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Clarice M. David

COMMON-LAW MARRIAGE IN TEXAS

by Clarice M. Davis

Texas recognizes the relationship of husband and wife and the legal incidents arising from that relationship when the parties either fulfill the statutory requisites for marriage or enter into a "common-law" marriage. The informal, or common-law, marriage comes into existence when two people, competent to marry, agree to be husband and wife, live together, and hold themselves out to the public as being married. The legal status created is identical to that created by a ceremonial marriage—the parties and their children are entitled to the rights and privileges and bound by the duties and obligations implicit in a ceremonial marriage.[1] The essential distinction between ceremonial and non-ceremonial marriages is that the solemnities of the ceremony eliminate the necessity of living together and holding out to the public.

Recently, however, the suggestion has been made that Texas follow the rule of most states by statutorily abolishing common-law marriage.[2] This Comment will investigate the institution of common-law marriage, its historical origins and legal requirements, the advantages and disadvantages of abolishing it, and alternative devices which could be substituted.

I. Historical Origins

The term "common-law marriage" immediately suggests an origin with roots deep in Anglo-American law. However, this relationship was not recognized for all purposes as a valid marriage by medieval English common law.[3] Despite the origin suggested by its name, the institution in the United States appears to have originated in the primitive conditions of colonial America.[4] The presence of relatively few clerics or civil officials necessitated a substitute for ceremonial marriage, and the need expanded as the settlers moved into the sparsely populated regions of the West.[5] The result was common-law marriage.

As local governmental units were created, local officials were authorized to perform marriages and the necessity for informal methods decreased. At the same time, the state began asserting greater control over ceremonial marriages. Statutes prescribing the formalities necessary for a valid marriage flourished: licensing requirements were added, health examinations became necessary, and recordation statutes became common. Nevertheless, the informal "common-law" relationship continued to be recog-

[1] Baker v. Mays, 199 S.W.2d 279 (Tex. Civ. App. 1946) *error denied*. *See* notes 75-88 *infra* and accompanying text.

[2] Grand Jury Ass'n of Harris County, For the Abolition of Common-Law Marriage in Texas (1965), and articles cited therein.

[3] F. Keezer, The Law of Marriage and Divorce 51 (3d ed. J. Morland 1923); J. Long, Domestic Relations 85-87 (3d ed. 1923); F. Pollock & F. Maitland, History of English Law 364-99 (2d ed. 1898). *See* Norvell, *Lewis v. Ames—An Ancient Cause Revisited*, 13 Sw. L.J. 301 (1959); Jackson, Book Review, 79 L.Q. Rev. 459 (1963).

[4] J. Long, *supra* note 3, at 90.

[5] Middlebrook v. Wideman, 203 S.W.2d 686, 687 (Tex. Civ. App. 1947); McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934).

nized due to judicial conclusions that the statutory requirements were directory rather than mandatory.[6] The existence of common-law marriage has been the subject of severe criticism,[7] and a majority of the states have abolished the institution entirely. In the last decade four more states[8] joined those which had already disposed of it, leaving fourteen states and the District of Columbia still recognizing common-law marriage.[9]

II. COMMON-LAW MARRIAGE IN TEXAS

The elements required in Texas before an informal relationship is considered a marriage are (1) agreement of the parties to be husband and wife; (2) cohabitation as husband and wife; and (3) public holding out by the parties that they are husband and wife.[10] Unlike some states,[11] Texas requires that each of these elements be found before the relationship is recognized and each must occur while neither party is incapacitated to marry.[12]

Agreement. An agreement between the parties to be husband and wife is essential to the creation of a common-law marriage. The trier of fact must specifically find that such an agreement existed,[13] that the parties

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[6] Williams v. White, 263 S.W.2d 666 (Tex. Civ. App. 1953) *error ref. n.r.e.*; J. LONG, *supra* note 2, at 94.

[7] Middlebrook v. Wideman, 203 S.W.2d 686 (Tex. Civ. App. 1947); McChesney v. Johnson, 79 S.W.2d 658 (Tex. Civ. App. 1934); F. KEEZER, *supra* note 2, at 59; C. VERNIER, AMERICAN FAMILY LAW 108 (1931).

[8] Indiana abolished common-law marriage in 1957, IND. ANN. STAT. § 44-11 (Supp. 1967); Michigan in 1957, MICH. STAT. ANN. § 25.2 (1957); Mississippi in 1956, MISS. CODE ANN. § 465.5 (1957); and South Dakota in 1959, S.D. CODE § 14.0101 (Supp. 1960).

[9] The states still recognizing common-law marriage are: Alabama, Huffmaster v. Huffmaster, 188 So. 2d 552 (Ala. 1966); Colorado, Graham v. Graham, 274 P.2d 605 (Colo. 1954); Florida, *In re* Estate of Alcala, 188 So. 2d 903 (Fla. Dist. Ct. App. 1966); Georgia, Hayes v. Hay, 92 Ga. App. 88, 88 S.E.2d 306 (1955); Idaho, Albina Engine & Mach. Works v. O'Leary, 328 F.2d 877 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964); Iowa, Coleman v. Graves, 122 N.W.2d 853 (Iowa 1963); Kansas, Smith v. Smith, 161 Kan. 1, 165 P.2d 593 (1946); Montana, Miller v. Sutherland, 131 Mont. 175, 309 P.2d 322 (1957); Ohio, *In re* Estate of Madia, 6 Ohio Misc. 109, 215 N.E.2d 72 (P. Ct. 1966); Oklahoma, Daniels v. Mohon, 350 P.2d 932 (Okla. 1960); Pennsylvania, Sinclair v. Sinclair, 197 Pa. Super. 59, 176 A.2d 123 (1961); Rhode Island, Scalzi v. Folsom, 156 F. Supp. 841 (D.R.I. 1957); South Carolina, Johnson v. Johnson, 235 S.C. 542, 112 S.E.2d 647 (1960); Texas, Humphreys v. Humphreys, 364 S.W.2d 177 (Tex. 1963); District of Columbia, Metropolitan Life Ins. Co. v. Chase, 294 F.2d 500 (3d Cir. 1961).

[10] Humphreys v. Humphreys, 364 S.W.2d 177, 178 (Tex. 1963); Shelton v. Belknap, 155 Tex. 37, 282 S.W.2d 682 (1955); Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n App. 1929).

[11] Ohio requires only the agreement but it may be proved by cohabitation and reputation. *In re* Estate of Madia, 6 Ohio Misc. 109, 215 N.E.2d 72 (P. Ct. 1966). Georgia requires the agreement and cohabitation but not public holding out. Hayes v. Hay, 92 Ga. App. 88, 88 S.E.2d 306 (1955). Florida apparently has two requirements: (1) capacity and (2) agreement. *In re* Estate of Alcala, 188 So. 2d 903 (Fla. Dist. Ct. App. 1966); *cf.* Fincher v. Fincher, 55 So. 2d 800 (Fla. 1952).

[12] Humphreys v. Humphreys, 364 S.W.2d 177 (Tex. 1963); *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960); Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913); Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n App. 1929); Middlebrook v. Wideman, 203 S.W.2d 686 (Tex. Civ. App. 1947); Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*

The issue submitted to the jury is whether or not a common-law marriage existed. 9 R. STAYTON, TEXAS FORMS § 5116, at 577 (1957). A charge defining a common-law marriage accompanies the question. *See* Schwingle v. Keifer, 105 Tex. 609, 153 S.W. 1132 (1913) (charge approved in part); Berger v. Kirby, 105 Tex. 611, 153 S.W. 1130 (1913) (charge approved in part); Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1125 (1913) (approved charge); Associated Indem. Corp. v. Billberg, 172 S.W.2d 157 (Tex. Civ. App. 1943) (disapproved charge).

[13] Associated Indem. Corp. v. Billberg, 172 S.W.2d 157 (Tex. Civ. App. 1943).

intended that their agreement create a marriage, and that it was to be an immediate and permanent relationship.[14] Although the finding of an agreement is required, the cases illustrate that as a practical matter the parties to a relationship as informal as common-law marriage rarely verbalize an agreement, much less realize its legal permanence.[15] Moreover, if the agreement is made at all, it probably is known only to those directly concerned. Hence, satisfactory direct proof of its existence is often difficult to obtain. Case law demonstrates the efforts of the courts to adapt the legal requirements to the actual situation.

For the most part this judicial struggle to apply the existing requirements compassionately has centered around the use of inferred and tacit agreements. Thus, the courts apply the traditional requirement, and demand that the trier of fact find an agreement between the parties. But, the trier of fact is allowed to find a tacit or inferred agreement from other evidence not directly relating to its existence. Specifically, actions of the parties constituting the other two requirements for a common-law marriage (*i.e.*, cohabitation, and holding out to the public) create an inference from which the trier of fact may find that the parties made an actual agreement.[16]

In earlier cases the intermediate appellate courts were reluctant to allow the jury to infer the agreement if the facts indicated that its existence was improbable. In such situations the courts customarily held that as a matter of law no common-law marriage existed and thereby prevented the jury from inferring the agreement and finding a common-law marriage.[17]

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[14] Schwingle v. Keifer, 105 Tex. 609, 153 S.W. 1132 (1913); McChesney v. Johnson, 79 S.W.2d 658 (Tex. Civ. App. 1934). However, the desire or intention of one or both parties to have a subsequent ceremonial marriage is not necessarily inconsistent with an intent to create a presently valid marriage by the agreement. The parties must intend, however, that their agreement creates the marriage and not the anticipated ceremony. McIlveen v. McIlveen, 332 S.W.2d 113 (Tex. Civ. App. 1960); Butler v. Butler, 296 S.W.2d 635 (Tex. Civ. App. 1956); Trammell v. Trammell, 196 S.W.2d 209 (Tex. Civ. App. 1946).

[15] *See, e.g.*, Shelton v. Belknap, 155 Tex. 37, 282 S.W.2d 682 (1955).

[16] Humphreys v. Humphreys, 364 S.W.2d 177 (Tex. 1963); Shelton v. Belknap, 155 Tex. 37, 282 S.W. 682 (1955); Consolidated Underwriters v. Kelly, 15 S.W.2d 299 (Tex. Comm'n App. 1929).

[17] In United States Fid. & Guar. Co. v. Dowdle, 269 S.W. 119 (Tex. Civ. App. 1924) the jury found that the parties entered a common-law marriage. The facts showed that the parties began cohabiting and holding themselves out as husband and wife while the husband was still married to another woman. His first wife divorced him, but neither he nor appellee, his asserted common-law wife, knew of the divorce. The court of civil appeals reversed holding that as a matter of law no common-law marriage existed. They reasoned that:

> Without knowledge of the removal of the impediment, they could not have intended a second marriage or have attempted to enter into another marriage. Notwithstanding the policy of the law to indulge any reasonable presumption in favor of innocence and against immorality and guilt, the law has never gone so far as to force the status of marriage upon citizens contrary to the facts revealing the true relation occupied by the parties. Courts cannot marry parties by mere presumption without their consent.

Id. at 124. The commission of appeals reversed the court of civil appeals [255 S.W. 388 (Tex. Comm'n App. 1923)] on other grounds but indicated that on retrial the issue of the existence of a common-law marriage should go to the jury.

In other cases the courts used even stronger language indicating that under some circumstances a presumption would arise that there was no agreement between the parties. For example, in DeCuneo v. DeCuneo, 59 S.W. 284 (Tex. Civ. App. 1900), the court remarked that a relationship illicit in its origin will be presumed to continue illegally until some evidence shows that a change was in-

In 1929 the commission of appeals in *Consolidated Underwriters v. Kelly*[18] initiated a more liberal use of the inference. The evidence demonstrated that Kelly and the appellee lived together and then separated. Thinking that Kelly was dead the appellee ceremonially married George Brown. She subsequently learned that Kelly was alive and resumed her relationship with him. They cohabited and held themselves out as husband and wife, but she never obtained a divorce from Brown. Brown died and three months later Kelly died. In an action to recover workmen's compensation benefits as the surviving spouse of Kelly, the appellee claimed that they were married at common law. The evidence showed that neither she nor Kelly knew of Brown's death, although they continued to cohabit and hold themselves out as husband and wife after that time. The trial court instructed a verdict that there was no common-law marriage. Due to the fact that neither party was aware of Brown's death they had no reason to agree to be married after the removal of the impediment. Under the rationale of the older cases this would have been sufficient to withdraw the case from the jury and direct a verdict.[19] The commission of appeals, however, refused to allow the directed verdict to stand and remanded the case, reasoning:

> It frequently happens, especially in common-law marriages, that the marriage which, of course, includes the agreement to marry, is proved by circumstances, technically known as cohabitation. Proof that a couple live together under the same name introducing each other as husband and wife, respectively, recognizing their children, and the many other respects tending to show their marital status is sufficient to prove a marriage. It is not necessary in addition to offer evidence of the statutory celebration, or of the actual agreement of the parties to be husband and wife . . . .[20]

Subsequent cases generally follow the more liberal reasoning in *Kelly*.[21]

tended by the parties. It is difficult to tell whether the court is talking about a true presumption or merely an inference. The language clearly indicates, however, that the court would refuse to allow the trier of fact to find an agreement between the parties on the basis of the cohabitation and holding out if the circumstances making it questionable also existed.

[18] 15 S.W.2d 229 (Tex. Comm'n App. 1929).

[19] *See* note 16 *supra* and accompanying text.

[20] 15 S.W.2d at 230.

[21] The decision of the commission of appeals applying the more liberal doctrine has not always been followed. In 1938, ten years after *Consolidated Underwriters v. Kelly*, the Galveston Court of Civil Appeals, while upholding a jury finding of no common-law marriage, stated that the trial court should have taken the case from the jury and directed a verdict that there was no common-law marriage. Brown v. Brown, 115 S.W.2d 786 (Tex. Civ. App. 1938). Following the strict interpretation used in the older cases the court states:

> The relationship being meretricious in its inception, the evidence that it later became lawful would have to be positive and satisfactory, which it was not. Certainly the original agreement, which resulted in the unlawful living together, was not sufficient to transform their adulterous relationship into a lawful one, upon the mere removal of the deceased's impediment to marriage.

Id. at 788.

In Middlebrook v. Wideman, 203 S.W.2d 686 (Tex. Civ. App. 1947) the court of civil appeals sustained the trial court's directed verdict of no common-law marriage holding that: "An inference of marriage will be overcome where the parties separate and one of them while the other is known to be alive, marries or cohabits with a third person." *Id.* at 688. Clearly the subsequent acts of the parties could have nothing to do with the inference of an agreement which could arise while they were still cohabiting and holding themselves out as husband and wife. Subsequent actions could be enough under the *Kelly* doctrine for the jury to refuse to infer the agreement but not enough for the court to direct a verdict.

The later supreme court cases indicate that the more liberal rule of *Consolidated Underwriters v. Kelly* is the accepted doctrine.

For example, in *Wingfield v. Pool*[22] the appellate court, in reversing the trial court's directed verdict, remarked:

> The learned trial court, in holding otherwise, seems from the recitations in the decree to have labored under the same view the appellees presented in their brief, to wit, that it was necessary by direct evidence to show 'an agreement between the parties to become, then and there, husband and wife, followed by co-habitation and holding out to the public as such,' whereas the rule is: 'Independent of any direct or documentary evidence, a marriage may be circumstantially established by the fact that a man and woman have for a considerable period of time openly cohabitated as husband and wife and recognized and treated each other as such so that they are generally reputed to be married among those who have come in contact with them. Such circumstances justify a finding that at the commencement of the cohabitation the parties actually entered into a marriage, but, although they justify such a finding they do not necessarily lead to or demand it.'[23]

In *Shelton v. Belknap*[24] the plaintiff testified that she and the deceased did not agree to become husband and wife, but that he had told her that living together for six months would make them so. They cohabited and held themselves out as husband and wife; from this the jury found that they had entered a common-law marriage. The appellate court reversed because of the wife's testimony regarding the agreement. The supreme court construed the husband's language to indicate a present intent to marry but an erroneous belief that the law would not recognize it for six months. Interpreting the wife's testimony in this manner, the jury could have inferred an agreement from the evidence of cohabitation and public holding out. The supreme court therefore held that the jury verdict finding a common-law marriage should have been sustained.[25]

Thus, *Kelly* and later cases which follow its reasoning hold that the inference of an agreement created by the parties when they cohabit and hold themselves out as husband and wife is completely permissive.[26] The jury may find an inference of an agreement despite the existence of circumstantial evidence indicating that no agreement was made. The question is always one of fact. The trial court may not properly direct a verdict against the finding of common-law mariage once cohabitation and holding out are proven, and the appellate court will not disturb the jury verdict.

The most recent Texas Supreme Court case[27] approved the *Kelly* rule regarding the inference of an agreement which may be drawn from evidence of cohabitation and holding out. However, the court refused to extend the inference further and hold that, as a matter of law, once cohabitation and public holding out were proven, the agreement and thus the common-law marriage were proven. In *Humphreys v. Humphreys*[28] suit was instituted by a child, after his parents' death, to establish his

[22] 38 S.W.2d 422 (Tex. Civ. App. 1931).
[23] *Id.* at 423.
[24] 155 Tex. 37, 282 S.W.2d 682 (1955).
[25] *Id.* at 41, 282 S.W.2d at 684.
[26] Rosales v. Rosales, 377 S.W.2d 661 (Tex. Civ. App. 1964); Potter v. Potter, 342 S.W.2d 800 (Tex. Civ. App. 1961); McIlveen v. McIlveen, 332 S.W.2d 113 (Tex. Civ. App. 1960).
[27] Humphreys v. Humphreys, 364 S.W.2d 177 (Tex. 1963).
[28] *Id.*

right to inherit from his father. He based his claim on an alleged common-law marriage between his parents. No direct evidence of an agreement was available. The trial court found no agreement and hence no common-law marriage between the parties. This finding was based on evidence that after the agreement was made, the alleged common-law wife instituted divorce proceedings against another man, claiming that he was her husband. The court of civil appeals reversed the trial court, holding that the undisputed evidence of cohabitation and public holding out between the plaintiff's parents established a common-law marriage as a matter of law. The supreme court reversed.[29] The supreme court reiterated the language in *Shelton v. Belknap*[30] that it was not essential for an express agreement to be shown by direct evidence, stating: "A contract to marry may be implied or inferred from evidence which establishes the second and third elements of the marriage."[31] The court refused, however, to find that such evidence established as a matter of law that the parties had entered into an agreement to marry. They found that the woman's actions in later instituting divorce proceedings against another man supported a finding that she regarded herself as married to him and not to the alleged common-law husband. They concluded that the trial court could reasonably find on the basis of the subsequent divorce suit that the parties did not agree to become husband and wife. Therefore, as the case came to them, "One of the essentials [*viz*: the agreement] of a common-law marriage had not been proved."[32]

Cohabitation and Public Holding Out. The second and third elements required in Texas for a valid common-law marriage are cohabitation as man and wife and public holding out.[33] The courts speak of these elements separately, but normally make very little effort to distinguish between the evidence which proves one and that which proves the other.

The basic and distinctive requirement for cohabitation is living together.[34] This does not mean merely engaging in sexual relations which in itself is insufficient to establish a common-law marriage.[35] Rather, the living together should be in the same house on a permanent basis.[36] If the parties did not consider it their home[37] or if they did not keep their personal belongings there, the courts have found that the living together was not cohabitation as man and wife.[38]

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[29] *Id.*

[30] 155 Tex. 37, 282 S.W.2d 682 (1955).

[31] Humphreys v. Humphreys, 364 S.W.2d 177, 178 (Tex. 1963).

[32] *Id.*

[33] *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960); Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913); Rosales v. Rosales, 377 S.W.2d 661 (Tex. Civ. App. 1964); Oliver v. Landry, 326 S.W.2d 923 (Tex. Civ. App. 1959); Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*; McChesney v. Johnson, 79 S.W.2d 658 (Tex. Civ. App. 1934).

[34] *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960); Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913).

[35] *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960); Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913); Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*

[36] Cases cited note 35 *supra.*

[37] Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*

[38] *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960).

Other activities such as the use of community credit,[39] use of the husband's last name,[40] and recognition of their children,[41] while not necessary, have been held to establish the fact that the cohabitation is "as man and wife." Conversely, the continued use of separate bank accounts,[42] maiden name,[43] and the failure of the children to recognize the father as their father have been held to indicate that the cohabitation was not as man and wife.[44]

Frequently these very same actions also constitute the element of public holding out. However, the two can be distinguished. Living together, which is necessary to prove cohabitation, is not necessary to prove public holding out, although it may be used. On the other hand, actions used to prove public holding out must be open and public. The fact that they exist indicates cohabitation; the fact that they are open and public indicates public holding out.

In terms of evidence, holding out is perhaps the most important of the three elements since it is the only one that is always susceptible to direct proof. This importance has led one court to refer to it as the "acid test," reasoning that, "If the conduct of such contracting parties does not show clearly an honorable abiding by such agreement before the eyes of their world of associates and contacts, then it should not receive judicial sanction."[45]

The absolute necessity of proving public holding out has eliminated the possibility of a secret common-law marriage. In *Ex parte Threet*[46] the plaintiff was suing for divorce, claiming that she and the defendant were married at common law. They made no public announcement. They never lived together in the same house, although they did engage in sexual intercourse after their agreement. She continued to use her maiden name, registered in school under her maiden name, and her father continued to list her as a dependent for income tax purposes. She told several of her close friends that she was married and wore a ring (which no one noticed). She did not tell her family of the marriage until caught in a compromising situation with the defendant. He apparently told no one. In holding the evidence insufficient to establish a marriage, the court remarked:

> [Here the facts] do not constitute evidence that the couple lived together *as man and wife* or that they held out to the public that they were man and wife. [The wife] apparently wanted to keep the alleged marriage a secret except from . . . her closest friends. . . . Under the Texas decisions, there can be no secret common-law marriage as such. The secrecy is inconsistent and irreconcilable with the requirement of a public holding out that the couple are living together as husband and wife.[47]

[39] Rosales v. Rosales, 377 S.W.2d 661 (Tex. Civ. App. 1964); Wingfield v. Pool, 38 S.W.2d 422 (Tex. Civ. App. 1931).
[40] Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n App. 1929).
[41] *Id.*; Brooks v. Hancock, 256 S.W. 296 (Tex. Civ. App. 1923).
[42] Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913).
[43] *Id.*; Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*
[44] Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*
[45] McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934).
[46] 160 Tex. 482, 333 S.W.2d 361 (1960).
[47] *Id.* at 486, 333 S.W.2d at 364.

It is impossible to delineate the precise degree of holding out necessary to establish a common-law marriage. In general "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."[48] If they make it a general practice to introduce each other to third parties as "my wife" or "my husband," it is considered public holding out.[49] The fact that the wife uses the husband's surname and calls herself "Mrs." in the presence of her husband is considered public holding out.[50] In addition, those things such as living in the same house, considering it their home, keeping their belongings there, recognizing their children and being recognized as mother and father by their children, which are evidence of cohabitation as man and wife, are also evidence of public holding out if done openly and publicly.[51]

On the other hand, isolated failures to publicly acknowledge the relationship will not necessarily defeat the common-law marriage. In *Oliver v. Landry*[52] the husband and wife lived together, introduced each other as husband and wife, and had a joint bank account. But, in order to receive veterans' benefits, the wife continued to claim she was the unremarried widow of her first husband. The jury found a valid common-law marriage. The appellate court agreed that the other evidence of holding out was sufficient to establish a common-law marriage.[53]

The element of public holding out also can be proven by testimony regarding the reputation of the parties' marital status in their community.[54] However, the reputation of the parties, which ordinarily results from their holding out, must not be confused with the holding out itself. While the holding out to the public is required,[55] a general reputation that they are married is not required.[56] In *Brooks v. Hancock*[57] the appellant contested the finding of a common-law marriage, claiming that there was insufficient holding out since only two witnesses testified to hearing the parties refer

[48] Grigsby v. Reib, 105 Tex. 597, 608, 153 S.W. 1124, 1130 (1913).

[49] Oliver v. Landry, 326 S.W.2d 923 (Tex. Civ. App. 1959); Baker v. Mays, 199 S.W.2d 279 (Tex. Civ. App. 1946) *error dismissed*; Brooks v. Hancock, 256 S.W. 296 (Tex. Civ. App. 1923). However, isolated references to a party as "my wife" or "my husband" where other circumstances indicate the cohabitation is not as husband and wife are insufficient to establish the required public holding out. Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913); Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*

[50] Wingfield v. Pool, 38 S.W.2d 422 (Tex. Civ. App. 1931); Brooks v. Hancock, 256 S.W. 296 (Tex. Civ. App. 1923).

[51] Shelton v. Belknap, 155 Tex. 37, 282 S.W.2d 682 (1955); Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n App. 1929); Brooks v. Hancock, 256 S.W. 296 (Tex. Civ. App. 1923).

[52] 326 S.W.2d 923 (Tex. Civ. App. 1959).

[53] *Id.* at 925. A similar situation arises when a church or lodge does not recognize the marital status created by a common-law marriage. In Baker v. Mays, 199 S.W.2d 279 (Tex. Civ. App. 1946) *error dismissed*, the man and woman lived together and for every other purpose held themselves out as husband and wife, but the wife joined the church under her maiden name. The appellate court affirmed the jury finding that there was a common-law marriage stating that the conclusions of a church or lodge "are not controlling upon the courts" and sufficient evidence was available to find the required holding out. *Id.* at 283.

[54] Rosales v. Rosales, 377 S.W.2d 661 (Tex. Civ. App. 1964); Oliver v. Landry, 326 S.W.2d 923 (Tex. Civ. App. 1959); Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939) *error ref.*; Wingfield v. Pool, 38 S.W.2d 422 (Tex. Civ. App. 1931).

[55] *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960).

[56] Brooks v. Hancock, 256 S.W. 296 (Tex. Civ. App. 1923).

[57] *Id.*

to each other as husband and wife. No witnesses testified that the alleged wife had the reputation in the community of being married. The appellate court affirmed the trial court's finding of a common-law marriage:

> It appears to have been generally known that [the parties] had not . . . been married according to the forms prescribed by statute. That fact alone would account for the absence of any popular recognition of them in that community as husband and wife, even though there might have existed a valid marriage agreement. Recognition of parties as husband and wife by neighbors is not essential to constitute a valid common-law marriage; it is only a circumstance to be weighed with others.[58]

Nor is it absolutely necessary for the one asserting the common-law marriage to offer evidence that the parties introduced each other as husband and wife.[59] In *Rosales v. Rosales*[60] the court of appeals stated:

> In order to prove the validity of the common-law marriage, it is not necessary to offer evidence of husband and wife introductions to the general public. Proof of holding out to the general public can be shown by other evidence, including the conduct and the actions of the parties, which sometimes speak louder than words of introduction.[61]

It is clear that cohabitation and holding out, while often used together, are separate elements and both must be established before a relationship will be given the status of a common-law marriage. They can be proven by almost any activity of the parties which evidences an intent to openly acknowledge their marital status and accept the responsibility involved in a marital union. The proof of such actions is made doubly important since it is from evidence of cohabitation and holding out that the trier of fact may infer the agreement. Therefore, it is advisable to prove every action of the parties which could be classified as cohabitation or holding out and thereby give the trier of fact ample evidence from which to find a common-law marriage.

III. Presumption of Competence

Finally, both parties must be free from any impediment at the time they agree to be married.[62] This requirement of competence is, of course, not peculiar to a common-law marriage, but applies to a ceremonial marriage as well. It means, among other things, that neither party can be married to someone else.[63] Although competence is necessary, it is a requirement of a nature different from the elements of agreement, cohabitation, and holding out. These three elements, like the ceremony, create the marriage. Competence is merely a status which must exist before the marriage, ceremonial or common-law, will be valid.

The question of competence is more difficult when a common-law rather than a formal marriage is involved, because no recorded dates prove the

[58] *Id.* at 297.
[59] Rosales v. Rosales, 377 S.W.2d 661 (Tex. Civ. App. 1964).
[60] *Id.*
[61] *Id.* at 664.
[62] Texas Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 282 S.W.2d 371 (1955).
[63] *Id.*

time of marriage. Frequently several informal relationships are involved, any of which may or may not be a marriage.[64]

Parties faced with the problem of an impediment are assisted by a judicially created presumption that a marriage, once proven, is presumed to be valid and the one asserting the invalidity must prove that an impediment existed.[65] In the past, however, the courts of civil appeals disagreed over the question of whether the presumption applied to a subsequent common-law marriage.[66] In 1955 the supreme court settled the question by holding that the presumption of capacity exists in the case of a subsequent common-law marriage.[67]

In *Texas Employer's Insurance Ass'n v. Elder*[68] the petitioner claimed that the respondent was ineligible for workmen's compensation death benefits because she was not legally married to the insured employee. After an earlier common-law marriage the respondent entered a common-law marriage with the deceased employee. They cohabited as man and wife and held themselves out to the public as man and wife. There was no evidence that the first marriage had been dissolved or that it had not been dissolved. The court of civil appeals ruled that in the absence of evidence it would be presumed that the prior marriage had been dissolved; the court therefore held the subsequent marriage valid. The supreme court approved the holding, stating: "The presumption in favor of the validity of a marriage which, as in this case, has been duly shown to have been contracted is one of the strongest, if, indeed, not the strongest, known to law. 'The presumption is, in itself, evidence, and may even outweigh positive evidence to the contrary.' "[69]

The attorneys for both parties had stipulated that the respondent had not sought a divorce from her first common-law husband. The supreme court held that this was insufficient to prove that the marriage had not been dissolved since the first husband could have obtained the divorce. The failure of the insurance company to negate every possible way the first marriage could have been dissolved allowed the presumption of validity regarding the second marriage to stand.[70]

In response to the claim that no presumption of competence obtained in the case of a common-law marriage, the court remarked: "We can perceive of no valid reason for a distinction between a subsequent common-law marriage and a subsequent ceremonial marriage in so far as the efficacy of the presumption is concerned."[71]

The presumption of validity that arises after the parties have proved the creation of a marriage will not withstand proof that an impediment did exist. For example, in *Baker v. Lee*[72] the court held that the presumption

[64] *See, e.g.*, Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n App. 1929).
[65] Texas Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 282 S.W.2d 371 (1955).
[66] *Id.* and cases cited therein; Holman v. Holman, 288 S.W. 413 (Tex. Comm'n App. 1926).
[67] Texas Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 282 S.W.2d 371 (1955).
[68] *Id.*
[69] *Id.* at 30, 282 S.W.2d at 373 (quoting C.J.S.).
[70] *Id.*
[71] *Id.* at 32, 282 S.W.2d at 375.
[72] 337 S.W.2d 637 (Tex. Civ. App. 1960).

of validity had been rebutted. The facts showed that the first husband had not obtained a divorce; had not been served with a divorce petition; and, at all times after their separation, the wife knew his address and, therefore, could not have legitimately served him by publication. With the only three alternatives negated, the court refused to presume an intervening divorce had removed the impediment to the wife's subsequent marriage.[73]

IV. Legal Significance of Common-Law Marriage

Under Texas law a common-law widow is entitled to workmen's compensation benefits upon the death of her husband.[74] She has a cause of action for his wrongful death.[75] She can inherit from her husband under the laws of intestate succession and is entitled to be administratrix of her husband's estate.[76] A common-law wife is entitled to temporary support from her husband pending divorce.[77] She is entitled to one-half of the community property upon divorce.[78] She has an insurable interest in the life of her husband.[79] She has a right to get child support from the father for children born during the marriage.[80] A woman who enters a common-law marriage in good faith with no knowledge that an impediment exists acquires the rights of a putative wife if the marriage is invalid.[81]

The common-law husband is entitled to inheritance rights from his wife under the laws of intestate succession.[82] He has the same parental rights to his children as a father married by ceremony and has the same obligations to support children born during the common-law marriage.[83] He apparently could have homestead rights in the community homestead.[84] Presumably, he would also have a right to workmen's compensation benefits if his wife were insured, and a cause of action for her wrongful death. He also would seem to have an insurable interest in his wife's life.[85]

The children of a common-law marriage are considered the legitimate children of both spouses, and they inherit from and through their mother

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[73] *Id.*

[74] Texas Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 382 S.W.2d 371 (1955); Consolidated Underwriters v. Kelly, 15 S.W.2d 229 (Tex. Comm'n App. 1929); Associated Indem. Corp. v. Billberg, 172 S.W.2d 157 (Tex. Civ. App. 1943).

[75] Shelton v. Belknap, 155 Tex. 37, 282 S.W.2d 682 (1955).

[76] Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913); McIlveen v. McIlveen, 332 S.W.2d 113 (Tex. Civ. App. 1960); Oliver v. Landry, 326 S.W.2d 923 (Tex. Civ. App. 1959); Middlebrook v. Wideman, 203 S.W.2d 686 (Tex. Civ. App. 1947); Wingfield v. Pool, 38 S.W.2d 422 (Tex. Civ. App. 1931).

[77] *Ex parte* Threet, 160 Tex. 482, 333 S.W.2d 361 (1960).

[78] Owens v. Owens, 398 S.W.2d 425 (Tex. Civ. App. 1965); Trammell v. Trammell, 196 S.W.2d 209 (Tex. Civ. App. 1946).

[79] Rush v. Travelers Ins. Co., 347 S.W.2d 758 (Tex. Civ. App. 1961).

[80] Esparza v. Esparza, 382 S.W.2d 162 (Tex. Civ. App. 1964); Butler v. Butler, 296 S.W.2d 635 (Tex. Civ. App. 1956).

[81] Whaley v. Peat, 377 S.W.2d 855 (Tex. Civ. App. 1964) *error ref. n.r.e.*

[82] Barker v. Lee, 337 S.W.2d 637 (Tex. Civ. App. 1960).

[83] Potter v. Potter, 342 S.W.2d 800 (Tex. Civ. App. 1961).

[84] Barker v. Lee, 337 S.W.2d 637 (Tex. Civ. App. 1960); Clack v. Williams, 189 S.W.2d 503 (Tex. Civ. App. 1945) *error ref. w.o.m.*; McChesney v. Johnson, 79 S.W.2d 658 (Tex. Civ. App. 1934).

[85] A common-law wife has been held to have these rights and no justification appears for denying them to the common-law husband. *See* notes 74, 75, 79 *supra* and accompanying text.

and father.[86] Their father has a duty to support them.[87] If either parent were under an impediment and therefore did not achieve a valid common-law marriage, the children are nevertheless legitimate under section 42 of the Probate Code.[88]

In addition to these rights attendant upon a valid common-law marriage under state law, various federal rights are dependent upon the marital status of the parties. The Longshoremen's and Harbor Workers' Compensation Act,[89] the Veterans Administration Act,[90] the National Service Life Insurance Act,[91] the Social Security Act,[92] the Copyright Act,[93] the Federal Employees' Group Life Insurance Act,[94] Federal Death on the High Seas Act,[95] the Federal Employer's Liability Act,[96] and the Jones Act[97] all provide for various benefits to the surviving spouse or children of a decedent. It is clear that the term "widow" under each of these acts requires reference to state law.[98] If the state where the parties are domiciled recognizes common-law marriage, the common-law wife will be eligible to receive the benefits.[99] If the state does not clothe the relationship with legality, the widow is ineligible to collect.[100] Children made illegitimate by the refusal of a state to recognize common-law marriage have fared somewhat better under federal programs than have the spouses.[101] Under some programs an illegitimate is treated exactly like a legitimate child; under other programs his eligibility is determined by the law of his domicile.[102] Clearly, though, the child of a common-law marriage will suf-

[86] Humphreys v. Humphreys, 364 S.W.2d 177 (Tex. 1963); Barker v. Lee, 337 S.W.2d 637 (Tex. Civ. App. 1960); Middlebrook v. Wideman, 203 S.W.2d 686 (Tex. Civ. App. 1947); Drummond v. Benson, 133 S.W.2d 154 (Tex. Civ. App. 1939).

[87] Esparza v. Esparza, 382 S.W.2d 162 (Tex. Civ. App. 1964); Butler v. Butler, 296 S.W.2d 635 (Tex. Civ. App. 1956).

[88] Whaley v. Peat, 377 S.W.2d 855 (Tex. Civ. App. 1964); TEX. PROB. CODE ANN. § 42 (1956).

[89] 33 U.S.C. § 901 (1964).

[90] 38 U.S.C. § 101(3) (1964).

[91] 38 U.S.C. § 701 (1964).

[92] 42 U.S.C. § 416 (Supp. II, 1965-66).

[93] 17 U.S.C. § 24 (1964).

[94] 5 U.S.C. § 2091 (1964).

[95] 46 U.S.C. § 761 (1964).

[96] 45 U.S.C. § 51 (1964).

[97] 46 U.S.C. § 688 (1964).

[98] Bell v. Tug Shrike, 332 F.2d 330 (4th Cir.), *cert. denied*, 379 U.S. 844 (1964); Albina Engine & Mach. Works v. O'Leary, 328 F.2d 877 (9th Cir. 1964), *cert. denied*, 379 U.S. 817 (1964).

[99] Pace v. Celebrezze, 243 F. Supp. 317 (S.D.W. Va. 1965); Madewell v. United States, 84 F. Supp. 329 (E.D. Tenn. 1949).

[100] Bell v. Tug Shrike, 332 F.2d 330 (4th Cir. 1964).

[101] *See generally* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

[102] Under the Longshoremen's and Harbor Workers' Act an illegitimate child is eligible for benefits only if he has been acknowledged by his father. 33 U.S.C. § 901 (1964). However, the acknowledgment need not be according to the procedural formalities required by the domicile state. An oral acknowledgment will suffice. Weyerhauser Timber Co. v. Marshall, 102 F.2d 78 (9th Cir. 1939).

Under the Veterans Administration Act an illegitimate child is eligible only after he has been acknowledged in writing, signed by the father, or the father has been judicially ordered to support the child or judicially decreed to be the father or paternity is otherwise shown by satisfactory evidence. 38 U.S.C. § 101(4) (Supp. II, 1965-66).

The National Service Life Insurance Act provides that the illegitimate child may receive benefits if he is designated as the beneficiary. 38 U.S.C. § 701(3) (1964). However, case law has expanded

fer some disabilities unless the domiciliary state recognizes his parents' marriage, or otherwise legitimates him.

V. Should Texas Abolish Common-Law Marriage?

The suggestion has been made that Texas join the majority of states and abolish common-law marriage. In view of the state and federal rights which depend upon the marital status of an individual, such action should only be initiated after careful study.

Children are obviously in no way responsible for their parents' failure to marry formally; yet they, perhaps, suffer the greatest loss if the relationship is not dignified with the status of a marriage. They are branded illegitimate; they no longer inherit from their father; they no longer qualify for the state workmen's compensation benefits; and considerable doubt is created concerning their eligibility under certain federal welfare programs.

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the illegitimate's rights so that he may receive the benefits even though not designated as a beneficiary. United States v. Philippine Nat'l Bank, 292 F.2d 743 (D.C. Cir. 1961).

Under the Federal Old Age, Survivors, and Disability Insurance Act, 42 U.S.C. § 416 (Supp. II, 1965-66) the illegitimate is eligible for benefits only if he is entitled to inherit from the estate of the deceased under the law of domicile. Moots v. Secretary, HEW, SSA, 349 F.2d 518 (4th Cir.), *cert. denied*, 382 U.S. 996 (1965); DeSoucey v. Flemming, 194 F. Supp. 348 (S.D.N.Y. 1960); Scalzi v. Folsom, 156 F. Supp. 838 (D.R.I. 1957).

The same situation exists in regard to the renewal rights descending to children under the Copyright Act, 17 U.S.C. § 24 (1964). The child is eligible only if he would inherit from the deceased under state law. DeSylva v. Ballentine, 351 U.S. 570 (1955).

For a time it seemed that the illegitimate child would be similarly limited for benefits under the Federal Employees' Group Life Insurance Act, 5 U.S.C. § 2091 (1964). However, the Third Circuit recently ruled that a child is still a child under the Act, "even though his father may have failed to meet the requisite standards of a lawful marriage in a particular state," and regardless of his inheritance rights under state law he can receive benefits under the federal insurance program. Metropolitan Life Ins. Co. v. Thompson, 368 F.2d 791 (3d Cir. 1966).

The Federal Death on the High Seas Act, 46 U.S.C. § 761 (1964), provides that a decedent's personal representative shall have a cause of action for the benefit of the decedent's children and others. In an early case the court held that the law of the place of the injury should govern the eligibility of a child under this section. Since the Act by definition only applies to death occurring on the high seas, federal law applied, and the court held that under federal law the term child included illegitimate child. Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir.), *cert. denied*, 293 U.S. 577 (1934).

The Jones Act, 46 U.S.C. § 688 (1964) provides that the personal representative of deceased seamen shall have the same cause of action provided by Congress for railroad employees in the Federal Employer's Liability Act, 45 U.S.C. § 51 (1964). Despite the fact that the Jones Act and FELA have the same beneficiary provisions the courts came to conflicting decisions regarding the rights of illegitimates. In FELA cases the rule seemed to be that the illegitimate could only receive benefits if he was considered a child under the law of his domicile. Bowen v. N.Y. Cent. R.R., 179 F. Supp. 225 (D. Mass. 1959). On the other hand, the illegitimate was held to be a qualified beneficiary in suits under the Jones Act. Civil v. Waterman S.S. Corp., 217 F.2d 94 (2d Cir. 1954). Recently, however, the federal courts have shown a tendency to moderate their position in FELA cases. In Tune v. Louisville & N.R.R., 223 F. Supp. 928 (M.D. Tenn. 1963), the children were domiciliaries of Tennessee. That state did not allow illegitimate children to inherit nor did the Tennessee wrongful death act allow an illegitimate child to recover for the death of the father. However, Tennessee did allow illegitimates to recover under the workmen's compensation statute. This the court found indicated that Tennessee's policy regarding illegitimates was to recognize them as children and therefore they should be so recognized for FELA cases. *Id.* More recently, a court has held that the right of an illegitimate child to make a claim for FELA benefits was determinable by federal law. Huber v. Baltimore & O.R.R., 241 F. Supp. 646 (D. Md. 1965).

Obviously, the rights of illegitimates under federal law are not consistent. The trend seems to be toward greater recognition of the rights of such a child but he is still not as fully protected as a legitimate child. Some statutes make outright distinctions. Others depend upon the changing case law to untie the knot between the right under federal law and the right of inheritance under state law. The illegitimate child is consistently treated the same as a legitimate child only when he happens to claim a benefit under an act which the courts have held subject to interpretation by federal common law.

The difficulties to be expected if common-law marriage is abolished are, of course, no greater than those encountered due to any illicit relationship. However, since Texas has no paternity act, the availability of common-law marriage serves a useful function in reducing the number of children made illegitimate by the failure of their parents to marry.

The system is, of course, replete with flaws. The very existence of a completely informal substitute makes a mockery of marriage laws designed in most instances to foster a more orderly and predictable family status. In addition, common-law marriage only mitigates the harshness of illegality or illegitimacy when through some fortuitous accident the courts decide the relationship meets the legal requirements for a common-law marriage. The marriage is usually legally useless until there has been adjudication of validity, and thus it creates a substantial amount of unnecessary litigation.

However, the choices open to the legislature are not limited either to recognition or to abolition. Several states which continue to recognize the validity of a common-law marriage have nevertheless regulated the institution to some extent. In Florida, in any matter dealing with welfare payments to dependent children, the existence of a common-law marriage is not accepted unless the marriage is registered in the county where the parties live.[103] The registration process is prescribed by statute and contains an oath similar to the one on a marriage license application and must be signed by both parties. Failure to sign the oath does not invalidate the marriage for other purposes.[104] Therefore the requirement does nothing but encourage the parties to make a binding agreement which is subject to direct proof.

Iowa provides that a marriage solemnized by the consent of the parties is valid, but the parties are fined $50 each if they fail to follow the statutory requirements.[105] In addition the husband is required to provide the district court with a completed form like that required for a ceremonial marriage.[106] The marriage is not invalidated by reason of nonstatutory solemnization but the consequences are sufficiently stringent to encourage compliance with the statute.[107]

Kansas has also made the consequences of entering a common-law marriage so harsh that the formalities required for a ceremonial marriage become a more desirable alternative. That state provides that any persons living together as man and wife without being formally married are guilty of a misdemeanor and subject to a fine of not less than $500 nor more than $1,000, or imprisonment in the county jail for not less than thirty days nor more than three months.[108] The Supreme Court of Kansas has declared that this does not annul the common-law marriage which is recognized as valid by Kansas law, nor does it prevent the parties from

[103] FLA. STAT. ANN. § 409.183 (1960).
[104] *In re* Estate of Alcala, 188 So. 2d 903 (Fla. Dist. Ct. App. 1966).
[105] IOWA CODE ANN. § 595.11 (1950).
[106] *Id.* § 595.16 (1950).
[107] Coleman v. Graves, 122 N.W.2d 853 (Iowa 1963).
[108] KAN. GEN. STAT. ANN. § 23-118 (1964).

obtaining all the marital rights acquired by a ceremonial marriage.[109] It merely subjects the parties to the fine or jail term, and thus encourages a ceremonial marriage.

Other states have mitigated the harshness of complete abolition by recognizing common-law marriages to a limited extent. For example, New Hampshire provides that persons who cohabit and acknowledge each other as husband and wife for a period of three years and until the death of one of them shall thereafter be deemed to have been legally married.[110] However, this limited recognition apparently only arises after the death of one of the parties and then only if they were married for three years and were living together at the time of the deceased spouse's death.[111] Oregon provides that if an unmarried man and woman cohabit in that state as husband and wife for over one year and children are living as a result of that relationship, the woman and children are entitled to workmen's compensation as if the parties had been legally married.[112]

Those states which do not recognize common-law marriages have statutory provisions which ameliorate the harshness of denying legal status to the relationship. In most instances these statutory schemes are designed to aid illegitimate children, both those made illegitimate by non-recognition of their parents' common-law marriage and those born as a result of an obviously illicit relationship. These schemes provide little help for the spouses and vary from state to state in the amount of assistance offered to the illegitimate.[113]

Tennessee, which has one of the most complete schemes, allows illegitimate children to collect workmen's compensation benefits if dependent upon the father for support;[114] provides for an involuntary bastardy proceeding which obligates the father to support and educate the child;[115] considers the child the legitimate child of the father for inheritance purposes once the paternity has been ascertained;[116] and provides a voluntary legitimation proceeding which makes the child the legitimate child of the father upon petition in writing signed by the person seeking to legitimate the child.[117]

On the other hand, Virginia only provides a voluntary acknowledgment statute. If the father willingly acknowledges his child, the child is then eligible for workmen's compensation benefits and the father becomes liable for his support and education.[118] Virginia, however, has been more helpful where the children are the product of a relation which would be a common-law marriage if such marriages were recognized in Virginia. A Virginia

[109] Smith v. Smith, 161 Kan. 1, 165 P.2d 593 (1946).
[110] N.H. REV. STAT. ANN. ch. 457, § 39 (1955).
[111] Fowler v. Fowler, 79 A.2d 24 (N.H. 1951).
[112] ORE. REV. STAT. 656.226 (1965).
[113] Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966).
[114] Shelley v. Central Woodwork, Inc., 340 S.W.2d 896 (Tenn. 1960).
[115] TENN. CODE ANN. § 36-223 (Supp. 1966).
[116] *Id.* § 36-234.
[117] *Id.* §§ 36-302, 306.
[118] VA. CODE ANN. §§ 20-61.1 (1960), 65-63(3) (1949).

statute provides: "The issue of marriages deemed null in law or dissolved by a court shall nevertheless be legitimate."[119] The Virginia Supreme Court of Appeals held that this statute made the children of a common-law marriage legitimate even though Virginia did not recognize common-law marriages.[120]

Ohio, which also does not recognize common-law marriages, followed the Virginia interpretation and held that its legitimation statute, patterned after the Virginia statute, legitimated the issue of common-law marriages.[121] Section 42 of the Texas Probate Code is identical to the Virginia statute.[122] Thus, if Texas did abolish common-law marriages, this statute could be used to protect the children. The Texas court has shown a tendency to follow the Virginia courts' interpretation of this statute and presumably could be expected to follow the Virginia doctrine regarding the legitimation of children of common-law marriages.[123]

VI. Conclusion

The alternatives are clear. Texas can retain the existing system, abolish common-law marriage altogether, recognize it for limited purposes, or continue recognition but regulate some of the more obvious abuses by statute. If the existing system remains, the problem of the agreement remains. It is indisputable that in most cases the agreement is more judicially inferred than actually made. Without a real agreement between the parties, it is difficult to imagine that they actually entered the relationship in good faith, intending to create a permanent state of matrimony. Absent such an intent, the historical and legal justifications for the institution fail.

The opponents of common-law marriage contend that it is unjustified in a society where ceremonial marriages are so readily available. However, in view of the handicaps under both federal and state law which are placed on individuals in a state which does not recognize common-law marriage, it is questionable whether Texas should abolish the institution. Clearly it should not be abolished unless some remedial legislation is provided to assist the children of such a relationship. In view of the fact that Texas has no paternity act, no voluntary acknowledgment provision, and no legitimation procedure except by subsequent marriage, and, in fact, has demonstrated some hostility to these ideas, it probably is inadvisable to abolish common-law marriage.

Recognition for limited purposes creates its own problems of proof since cohabitation for a defined number of years is usually required. In addition, it is conceptually difficult to defend a system which considers a person married for some purposes but not others, and puts the stamp of approval on a relationship after three years but not one day less.

Continued recognition, with statutory regulation of the abuses, appears

[119] *Id.* § 64-7 (1949).
[120] McClaugherty v. McClaugherty, 21 S.E.2d 761 (Va. Sup. Ct. App. 1942).
[121] Santill v. Rossetti, 178 N.E.2d 633 (Ohio C.P. 1961).
[122] Tex. Prob. Code Ann. § 42 (1956).
[123] Home of Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965).

to be the most viable alternative available. The use of fictional agreements is obviously the most pressing problem. Outright requirement of an actual agreement would handicap even those who did make such a pledge if death or the dead man's statute prevented one or both of the parties from testifying to the agreement. Therefore, some inferences drawn from the cohabitation and public holding out are necessary.

However, it would be advisable to encourage the parties to make the agreement more accessible to direct proof. A registration process like that used in Florida and Iowa should be devised. Any recordation should not be the only method for proving the marriage; but, some statement by the parties ought to be required before they can benefit from the legal incidents of marriage. Perhaps fines also ought to be imposed to encourage registration immediately after the agreement so that one party does not die before the agreement is made a matter of written proof. Failure of the parties to record the marriage would not prejudice the right of one party, or their children's right, to assert it in later legal action. The proof and the requirements for a valid common-law marriage would remain the same. However, if both parties were still alive and claiming a marriage, they would have to record it before they could benefit from it and the record would estop either from later claiming no marriage existed. In addition, the availability of recordation process would provide a non-judicial means for establishing a common-law marriage and thus eliminate much of the litigation now involved.