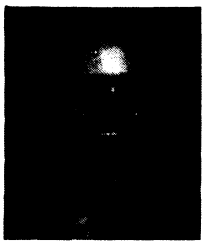
Can Kansans Live Happily Ever After Without Common Law Marriage?



Nancy G. Maxwell, Associate Professor of Law, has taught Domestic Relations since 1979.

By Nancy G. Maxwell

Common law marriage may be abolished in Kansas if the Legislature accepts that recommendation from the Family Law Advisory Committee of the Judicial Council. The Committee was appointed by the Judicial Council to study and recommend changes to the Kansas Divorce Code, KAN. STAT. ANN. § 60-1601 **et. seq.** One of the controversial recommendations proposed by the Committee is amending KAN. STAT. ANN. § 60-1609 to read "Common law marriages entered into after [date] shall not be recognized in Kansas." Evidence of the controversy is the refusal of the Judicial Council to be persuaded by its own Committee that common law marriage should be abolished. However, the Judicial Council "believed that the recommendation ... should be submitted to the bench, bar and other persons for comment and critique. In doing so, the Council recognized that this is a sensitive matter involving the institution of the family and that a broad spectrum of views would be helpful in making final recommendation to the Kansas Legislature."

The Family Law Committee gave three reasons for abolishing common law marriage in Kansas. The reasons are unpersuasive and also contradictory.

DIFFICULT TO PROVE?

One reason given by the Committee is the difficulty of proving the marriage because "it is now becoming commonplace for persons having the capacity to marry to instead live together as nonmarital partners" rather than common law marriage partners. Although couples are living together in greater numbers than the past,[1] this does not mean, necessarily, that proof of a marriage relation will be any more difficult.

Common law marriage requires proof of three elements. The parties must: 1) have the capacity to marry, 2) represent themselves as a married couple to the public and 3) have a present mutual agreement to be husband and wife. In the case of a man and a woman who only are living together, two elements of common law marriage are lacking. They do not represent themselves to the public as a married couple, nor do they have an agreement to be married. Although the cohabiting partners may have the capacity to be married, this fact does not raise the presumption that the living arrangement is a common law marriage. The burden is on the party asserting the marriage to prove all three elements. Therefore, merely because **more** people are living together does not make the proof of these three factors any more complex. The court can continue to rely on past cases as precedent to determine whether the cohabiting partners have fulfilled the requirements of a common law marriage.

In fact, judicial determination of the existence of a common law marriage may be easier than in the past. Because there is less of a social stigma against unmarried couples living together, the cohabiting partners are more open about the nature of their relationship. They generally make it clear they are "living together" and are not married. This openness about the living arrangement clearly establishes the parties intentions not to be married and no common law marriage exists because the parties have failed to represent themselves to the public as husband and wife. Therefore, even if more common law marriage cases are brought to the court, they may be easier to resolve than in the past, when unmarried partners may have represented themselves as husband and wife to prevent ostracism.

OTHER REMEDIES?

The Committee's concern about the difficulties of proving a common law marriage is even less persuasive when it asserts that a second reason to abolish common law marriage is " if certain property matters have to be resolved when nonmarital partners cease to live together, there are various causes of action other than dissolution of marriage to effectuate that end." Although the Committee does not elaborate on what these various causes of action might be, several cases decided in other jurisdictions have discussed legal remedies which protect the property interest of unmarried partners. The most familiar case is **Marvin v. Marvin,** [2] in which the plaintiff, Michelle Triola Marvin, asserted that she and Lee Marvin had an agreement to share all property accumulated during the time they lived together. The California Supreme Court, in recognizing the plaintiff's cause of action, listed five possible legal theories unmarried partners could assert against each other to protect their property interests: 1) breach of an express contract, 2) breach of an implied contract, 3) breach of a partnership or joint venture agreement, 4) quantum meruit and 5) constructive or resulting trusts.

The problems with rejecting common law marriage in favor of the **Marvin** case remedies are numerous. Instead of reviewing the facts to determine whether the three elements of common law marriage

are present, in the **Marvin** - type case the court must examine the behavior of the parties to determine whether any one of five possible remedies exist. If the plaintiff alleges a breach of contract, the court must determine not only whether a contract existed and what its terms were, but also appropriate damages for its breach. In cases of quantum meruit or equitable trusts, the court must determine what services or funds were contributed to the relationship and what equitable remedies will adequately compensate the cohabiting partners for these contributions.

The main problem with applying the **Marvin** case remedies is that most couples do not have explicit understandings about how they will share their property should the relationship end. As long as the relationship runs smoothly, both parties probably will use their property jointly, without being concerned about who has title. However, when the cohabitation ends, a dispute over property ownership may pose difficult legal issues. The court, in applying the **Marvin** case principles, must decide how to divide property based on agreements or understandings the parties had while they lived together. These vague agreements or understandings are difficult to reconstruct, particularly after the relationship has soured and anamosities between the parties color the facts.

The resolution of these issues will be far more complex and time consuming than determining whether the three elements of common law marriage are present. Therfore, the Family Law Committee contradicts itself by claiming that common law marriage should be abolished because of "the difficulty of proof of issues of fact" when it also asserts that other causes of actions can adequately protect the property interest of cohabiting partners. These other causes of action have far greater difficulties in proving issues of fact.

However, a good argument can be made that **Marvin** - type actions better protect cohabiting partners than actions for common law marriage. In a **Marvin** - type suit, the parties do not need to allege and prove a marriage to protect their property interests. Therfore, all cohabiting partners will have a legal remedy if they can prove a contract or equitable justification to protect their interests. In Kansas, however, the courts have not ruled yet on the validity of the **Marvin** case remedies.

Many jurisdictions have refused to recognize a cause of action brought by cohabiting partners for several reasons. The most common reasons are the lack of valid consideration to form a contract, illegal behavior between the parties and concern for the public policy favoring marriage. In contract law, meretricious sexual services cannot be valid consideration for a contract and if a court refuses to sever the sexual relationship from other possible consideration for the contract, the cause of action will fail. Also, statutes prohibiting nonmarital cohabitation or fornication have prevented cohabiting partners from obtaining equitable remedies because they do not come into court with "clean hands". Even in states which do not criminally punish nonmarital cohabitation, courts have held that recognition of **Marvin** - type law suits undermines a public policy favoring marriage. Consequently, it is not known whether Kansas courts, or the legislature, [3] will recognize law suits brought by unmarried, cohabiting partners to protect their property interests.

FORMAL MARRIAGE EASIER?

In giving a third reason for eliminating common law marriage in Kansas, the Family Law Advisory Committee said, "in this modern age parties can easily obtain a formal marriage if they actually determine to do so". This reason is premised on the practical function common law marriage served during the frontier days. Because it was difficult to travel to ministers and judges when the country was first settled, common law marriage was recognized as a method of legalizing a marriage which existed in fact, although no formal ceremony was performed. If the couple acted as though they were married, by accepting the rights and obligations of a married couple, then the law recognized the relationship as a legal marriage.

Although it is no longer difficult to formalize a marriage in Kansas, common law marriage has a much broader function than serving a nineteenth century society. Even in the frontier days, it was not required that the person asserting a common law marriage prove the unavailability of judges and ministers. Rather, the court decided whether the couple had lived according to the standards of all marriages, even though they lacked a marriage license and ceremony. If the couple bahaved as though they were married, then they would receive the benefits of the marriage relationship, even if the couple lived next door to the courthouse. Therefore, common law marriage was a way of granting **de jure** status to a **de facto** marriage.

This function of common law marriage, the judicial recognition of **de facto** marriage, is a valid reason for its retention in the Kansas legal system. The court should continue to have the power to grant legal status to relationships which have all the attributes of a marriage, but lack only a license. By arguing that a marriage license is easy to obtain and common law marriage thus not necessary, the Family Law Advisory Council makes the assumption that a couple reaches a reasoned decision to be married when they begin their common law marriage cohabitation. This assumption ignores reality, because if a couple is consciously entering into a marriage relationship, they would obtain a license. Rather, common law marriage is a relationship that people establish over time, through their actions which imply a marriage-like relationship. Common law marriage laws most often have significance only **after** the relationship has ended, through death or divorce. Thus, common law

Can Kansans Live Happily *continued*

marriage is an after-the-fact determination which allows the court to divide property and establish support and financial security for the parties, and children, of **de facto** marriages. By eliminating common law marriage, the legisature will not stop people from living together. However, it will take away the power of the court to grant ecomonic and legal stability to a relationship which is a marriage in fact, but was never licensed. It is better to recognize the relationship for what it is, a marriage, and apply marital rights and obligations, than to self righteously ignore the expectations, needs and realities of the parties and their children.

Because the proof of common law marriage requires a showing that the parties behaved according to the standards of all married couples, common law marriage does not weaken the institution of marriage. Only those couples who exhibit acceptable marital behavior will be given the benefit of the judicial finding of a marriage relationship.[4] If a man and woman perform all the obligations and responsibilities expected of a married couple, and the community has always assumed they were married, only a harsh and narrow-minded society would deny them and their children the benefits of marriage merely because they failed to license their relationship.

Because abolishing common law marriage will not deter **de facto** marriage relationships, the courts will be forced to fashion other remedies to protect the interests of the parties. For example, children of **de facto** marriages may learn, when a parent dies, that their parents were never legally married. Consequently, inheritance disputes and paternity claims will increase with the elimination of common law marriage. States which have abolished common law marriage have been forced to create legal remedies to protect the interests of the parties, as California did in the **Marvin** case, resulting in more legal uncertainties. However, if Kansas retains common law marriage, the courts can continue to treat all marriage relationships similarly and apply the well-established precedents of domestic relations law. By continuing to recognize common law marriages, Kansas is promoting two objectives of the law — certainty and uniformity in treatment of persons in similar situations.

Kansas should heed the warning of Homer Clark, author of the hornbook on domestic relations. Without common law marriage "there would be more injustice and suffering in the world than there is with it." Kansans have lived with common law marriage since statehood. The reasons for keeping it remain stronger than the arguments of those who would abolish it.

FOOTNOTES

1. The 1970 census reported 523,000 unmarried men and women living together. By 1979 the figure increased to 1.346,000. U.S. Bureau of the Census, **Statistical Abstract of the United States**: 1980 (101st Edition) Washington, D.C., 1980, No. 60; Pg. 44.
2. 18 C.3d 660, 134 Cal. Rpts. 815, 557 P. 2d 106 (1976).
3. The 1980 Kansas Legislature refused to enact legislation which would have limited lawsuits between cohabiting, unmarried partners to only persons who had written agreements on property ownership. KAN. S.B. 502 (SOWERS).
4. Kansas courts have not hestitated to deny relief to a party asserting a common law marriage when the party's behavior was inconsistent with acceptable marital standards. See, **Schrader v. Schrader,** 207 Kan. 349 (1971) and **In re Estate of Keimig,** 215 Kan. 869 (1974).

Twenty Fourth Annual Law Institute Set For October 9

The 24th Annual Law institute, cosponsored by Washburn, the Topeka Bar Association and the Kansas Bar Association will be held on Friday, October 9, 1981 — Homecoming Weekend. This year there will be added festivities incorporated with the Institute because Washburn's new President John Green will be guest of honor at a dinner to introduce him to the Washburn community on Friday evening, October 9th. Law Institute registrants are invited to attent this event. There will be a separate symposium for law institute participants preceding the dinner.

The law institute program will follow traditional lines with three separate programs in the morning and trial clinics in the afternoon. This year's morning programs will have two parts so that registrants can attend parts of the different programs. Austin Nothern is chairing a taxation program which will highlight the changes in the income and estate and gift taxes brought about by the Economic Tax Recovery Act of 1981; Jim Wadley is chairing a program on developments in oil and gas law and water rights; and John Kuether will moderate a discussion of the new financing arrangements for consumer home loans and developments in farm financing.

The afternoon trial clinic will present two hypothetical divorce cases. One case will deal with the problems of determining valuation and property settlements in cases in which the major asset of the marriage is a pension and profit sharing plan. The other will deal with valuation of a closely held business with depositions of expert witnesses. Frank Rice is moderating the trial clinic. Other committee members include Jim Ahrens, Ann Baker, Art Glassman, Mike Kaye, Jerry Letourneau, Jerry Palmer, Billie Parr, Carl Quarnstrom, Jean Reeves and John Stumbo.