in order to retain the status of putative spouse, or gain the status of a lawful spouse. Knowingly living under the same conditions after

discovering that the marriage is invalid terminates the status of putative spouse. *Id.*

In order for a putative marriage to exist under probate law, at least one party must be ignorant of the impediment at the time of the marriage and must remain ignorant of the impediment during the life of the other party. *Consolidated Underwriters v. Taylor*, 197 S.W.2d 216 (Tex. Civ. App. - Beaumont 1946, writ ref'd n.r.e.).

F. Other Rights of a Putative Spouse

(1) Inheritance Rights

The surviving putative spouse cannot inherit the other spouse's separate property unless the will so specifies. *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S.W. 154 (Tex. Civ. App. 1892). When a putative spouse's partner dies intestate and the decedent has a surviving lawful spouse, the putative spouse is only entitled to a one-half interest in the marital property acquired after the inception of the putative marriage constituting the decedent's estate. *Davis v. Davis*, 521 S.W.2d 603, 606-607 (Tex. 1975). The surviving putative spouse's right to the estate of an intestate spouse dates only from the time of the ceremony if the putative marriage is based on a ceremonial marriage, or from the time of the agreement to be married, if the putative marriage is based on a common law or informal marriage. *Parker v. Parker*, 222 F 186 (5th Cir. 1915) cert, denied, 239 US 643.

(2) Homestead Rights

As with all citizens of the State of Texas, a putative spouse having an interest in property is entitled to claim homestead rights as a single adult person. TEX. CONST, art. XVI; TEX. PROP. CODE § 41.002.

XII. CONCLUSION

As shown in the Demographics section, the number of unmarried partner households has increased tremendously in the last 30 years. Twenty one percent (21%) of those unmarried partners have children together. When you add these two facts together with the fact that forty percent (40%) of those unmarried partners break up within 5 years, you can easily see why the claims of an informal or common law marriage have increased as well. Litigation involving informal, common law, and putative marriages encompasses a wide range of factors. Family law attorneys will continue to be called upon to assist those partners in determining their rights and obligations. The interaction between the legal and factual criteria of informal, common law, and putative marriages make this particular cause of action both exciting and challenging.

