



THE FAMILY LAW CORNER

THE COLORADO COMMON LAW MARRIAGE CONUNDRUM

As an attorney that practices exclusively in the area of family law, I receive questions on a regular basis from potential clients and attorneys who practice in other areas of law regarding common law marriage. Most of us know that Colorado recognizes common law marriage; however, few understand the nuances of what it takes to become or to avoid becoming common law married. Some believe, for example, that if the parties live together for a prescribed amount of time or commingle assets, they are common law married. Others are confident that although they may have claimed their significant other as a “spouse” for tax purposes or have referred to them as their “husband/wife” for the sake of keeping things simple with their neighbors, their intent was not to be married, and therefore they will not be found to be married by the court. So, are the above couples married? Maybe.

The reason for the public confusion, the misinformation on the internet, and the caginess of family law attorneys when they are asked this question is that there are no clearly defined rules as to when and how a common law marriage is established in Colorado. One goal of this article is to help those who practice in other areas of law to gain a better understanding of the factors a court may consider when deciding whether a couple is common law married. Additionally, this article aims to kick-start the conversation of whether the benefits in recognizing such marriages are outweighed by the increase in litigation caused by the confusion surrounding this archaic and all-but-extinct practice.

An Introduction

Recognition of common law marriage in Colorado is not statutory; it is instead derived and interpreted based on case law. The Uniform Marriage Act (UMA), § 14-2-101, et seq., C.R.S. 2005, sets forth the rules and requirements for ceremonial marriages in Colorado. However, the UMA does not set forth the requirements for a common law marriage. The UMA only mentions common law marriage twice, once in C.R.S. § 14-2-104 stating, “Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman.” (More on same-sex common law marriage later). Additionally, C.R.S. § 14-2-109.5 sets for the age restrictions for a common law marriage. Thus, in the absence of any legislative direction, family law attorneys (and judges deciding such cases) are required to sift through case law dating back to English common law. *In re Marriage of J.M.H.*, 143 P.3d 1116 (Colo. 1987).

The Colorado Supreme Court first recognized common law marriage in *Klipfel’s Estate v. Klipfel* which held that a common law marriage is established 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. *Klipfel’s Estate v. Klipfel*, 92 P. 26, 27-28



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(Colo. 1907). In *Deter v. Deter*, the court added the element of “reputation in the community that the parties have established a relationship as husband and wife” as essential to proving a common law marriage. *Deter v. Deter*, 484 P.2d 805, 806 (Colo. App. 1971).

In an effort to bring some clarity to the common law marriage issue, the Colorado Supreme Court issued its opinion in what remains the seminal case on common law marriage in Colorado, *People v. Lucero*. *People v. Lucero*, 747 P.2d 660 (Colo. 1987). Like most of the case law defining common law marriage, *Lucero* is not a family law case. In that case the defendant claimed that the trial court had erred in receiving the testimony of a woman who he claimed was common law wife and thus entitled to claim the spousal privilege set out in C.R.S. § 13-90-107(1) (a). In *Lucero* the court found that a common law marriage is established by (1) the mutual consent or agreement of the parties to be husband and wife, followed by (2) cohabitation as husband and wife. *Id.* at 663.



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According to the court in *Lucero*, the two factors that most clearly show an agreement to be husband and wife are: (1) cohabitation; and (2) a reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. *Id.* at 665. The court in *Lucero* also gave some specific examples of behavior that may be considered when deciding whether the parties came to an agreement to be husband and wife, including: (1) maintenance of joint banking and credit accounts; (2) the purchase and joint ownership of property; (3) the use of the man's surname by the woman; (4) the use of the man's surname by children born to the parties; (5) and the filing of joint tax returns. *Id.* Finally, the court held that there is no single form that any such evidence must take. In fact, “any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred.” *Id.*

In family law cases, the issue of common law marriage is often brought up when a party files a Petition for Dissolution of Marriage, and the other party files a response, objecting to the jurisdiction of the court, claiming the parties were never married. There is no common law divorce in Colorado, so if it is determined by the court that the parties were common law married, then the couple must appeal to the courts to receive a divorce. Thus, the question of whether the parties are married is often the subject of extremely costly and heated litigation. Financially disadvantaged parties may claim the couple was common law married and request spousal maintenance and an equitable portion of the marital property, neither of which they would be entitled to without a finding of a common law marriage. In cases where the parties are wealthy, the difference between being married and not can mean hundreds of thousands of dollars to the disadvantaged spouse.

But I don't practice family law; why should I care?

As the case law included in this article shows, common law marriage affects many areas of law including: probate, eviction, real estate transactions, and even criminal cases (See *Lucero*), just to name a few. The following are two specific examples of other areas of law in which the uncertainty of a common law marriage can lead to difficult and costly litigation:

Common law marriage can be asserted in eviction cases as a defense in an effort to either prolong the litigation or to assert a legitimate claim for property. Procedurally, the evictee would assert the claim of common law marriage along with a request to move the case to District Court to have a hearing to determine whether or not the parties were married. Because the finding of a marriage would likely give the person being evicted a share of the marital home, the question of whether the parties were married needs to be decided before the eviction can be completed. Thus, the common law marriage defense is often used by would-be evictees who have nothing to lose (and perhaps ½ of a house to gain) by proceeding to hearing.



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In probate cases, the issue of common law marriage can arise when a party claims the right to inherit an intestate share or other benefit payable to the deceased spouse. Thus, the finding of a common law marriage can have a dramatic effect on potential beneficiaries of the estate. For example, if the decedent had a valid will at the time of death, a common law spouse would be entitled to the elective share of the estate under C.R.S. § 15-11-202. Additionally, except in the case of a decedent who nominates someone else to serve, the surviving spouse has priority to serve as personal representative pursuant to C.R.S. § 15-12-203. The surviving spouse also may assert a claim against the decedent's estate for a "family allowance" pursuant to CRS § 15-11-405. Once again, because the stakes are high, and the discretion of the court is so broad, the would-be inheritor may have little to lose in continuing litigation.

Conclusion

From the above examples and many more that each of you have likely experienced in your practices (or have written about in law school examinations), it becomes clear that the absence of clear rules defining common law marriage in Colorado makes its continued recognition and enforcement impractical. Colorado's choice to continue to recognize common law marriage when all but a handful of states have abolished it is made more perplexing in light of the *Obergefell* decision which would require other states to recognize a common law marriage that was lawfully created in Colorado. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Common law marriage was created and appropriate when the United States was being colonized, towns were sparse, and marriage licenses difficult to obtain. However, in today's world of instant access, the benefits of common law marriage are vastly outweighed by costly litigation and the chilling effect that such litigation might have on those who fear to enter into a lengthy relationship might somehow create a marriage that they never intended.



James Townsend leads Robinson & Henry's Colorado Springs office where he also serves as the lead family law attorney. For over a decade he has worked in the Colorado court system, helping families navigate the legal system with compassion and integrity. He enjoys volunteering for organizations such as the Douglas County Task Force and Habitat for Humanity. Additionally, James serves as a member of his local Town Council. James has lived abroad in Mexico and Brazil and is fluent in Spanish and Portuguese. He enjoys camping and hiking in Colorado's amazing mountains.



THE PROBATE CORNER

On August 3, 2019, the Justice Center and El Paso County Probate Section held the annual Senior Law Day at the Senior Center. Senior Law Day in Colorado Springs has been held since 1985. The founders of this event, founder of Silver Key Senior Services, Mikki Kraushaar, attorney Clifton B. Kruse, Jr., and former Probate Magistrate E. David Griffith, were instrumental in the early success of Senior Law Day.

The first event was held at Silver Key in 1985, and was moved to the Senior Center the following year, where it has been held since. The event has evolved over the years and expanded to a weekend event featuring local attorneys and other professionals.

This year Probate Section Chair, Jessica Showers, and Magistrate E. David Griffith welcomed approximately 80 attendees to the event. Current Probate Magistrate Rahaman provided seniors an overview of the purpose of a probate court and the importance of early planning.

The individual breakout sessions covered Social Security benefits, senior housing, scams & elder abuse, probate and estate planning. After the event, a free lunch and the 2019 Senior Law Handbook was provided to attendees.

We want to thank the speakers, Magistrate E. David Griffith, Magistrate Rahaman, Paul H. Haller, Craig Carmean, Charles Szatkowski, Catherine Seal and Michael Kirtland.

A special thank you to our gold sponsor, Brookdale Senior Living as well as to the committee who organized this year's event: Magistrate Rahaman, Magistrate E. David Griffith, Britt Kwan, Devon Coleman, Wendy Farr, Rebecca Jackson, Luke Johnson, Ann McKenzie, Susan Pavlica and Rabea Taylor.

The event would not be possible without the great support provided by Mary Swantek and employees of the Senior Center.

The Probate Section's monthly breakfasts will begin September 18, 2019 at the Antler's Hotel. Please register through the El Paso County Bar Association website through the Probate Section Page. Under 'Upcoming Events' you will find the September Breakfast.

Attendees also have the option of pre-paying for all breakfast events for the 2019/2020 season. When you pre-pay for all breakfasts you will be automatically registered for each future breakfast.

The Justice Center in conjunction with the 4th Judicial District will be hosting their 3rd Annual Legal Resource Day on October 25, 2019 from 9:00 a.m. - 3:00 p.m. They are looking for volunteers and you can sign up through the El Paso County Bar Association Website Event Page. Handouts will be available at our September Breakfast.

Looking forward to seeing everyone in September!