

COMMON LAW MARRIAGE IN PROBATE



Herb E. Tucker, Esq.
Spencer J. Crona, Esq.
360 South Monroe Street, Suite 400
Denver, CO 80209
Telephone: (303) 322-8943
Facsimile: (303) 320-7501
Herb's E-Mail Address: htucker@wadeash.com
Spencer's E-Mail Address: scrona@wadeash.com

I. INTRODUCTION

United States Supreme Court first recognized common law marriage in 1877. Colorado has recognized common law marriage since 1870. To date, only ten states recognize common law marriage. The states that recognize common law marriage are Alabama, Colorado, Iowa, Kansas, Montana Oklahoma, Rhode Island, South Carolina, Texas, Utah and the District of Columbia. Essentially, in a common law marriage, two people create a valid marital relationship without the benefit of a legal marriage ceremony performed in accordance to statutory requirements. In order to prove the existence of common law marriage in Colorado, a petitioner must prove the following: (1) mutual consent or agreement of the parties to be husband and wife; and (2) mutual assumption of a marital relationship.

- *The Issue of Whether or Not to Abolish the Concept of Common Law Marriage in Colorado.*

The Colorado Bar Association formed the Task Force on Common Law Marriage, which authored a report in December 2007, a copy of which is attached. The report summarizes the various pros and cons of this issue and recommends the retention of common law marriage in Colorado.

- Recent Legislation C.R.S. § 14-2-109.5 – Codification by Colorado Legislature of Common Law Marriage.

C.R.S. §14-2-109.5 provides:

Common law marriage - age restrictions. (1) A common law marriage entered into on or after September 1, 2006, shall not be recognized as a valid marriage in this state unless, at the time the common law marriage is entered into:

- (a) Each party is eighteen years of age or older; and
- (b) The marriage is not prohibited, as provided in section 14-2-110.

(2) Notwithstanding the provisions of section 14-2-112, a common law marriage contracted within or outside this state on or after September 1, 2006, that does not satisfy the requirements specified in subsection (1) of this section shall not be recognized as valid in this state.

- Full Faith and Credit to Laws in Sister States.

A duly entered determination of a valid common-law marriage, in a state where such marriage exists, must be enforced in other states. Pursuant to the United States Constitution, Art IV, § 1, the final judgments and public acts of one state must be given full faith and credit in every other state.

- No Common Law Divorce.

While a couple may enter into a marriage by common law, there is only one form of divorce: Formal dissolution pursuant to the Colorado Uniform Dissolution of Marriage Act, C.R.S. §14-10-101, *et seq.* (“CUDMA”).

II. ESTATE PLANNER ASSESSMENT OF COMMON LAW MARRIAGE AND ADVICE TO CLIENTS, INCLUDING TAX ISSUES AND MARITAL DEDUCTION

- *Common Law Marriage Status Can Result in a Marital Deduction and Tax Savings.*

For estate planning and administration, the marital deduction is a helpful tool in reducing the amount of estate tax upon the death of the first spouse. The marital deduction is available to married couples and common law married couples however the complication lies in proving the common law marriage in order to use the marital deduction. *Jones v. U.S.*, 89-2 USTC Para. 13,826 (1989). (See attached Estate Planner's Checklist for Common Law Marriage.)

III. COHABITATION AGREEMENTS

A cohabitation agreement is a contract between two people wanting to live together but do not wish to be married or common law married. The agreement sets out each party's rights and obligations under the contract and sets guidelines for potential creditor's claims and changes in value to property. A cohabitation agreement, like any other contract, must have certain attributes to be valid. The agreement must be made between two consenting adults, the parties must have the requisite mental capacity, and the agreement must be supported by consideration.

Craig Fleishman's article, "*Cohabitation Agreements*," Trial Talk, published by the Colorado Trial Lawyer Association, (April/May 2005), does an excellent job of summarizing cohabitation agreements and discussing the numerous pitfalls people run into with and without cohabitation agreements.

IV. REMEDIES FOR COHABITANTS INCLUDING IMPLIED OR QUASI CONTRACT

Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) a palimony case Michelle Triola alleged an oral contract and sought remedies in terms of property division and alimony in consideration for terminating her career and acting as Lee Marvin's companion, housekeeper, cook. The California Supreme Court determined there was good public policy to allow for recovery under a theory of contract or quasi-contract so long as the relationship was not based on sexual services.

In *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000), the Colorado Supreme Court held that the cohabitation of the parties did not bar claims of quasi contract or unjust enrichment by one party against the other.

V. LITIGATING COMMON LAW MARRIAGE CASES

- *Putative Spouse's Priority to be Appointed as Personal Representative is Dependent upon His or Her Success on Proving Common Law Spouse.*

Often times common law marriage litigation is initiated through the putative spouse's filing for his/her informal appointment as personal representative, alleging priority to be appointed as surviving spouse of the decedent. The central argument will be that the putative spouse's standing to assert his/her priority as personal representative as well as seek any other statutory entitlements is solely premised upon his/her unproven claim that he/she is the common law spouse of the decedent.

- *Demand for Bond, Request for Inventory, Accounting and Order Restraining the Acting Personal Representative.*
- *Petition for Removal of Putative Spouse as Personal Representative and Appointment of Special Administrator.*

Colorado courts have consistently held that proof of marital status is a condition precedent to receipt of a widow's allowance or other statutory entitlements. *Zackheim v. Zackheim*, 75 Colo. 161, 225 P. 268 (1924); *Brimble v. Sickler*, 22 Colo. 494, 266 P. 497 (Colo. 1928), *Deebler v. Alerton*, 58 Colo. 166, 143 P. 1096 (Colo. 1914).

VI. COLORADO COMMON LAW MARRIAGE CASES

- *Elements of Common Law Marriage; Two Step Test.*

The law on common law marriage is well settled in Colorado. In order to prove the existence of a common law marriage, a petitioner must prove the following:

1. Mutual consent or agreement of the parties to be husband and wife.
 2. Mutual assumption of marital relationship.
- *"Marriage is not a Buffet Where Parties May Pick and Choose when They Do and Do Not Want to be Married. Marriage is a Fixed Menu. You Take the Good with the Bad."* (Judge C. Jean Stewart, Denver Probate Court)

In the Matter of the Estate of Goffman, Case No. 98 PR 801 (1999).

- *Tax Returns are Critical to Proving Common Law Marriage.*

The filing of joint tax returns are necessary to prove common law marriage. There is no Colorado case law which supports a common law marriage when the parties filed separate tax returns. This author has found only five reported cases in the United States (three from Montana, one in Georgia and one in Alabama) which have held to the contrary: *Estate of Murnion*, 212 Mont. 107, 686 P.2d 893 (Mont. 1984); *Matter of the Estate of Alcorn*, 263 Mont. 357, 868 P.2d 631 (1994); and *Matter of the Estate of Hunsaker*, 291 Mont. 412, 968 P.2d 281 (1998); and *Beals vs. Beals*, 203 Ga. App. 81 416 SE.2d 301 (1992) and *Krug v. Krug*; 292 Ala. 498, 296 So.2d 715 (1974). However, in all four of the above referenced cases there was persuasive documentary evidence and testimony in support of a common law marriage.

(See Denver Probate Court Website at <http://www.courts.state.co.us/district/02nd/probate> citing *In re William A. Goffman*, Denver Probate Court, 98 PR 801 (1999); *In re Yoshimura*, Denver Probate Court, 96 PR 1216 (1997) and *In re Robinson*, Denver Probate Court, 94 PR 2106 (1995). See also article by Amy K. Rosenberg, “*The Common Law Spouse in Colorado Estate Administration*,” Colorado Lawyer, Vol. 35, No. 9, P. 89).

VII. EVIDENTIARY ISSUES AT TRIAL

- *An Understanding of the Application of the Colorado Dead Man’s Statute is Essential Before Trying a Common Law Marriage Case.*

Common law marriage cases most often involve testimony from the parties as well as numerous lay witnesses. The Colorado Deadman’s Statute must be applied to each witness.

- Colorado Dead Man’s Statute § 13-90-102 C.R.S.

- *The Dead Man’s Statute Applies to the Putative Spouse’s Claim for the Elective Share.*

The Colorado Court of Appeals held *In re Estate of Crenshaw*, 100 P.3d 568 (Colo. App. 2004) that the Colorado Dead Man’s Statute applied to a putative spouse’s claim for elective share.

- *At Trial, Put the Documents in Evidence First. This May Open the Door to Incompetent Witnesses’ Testimony.*

- Deposition of Putative Spouse

In the opinion of this author, the putative's spouse's deposition should be taken as soon as possible. It may be strategic to take the putative spouse's deposition prior to receipt of written discovery in order to lock in his/her testimony.

VIII. NON-TRADITIONAL CEREMONIES IN SUPPORT OF MARITAL CLAIMS

Some marital litigants have been engaged in marital, or even "quasi-marital," relationships based on unique or non-traditional cultural or religious practices or ceremonies, or portions of them that have not necessarily been formally recognized as ceremonial marriage. In *Combs v. Tibbitts*, 148 P.3d 430 (Colo.App. 2006), the parties' alleged "religious" or "celestial" marriage ultimately was deemed void by the Court, but only because "both parties knew that plaintiff was legally married to another person throughout the period of his cohabitation with defendant."

IX. CONCLUSION

As a matter of law, marriage clearly comprises much more than ceremonial and "statutory" marriage, marital agreements and dissolution. Marital litigation ranges from claims of common-law marriage in various contexts, including public benefits, priority for legal or representational authority and decedent's estates; to assertions of putative marriage based on belief, faith and culture; to quasi-contracts involving assets and property, where characteristics of the marital relation may form an aspect of the consideration. In view of the complexity of these relationships and their constituent aspects, especially where litigation arises, it is difficult to imagine that any single statutory amendment to the law of marriage will simplify or homogenize the case-by-case analysis. Particularly in view of the creative assertion of competing contractual claims within the relationship of a couple in litigation with one another, it is even more difficult to project a realistic link between any single statutory enactment and a demonstrable diminishment of the docket in either the domestic relations or probate courts. As it coincidentally is always the case with the viability of any marital relationship, time will indeed tell.

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.

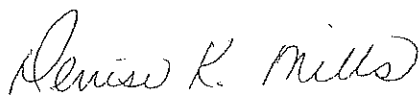
The Diversity in the Legal Profession Committee of the Colorado and Denver Bar Associations ("DILP") is concerned about compelling anecdotal evidence suggesting that the abolition of common law marriage may create undue hardship for members of certain minority communities, particularly female members. 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

ESTATE PLANNER'S CHECK LIST FOR COMMON LAW MARRIAGE

A preponderance of evidence is required to prove common-law marriage

i. Types of evidence to consider:

1. Joint tax returns (filing married)
 - a. Direct statement of marriage
 - b. Signature block has a perjury warning
2. Joint bank or investment accounts
 - a. How account titled
 - b. Signature cards or other authorization forms
3. Joint credit cards
 - a. Contract/Application
 - b. Name listed on card
 - c. Authorized users forms list relationship to owner
4. Joint debts
 - a. Mortgages
 - i. Home ownership and living together
 - ii. Refinancing and Closing documents that state marital status
 - b. Contracts that state marital status
 - i. Cell phone account
 - ii. Utility or home phone applications and invoices
 - iii. Automobile Lease or purchase agreements
 - iv. Real Estate Contracts
 1. Listing agreements
 2. Offer or sale agreement
 - v. Home contracts
 1. Cleaning and maintenance
 2. Yard service
 - c. Loans
 - i. Contract/Application
 - ii. Other documents that state marital status or list dependents
5. Children who carry the surname of the man
 - a. Birth certificate, adoption or name change
 - b. Statement of witnesses
 - c. Cards and letters referring to relationship ("dear Dad")
 - d. School emergency contact information
6. Although there is no set period of time, duration may be factually significant
7. Use of surname by wife
 - a. Not as compelling, but helpful
 - b. Use of Mr./Mrs. Or Husband/Wife

8. Insurance

- a. Contracts for insurance
 - i. Many statements of marital status
 - ii. Emergency contact person listed
 - iii. Who is covered by insurance
- b. Forms submitted to Employer

9. Types of Insurance

- a. Health Insurance
- b. Life insurance
- c. Car insurance
- d. Homeowners Insurance

10. Medical records that name spouse

- a. Emergency information forms
- b. Intake information sheets
- c. Medical records, Doctor notes

11. Other documents

- a. Wills or Testamentary instruments
- b. Powers of Attorney
- c. Trusts
- d. Dissolution Decrees
- e. Letters or Correspondences
- f. Police reports
- g. Public records
- h. Titles and records of property ownership

Witness Statements

- a. Doctor or medical providers
- b. Family Attorney
- c. Real Estate agent
- d. Accountant/Tax preparer
- e. Employer
- f. Personal Banker
- g. Teacher or contact person at the child's school
- h. Neighbors
- i. Family and Friends