

REPORT AND RECOMMENDATIONS OF THE COMMON LAW MARRIAGE TASK FORCE

December, 2007

I. INTRODUCTION AND BACKGROUND

Elizabeth Starrs, while President of the Colorado Bar Association (CBA), 2006-2007, formed a Task Force on Common Law Marriage ("Task Force"). The Task Force was charged with examining the issue of common law marriage as it intersects with many and varied interests in Colorado. The Task Force was asked to make recommendations about whether or not the CBA should take an official position on any proposed legislation, whether the Sections of the CBA should be allowed to lobby for a position on behalf of the individual Section, or whether any other leadership role should be undertaken that may be appropriate for the CBA.

II. TASK FORCE PROCESS

A. Make-Up of Task Force

The Task Force was composed of a broad base of interests, including attorneys specializing in and representing colleagues who specialize in numerous legal areas including bankruptcy, family law, real estate, trust and estates, worker's compensation, immigration, and legal services for the indigent. The Task Force also included representatives from the Office of the State Court Administrator, the Hispanic Bar Association and the Sam Cary Bar Association.

B. Information Gathering Process

The Task Force determined that it was important to research and obtain as much information as possible regarding the benefits, problems, disadvantages, cultural issues, and ramifications of any change to the current status of common law marriage. To that end, members gathered pertinent information such as research papers and articles, including

information from the United Kingdom; relevant case law from Colorado and other states; an informal survey of judicial officers through the Office of the State Court Administrator; individual judicial comments; individual practitioner comments; informal surveys taken by the members of the Task Force; and discussion with legal service counterparts in Idaho, Georgia, and Pennsylvania, where common law marriage has most recently been abolished. Through the CBA, a four-question on-line survey was taken of the Family Law Section and the Trusts and Estates Section. Task Force Members reported positions as representatives of their respective practice specialties and organizations. Task Force Members also presented written and oral pros and cons for the retention or abolition of common law marriage.

C. Definition of Common Law Marriage

A common law marriage is established in Colorado by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. The very nature of a common law marital relationship makes it likely that in many cases express agreements to marry will not exist. The determination of a common law marriage is a matter of intent of the parties and this is a factual question for the courts. The agreement of the parties may only be tacitly expressed and the difficulty of proof is readily apparent. There are opportunities for confusion, corruption and fraud. In addition, there appear to be many misconceptions by the public about the requirements to create a valid common law marriage. Some people mistakenly believe they can claim to be married for some purposes (e.g. health insurance benefits) but deny being married for others (e.g. tax returns). Often people believe they are common law married after they have lived together for a certain number of years. Many do not understand that if they are common law married they must obtain a divorce if the marital relationship is to end.

III. MAJOR ISSUES AND CONCERNS

The status of being married results in numerous state and federal benefits, rights, and responsibilities. We set forth below a brief summary of some of the major issues and concerns brought to light during the Task Force process.

A. General Marriage Issues

The statutory requirements for a ceremonial marriage are relatively simple and inexpensive. A man and a woman may marry each other without a minister or authorized official. The key is the registration process with a county clerk. As a result, some believe that a person should be required to adhere to the requirements of registering a marriage to be assured he or she will be entitled to the many benefits of a marriage. If people knew that common law marriage did not exist, they would know without a doubt whether or not they were married. That would avoid mistaken and potentially detrimental reliance on a belief that one is married when such is not, in fact, true.

There are advantages and disadvantages to a common law marriage depending upon the facts of each situation and whether a person will benefit or not from being married. A common law married couple and their children have the same rights and benefits of a married couple.

It does not appear that the courts are overly burdened with determinations of whether a common law marriage exists. Court dockets alone should not provide a basis for abolishing common law marriage. It can be expensive for parties to litigate a determination of a common law marriage, and that may hinder many from appropriately challenging or pursuing such a claim. Common law marriage is often a mechanism for avoiding significant inequities and helps prevent grave injustices if a ceremonial marriage does not exist.

B. Bankruptcy

Common law marriage does not appear to have a significant impact in the bankruptcy area. If a party is married there is a joint fee for filing, which is currently \$300. If there is no marriage, each would individually pay a fee of \$300.

C. Family Law Section

The CBA emailed a survey to all members of the Family Law Section. There are approximately 850 members of the Section and 28% responded. Of the responses, 44% responded that common law marriage should be abolished and 49% responded it should not be abolished. Of those members supporting the continuation of common law marriage, 24% responded it should not be further defined by statute, and 39% felt it should be more clearly defined by statute. Seventy-two percent (72%)

responded that the CBA should take a position on any legislation regarding common law marriage that is proposed.

D. Hispanic Bar Association

The Colorado Hispanic Bar Association “(CHBA)” opposes the abolition of common law marriage. Colorado has historically been a cultural melting pot. Different cultures recognize and value marriage in different ways. A 1965 study found that Mexican-American mothers born in the United States (“US”) were the largest group describing themselves as being common law married. The abolition of common law marriage is not necessary. In the diverse communities of Colorado, its impact will be negative due to the issues of poverty, cultural values, elderly women in particular, and immigrant and refugee family concerns. The CHBA believes there is a significant need for academic-based studies to determine the impact of the abolition of common law marriage.

E. Immigration

The abolition of common law marriage is particularly detrimental to immigrants who have obtained legal presence in the US through common law marriage when it was a proper basis for legal immigration status. Certain immigration benefits are available to persons who are married to United States Citizens (“USC”) or Lawful Permanent Residents (“LPR”). The primary benefit of an LPR is the status of a “green card.” An LPR most often may work in the US, travel in and out of the US, and may when approved, petition for US citizenship. Immigration benefits to children may depend on, or be affected by, whether the child’s parents are married, if the child’s USC parent is the father. Immigration through a father could be precluded if the parents were not married and the child had not been legitimated or otherwise met the definition of a child. A child of a USC mother who is born out of wedlock does not suffer the same treatment under immigration laws. The abolition of common law marriage substantially harms legal immigrants who may no longer be able to establish legal status or obtain benefits through proof of marriage. This is true in view of the increasing refusal by county court clerks to issue marriage licenses to undocumented immigrants, which appears to have no basis in the law.

Immigrant women, who have been abused and are able to allege a common law marriage, may file a self-petition for residency under the federal Violence Against Women Act. This non-citizen applicant process not only benefits the woman but also her children, because they do not need to rely upon the abusive spouse for their legal status.

It should be noted that immigration authorities require rigorous proof of common law marriage before awarding a benefit on that basis. When abolition is weighed against the potential harm to immigrants who are legally present in the US, or who may gain legal status through marriage, but may lose or be denied status because of failure to establish a common law marriage, common law marriage should be preserved.

F. Legal Services

Family law practitioners and Executive Directors in legal services offices in Idaho, Georgia and Pennsylvania were contacted, as they practice in the three most recent states to abolish common law marriage. In summary, the information suggests there may not be as many problems due to the abolition of common law marriage as anticipated. Idaho is a single statewide program and the contacts in that State were not able to say they had experienced major problems after the abolition of common law marriage. Georgia has two programs, one services the Atlanta metropolitan area and the other services the remainder of about 200 counties in the state. The contacts in Georgia did not report major problems, although they had expected more issues. Pennsylvania has eight programs. Although there are occasional issues, the contacts have not seen major problems after common law marriage was abolished.

G. Real Estate

A person's marital status does not seem to have a major impact in the real estate area, as ownership issues are determined by title rather than marital status.

H. Sam Cary Bar Association

The Sam Cary Bar Association believes all socio-economic levels would be harmed by the abolition of common law marriage, especially citizens with the fewest amount of resources. Common law marriage protects, encourages and promotes marriage and family as a social institution. African-Americans have an historical distrust of formal institutions and to overcome 300 years of prejudice and bias is a huge task. The Sam Cary Bar Association is concerned that any attempt to abolish common law marriage without an appropriate study of its full impact, or without significant input from the communities most likely to be adversely affected, would create potential long term social and economic problems for those communities. If common law marriage is abolished, women and men who are in a relationship with the intention of being married would

have no ability to have their matter heard by the courts. The result of denying access to the courts would be a bright line, disenfranchising individuals who can afford it least. Common law marriage has allowed equitable receipt of state benefits, social security benefits, veteran's benefits, and workers' compensation benefits for spouses and their children. Abolition would have a negative impact on such families and children already at risk with the loss of a wage earner.

I. Trusts and Estates

The determination of whether a common law marriage exists has significant implications for the common law spouse under the Colorado Probate Code. There are numerous benefits and rights granted to a common law spouse under the Probate Code and Uniform Anatomical Gift Act, including but not limited to the spousal right to intestate share, right to elective share as spouse, exempt property allowance, family allowance, priority for appointment as personal representative, guardian or conservator, priority for right to control disposition of last remains or ceremonial arrangements, and priority to make anatomical gifts. There are also significant implications for federal estate and gift tax purposes and whether a marital deduction is available for lifetime or death transfers to the common law spouse.

The same CBA survey emailed to the Family Law Section was emailed to all members of the Trust and Estate Section. There are approximately 1,000 members, and there was a 21% response rate. Of the 21% who responded, 39% responded that common law marriage should not be abolished and 47% responded it should be abolished. If common law marriage is continued, 36% felt it should be further defined by statute. Fifty-seven percent (57%) responded that the CBA should take an official position on any proposed legislation regarding common law marriage.

J. Workers' Compensation

The Executive Board of the Workers' Compensation Section agreed to take no position on the continuance of common law marriage in Colorado. The existence of common law marriage allows for unpredictable litigation options, in advancing or defending claims for dependent benefits, which some members believe justifies the preservation of common law marriage.

K. The Diversity in the Legal Profession Committee.

The Diversity in the Legal Profession Committee of the Colorado and Denver Bar Associations ("DILP") is concerned about compelling anecdotal evidence suggesting that the abolition of common law marriage may create undue hardship for members of certain minority communities, particularly female members. Therefore, the DILP recommends that the Colorado Bar Association adopt a position opposing any bill proposing to abolish common law marriage in Colorado unless and until a thorough study is undertaken demonstrating that members of such minority communities will not suffer an undue hardship.

IV. RECOMMENDATIONS AND CONCLUSION

Based on its thorough input from various constituencies and practitioners, and its thorough discussion and consideration, the Task Force on Common Law Marriage recommends that the Colorado Bar Association take a position to retain common law marriage in Colorado (if legislation should be introduced).

In conclusion, there are significant advantages and disadvantages of either retaining or abolishing common law marriage and likely always will be. Injustices could occur either way. In view of the cultural aspects and concerns, and the denial of potential benefits for a common law married spouse, the Task Force concludes that common law marriage should be retained. Although individual cases are very fact specific, our court system is charged with and capable of determining which claims are meritorious and which are not.

Thank you for the opportunity to be of service.



Denise K. Mills
Chairperson, Common Law Marriage Task Force