Common Law Marriage

A New Definition of an Age-Old Concept

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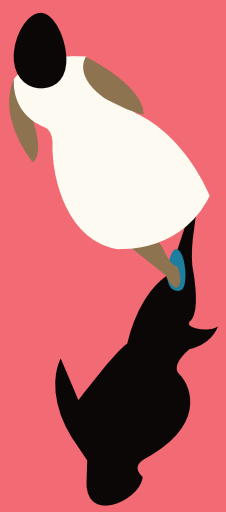

This article discusses the new test for proving the existence of a common law marriage and the legal implications arising from a court's determination of a valid common law marriage.

The legal concept of common law marriage was originally developed in pre-Reformation Europe, where marriage was viewed as a private family matter that rarely justified state involvement.[1] Typically, only highborn members of society had a purpose for formalizing a marriage, for instance, to establish alliances and preserve property rights.[2] Most others established marriages informally.[3] For example, in England, a couple could establish a common law marriage either by mutual assent to marriage in words of the present tense ("sponsalia per verba de praesenti"), or by mutual assent to marriage in the future, followed by sexual intercourse ("sponsalia per verba de futuro cum copula").[4]

The Roman Catholic Church accepted the principle that a man and woman could marry pursuant to their own agreement and without the presence of a magistrate or clergyman until 1563, and the English ecclesiastical courts accepted the notion until 1753.[5] Common law marriage in England ceased due to the enactment of laws requiring marriage to be formalized in the presence of a priest or a church official.[6]

Nevertheless, the doctrine of common law marriage made its way to America, where it remains recognized in a number of states. This article discusses the history of common law marriage in the United States and the doctrine's evolution in Colorado.

The National Picture

Before the Revolutionary War, some American colonies recognized the validity of common law marriage, while others, including Massachusetts, did not.[7] After the Revolution, the majority of colonies recognized common law marriage, following the New York case *Fenton v. Reed*, while the minority followed Massachusetts and refused to recognize the doctrine.[8]

A primary factor influencing the continuation of common law marriage in certain American colonies was frontier society. As one Texas court stated:

> The sparse settlements, the long distance to places of record, bad roads, difficulties of travel, made access to officers or ministers difficult for some of our residents, lack of general education in the English language produced unfamiliarity with the laws, and, in the small settlements it was more difficult to dignify an illicit association with the name of marriage than in one of our large cities where all of us are strangers to the private life of most of its residents.[9]

In 1877, the US Supreme Court recognized the validity of marriages contracted by present assent unless a state explicitly forbade such marriages by statute.[10] Presently, the US Constitution requires all states to recognize as valid a marriage that occurs in a sister state according to the sister state's law.[11] Thus, if a marriage is validly created at common law in one state, it must be recognized as valid in every other state. Today, only Colorado and nine other US jurisdictions continue to allow the formation of common law marriages.[12] Those jurisdictions are Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, Utah, Texas, and the District of Columbia.[13]

Common Law Marriage in Colorado

Common law marriages have been recognized in Colorado since the 1800s.[14] In *Taylor v. Taylor*, the Colorado Court of Appeals declared that

marriage is a civil contract requiring only the consent of the parties, followed by cohabitation as husband and wife, to be valid.[15]

Until this year, the seminal case addressing common law marriage in Colorado was the 1987 Colorado Supreme Court opinion *People v. Lucero*.[16] Under *Lucero*, 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.[17] While *Lucero* acknowledged that cohabitation and the parties' reputation in the community are "[t]he two factors that most clearly show an intention to be married," these factors are not necessary to prove a common law marriage.[18] Instead, "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."[19]

Current Definition of Common Law Marriage

On January 11, 2021, the Colorado Supreme Court issued a trifecta of cases refining the test for proving the existence of a common law marriage, recognizing that societal changes necessitated a corresponding change in the Court's long-standing definition. These cases, *In re Marriage of Hogsett and Neale*,[20] *In re Estate of Yudkin*,[21] and *In re Marriage of LaFleur and Pyfer*,[22] are described in detail in a previous *Colorado Lawyer* article.[23] In essence, the Supreme Court refined the test "to better reflect the social and legal changes that have taken place since *Lucero* was decided, acknowledging that many of the traditional indicia of marriage identified in *Lucero* are no longer exclusive to marital relationships, while at the same time, genuine marital relationships no longer necessarily bear *Lucero*'s traditional markers."[24]

In *Hogsett*, the Court recognized that the *Lucero* test included "gender-differentiated terms and heteronormative assumptions" that needed refinement.[25] It established a new test to determine whether a couple has established the existence a common law marriage:

> [A] common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The core query is whether the parties intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation. In assessing whether a common law marriage has been established, courts should accord weight to evidence reflecting a couple's express agreement to marry. In the absence of such evidence, the parties' agreement to enter a marital relationship may be inferred from their conduct. When examining the parties' conduct, the factors identified in *Lucero* can still be relevant to the inquiry, but they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. Finally, the manifestation of the parties' agreement to marry need not take a particular form.[26]

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The Court analyzed the claimed marriage between Hogsett and Neale under its revised definition and concluded that the *Lucero* test was difficult to apply to same-sex couples because (1) its very definition (parties agreed to be "husband and wife") excludes same-sex couples, (2) same-sex couples could not present evidence that they filed taxes as a married couple or listed their partners as "spouses" on beneficiary designations or other formal documents, and (3) same-sex couples could not always safely affirm their marital status by holding themselves out to the public as a married couple.[27]

The Court also concluded that the *Lucero* factors are no longer reliable to demarcate a boundary between marital and nonmarital unions because (1) many unmarried couples live together, (2) many unmarried couples have children together, (3) many married couples do not have the same surname, (4) many married couples retain separate finances, and (5) there are a variety of traditions and symbols that illustrate marital and nonmarital commitments.[28]

Ultimately, the Court opined that the *Lucero* factors are still relevant, but not conclusive. The Court's refined test is intended to emphasize the parties' mutual agreement to enter into a marital relationship.[29] To the extent that the more traditional factors enumerated in *Lucero* aid in that inquiry, courts may consider them. But courts should also consider "evidence of shared financial responsibility, such as leases in both partners' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, beneficiary and emergency contact designations; and symbols of commitment, such as ceremonies, anniversaries, cards, gifts, and the couple's references to or labels for one another."[30] "[T]he parties' sincerely held beliefs regarding the institution of marriage" should also be considered.[31] And courts must generally establish the date of the common law marriage in each case.[32]

In *Yudkin*, the Court made it clear that courts must consider the totality of the circumstances when determining whether a common law marriage exists;[33] the key inquiry is whether

the parties agreed to be married. If there is an express agreement to be married, the court must "accord weight" to that evidence.[34] Additionally, the parties' intent can be demonstrated by their conduct, including cohabitation, reputation in the community, joint accounts, joint ownership of property, and joint filing of tax returns.[35] Courts must also consider the parties' "relationship or family histories, and their religious beliefs and practices" when analyzing these factors.[36] "The purpose of examining the couple's conduct is not to test the couple's agreement to marry against an outdated marital ideal, but to *discover* their intent."[37]

In *LaFleur*, the Court considered whether a same-sex couple could prove the existence of a common law marriage entered into in Colorado before Colorado legally recognized same-sex marriages.[38] It concluded that common law marriages between same-sex couples that predate *Obergefell v. Hodges*[39] must be recognized in the same manner that a court would recognize common law marriages between opposite-sex couples.[40] In so ruling, the Court relied on the general rule "that a statute that is declared unconstitutional is void *ab initio*; i.e., it is inoperative as if it had never been enacted"[41] because courts must disregard any law that is "repugnant to the Constitution."[42] Second, the Court considered whether *Obergefell* applies retroactively as a matter of federal law.[43] The Court reasoned that when a rule derives from the US Constitution, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and *as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule*."[44] The US Supreme Court did not reserve the question of whether the rule of law announced in *Obergefell* operated only prospectively. Accordingly, same-sex couples must have the same rights as opposite sex-couples before *Obergefell* was issued,[45] including the right to enter into a common law marriage.

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Legal Implications of a Valid Common Law Marriage

Establishing a common law marriage is an uncertain battle, but it is one that has to be fought to determine the legal rights of parties in family law and related disputes.

Estate Planning

Marriage ends in one of two ways: divorce or death. In the latter case, when the decedent's estate is administered, it must be determined whether the decedent's assets constitute "probate" assets.[46] Probate assets either pass to the decedent's heirs according to the terms of a will or according to intestacy laws, if the decedent died intestate.[47]

In Colorado, the surviving spouse of an intestate decedent has defined statutory rights with respect to the decedent's probate assets.[48] For example, if the decedent dies without a living child or parent, the surviving spouse receives the entire intestate estate; or, if the decedent dies without a living child, but with a living parent, the surviving spouse receives $200,000, plus three-fourths of the balance of the intestate estate.[49]

On the other hand, if the decedent had a valid will, the surviving spouse may assert a right to an "elective share" of the value of the decedent's "augmented estate,"[50] rather than being bound by the will. Essentially, the "augmented estate" is the total value of the decedent's "probate" estate, plus certain of the decedent's non-probate transfers to others.[51] The surviving spouse's elective share increases with the duration of the marriage.[52] Additionally, subject to certain limitations and exceptions, if the testator married the surviving spouse after executing a will, the surviving spouse may receive, as his or her intestate share, at least the value of the share that would have been received if the testator had died without a will.[53] This is known as the "omitted spouse" share.[54]

Thus, whether a common law marriage is legally recognized has important consequences with respect to estate planning. As an example, one could imagine a couple with no living children or parents and no validly executed wills. When one partner dies, the surviving partner must demonstrate the existence of a common law marriage to the court, even though the decedent cannot testify about his or her intent, and no closely related parties exist to bear witness to the relationship. Depending on the court's examination of the pertinent factors and its evaluation of the evidence and the credibility of the witnesses, the surviving partner will be entitled to either 100% of the decedent's estate or nothing at all.

Spousal Privileges

Individuals who are in legally recognized marital relationships, including common law marriages, also have certain evidentiary privileges that

protect their rights with respect to testifying about or against each other in open court.

CRS § 13-90-107(1)(a) outlines the two privileges commonly referred to as the "spousal privileges":

1. a marital communications privilege that precludes examination during or after the marriage about confidential communications between the spouses that occurred during the marriage, without consent of the other person; and
2. a testimonial privilege, which operates only during the marriage and precludes testimony by a witness-spouse without consent of the other spouse.[55]

To invoke spousal immunity, there must be a valid marriage at the time of the testimony. To invoke the marital communications privilege, there must be a valid marriage at the time of the communication.[56]

The importance of demonstrating a common law marriage in the context of spousal evidentiary privileges is well-illustrated by *Lucero*. In that case, the defendant was convicted of attempted robbery and conspiracy to commit robbery of the elderly.[57] Defendant appealed, arguing that the trial court erred in admitting the testimony of Trujillo, who claimed to be defendant's common law wife.[58] After outlining the legal standard for establishing a common law marriage discussed above, the Colorado Supreme Court remanded the case to the trial court to reconsider whether a common law marriage existed.[59] If the trial court found that a common law marriage existed between defendant and Trujillo at the time she testified against him, the judgment of conviction would have to be reversed.[60]

Other Matters

The existence of a valid common law marriage also has significant implications with respect to insurance coverage, standing, entitlement to benefits, and various other issues.

For instance, in *Valencia v. Northland Insurance Co.*, plaintiff was struck and injured by a hit-and-run motorist and sought recovery under an insurance policy issued by the defendant insurance company to plaintiff's alleged common law husband.[61] The policy provided benefits to the insured, his wife, and his family in the event that any covered individual was injured by an uninsured motorist or a hit-and-run automobile.[62] The sole question at trial was whether plaintiff was the common law wife of the insured at the time of the accident and thereby entitled to benefits as a covered individual.[63] Considering the testimony of several witnesses and various documents in which plaintiff used her maiden name, the Court of Appeals answered the question in the negative.[64]

In *Whitenhill v. Kaiser Permanente*, plaintiffs alleged that defendants were negligent in failing to timely diagnose their daughter's ovarian cancer.[65] Defendants filed a motion for summary judgment, alleging that plaintiffs lacked standing under the Wrongful Death Act because the daughter left a surviving spouse.[66] The Court, after considering conflicting affidavits from the parties regarding the *Lucero* factors, found that there was a genuine issue of material fact with respect to whether a common law marriage existed, thus precluding summary judgment.[67]

Demonstrating a valid common law marriage may also be a prerequisite for one spouse to receive benefits (e.g., health insurance) through the other spouse's employment, or to receive government benefits. Individuals claiming Social Security or widows' benefits under 42 USC § 402 must prove that they are common law married according to the law of the state in which they reside. In a case applying Pennsylvania law, the court sided with a widow claiming Social Security benefits and lump sum death benefits where the couple exchanged wedding vows, resided together, raised a granddaughter together, and intended to be regarded as husband and wife, despite subsequent incidents in which the couple failed to identify themselves as married.[68] Similarly, in a case applying Alabama law, the court decided that the claimant was entitled to receive survivor's benefits where the couple lived together continuously for over eight years and held themselves out to the public as husband and wife, regarded their relationship as a permanent union, and continued their relationship until the husband's death, despite the facts that there were no actual words of assent and the claimant expressed doubt as to the legal validity of the relationship and had indicated that the couple planned to have a ceremonial marriage.[69]

Conclusion

Common law marriage remains legal and viable in Colorado, despite the doctrine's limited recognition by other states. The Colorado Supreme Court's revised definition of common law marriage recognizes that marriage takes many forms and numerous factors may evidence its existence. Practitioners should be prepared to meet the Court's evidentiary tests when asserting spousal rights in family law and all other proceedings in which spousal status is an issue. CL


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NOTES

1. Primrose, "The Decline of Common Law Marriage and the Unrecognized Cultural Effect," 34 *Whittier L. Rev.* 187, 192 (2013).
2. *See id.*
3. *See id.*
4. *Id.*
5. Crawley, "Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine," 29 *Cumb. L. Rev.* 399, 401–02 (1998–99).
6. Primrose, *supra* note 1 at 193.

7. Crawley, *supra* note 5 at 402.

8. *Id.* at 402–03.

9. *McChesney v. Johnson*, 79 S.W.2d 658, 659 (Tex.Civ.App. 1934).

10. *Meister v. Moore*, 96 U.S. 76, 78 (1877).

11. U.S. Const. art. IV, § 1.

12. *In re Marriage of Hogsett and Neale*, 478 P.3d 713, 720 n.6 (Colo. 2021).

13. *Id.*

14. *See Taylor v. Taylor*, 50 P. 1049 (Colo.App. 1897).

15. *Id.* at 1049.

16. This case involved the spousal testimonial evidentiary privilege, which is discussed below.

17. *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

18. *Id.* at 665.

19. *Id.*

20. *Hogsett*, 478 P.3d 713.

21. *In re Estate of Yudkin*, 478 P.3d 732 (Colo. 2021).

22. *In re Marriage of LaFleur and Pyfer*, 479 P.3d 869 (Colo. 2021).

23. Rosenberg, "'I Do?' Common Law Marriage and a 'Refined' Look at *People v. Lucero*," 50 *Colo. Law.* 50 (June 2021), https://cl.cobar.org/features/i-do-common-law-marriage-and-a-refined-look-at-people-v-lucero.

24. *Yudkin*, 478 P.3d at 734 (citing *Hogsett*, 478 P.3d at 714–15).

25. *Hogsett*, 478 P.3d at 714–15.

26. *Id.* at 715.

27. *Id.* at 721.

28. *Id.* at 722–23.

29. *Id.* at 724.

30. *Id.* at 725.

31. *Id.*

32. *Id.*

33. *Yudkin*, 478 P.3d at 734, 736.

34. *Id.* at 737.

35. *Id.* (citing *Hogsett*, 478 P.3d at 724–25).

36. *Id.*

37. *Id.* at 718 (emphasis in original).

38. *LaFleur*, 479 P.3d at 873–874.

39. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

40. *LaFleur*, 479 P.3d at 880.

41. *Id.* at 874.

42. *Id.* at 880.

43. *Id.* at 874.

44. *Id.* at 882 (citing *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993)) (emphasis in *LaFleur* but not in *Harper*).

45. *Id.*

46. Rosenburg, "The Common Law Spouse in Colorado Estate Administration," 35 *Colo. Law.* 85, 86 (Sept. 2006). Probate assets are those the decedent owns in his or her name alone or co-owned with others as tenants in common. Non-probate assets include assets held in joint tenancy and other accounts and benefits payable to persons or entities other than the decedent's estate. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. "The effect of the election is to prevent one spouse from disinheriting the other, absent a valid agreement or the failure of the surviving spouse to recognize and assert the election." *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 88.

54. *Id.*

55. *People v. Inman*, 950 P.2d 640, 642 (Colo. App. 1997).

56. Litt and Dussault, "The Spousal Privileges," 26 *Colo. Law* 61 (Jan. 1997).

57. *Lucero*, 747 P.2d at 661.

58. *Id.*

59. *Id.* at 667.

60. *Id.*

61. *Valencia v. Northland Ins. Co.*, 514 P.2d 789, 790 (Colo.App. 1973).

62. *Id.*

63. *Id.*

64. *Id.* at 790–91.

65. *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129, 1130 (Colo.App. 1997).

66. *Id.*

67. *Id.* at 1132.

68. *Turner v. Barnhart*, 245 F.Supp.2d 681, 684–85 (E.D.Pa. 2003).

69. *Baber v. Schweiker*, 539 F.Supp. 993, 997–98 (D.D.C. 1982).