

Examples and Explanations

Family Law, Second Edition, Oliphant & VerSteegh

Page limitations in the second edition placed a natural practical limitation on the number of problems that we could share with student readers. However, the web provides us with the opportunity to supplement several of the sections in the Examples and Explanation book. We believe that these new problems will further enhance a student's ability to master family law and provide an added intellectual boost when preparing for final family law examinations.

Please read the introductory material for each section before you begin work on the following additional problems.

Note: This material is available only to a student who has purchased the first or second edition of the Family Law Examples and Explanations book. It may not be copied or reproduced in any form without the express written consent of authors. Students who have purchased the second edition may, of course, download and print out this supplemental material for their individual use.

DOWNLOAD #2, June 4, 2007: 2.11 Common Law Marriage Defined

2.11(a) EXAMPLE. Assume that Jack and Jill reside in a jurisdiction that recognized common law marriages. They never had a ceremonial marriage, did not live together, and generally kept the claimed relationship secret, although occasionally they told close friends they were married. They often had sexual relations. When Jill died, Jack sought his intestate share of her estate as her common law husband. Will Jack be successful?

EXPLANATION. Jack will not be successful. A common-law marriage requires that the parties: agree to be married; live together after the agreement as husband and wife; and represent to others that they are married. Jack and Jill did not hold themselves out to the community as husband and wife; did not cohabit together, and apparently did not have a present agreement to marry. Isolated references to close friends that they were husband and wife, without more, will not persuade most courts that there was a holding out that satisfies the common law marriage criteria. *Matter of Estate of Giessel*, 734 S.W.2d 27 (Tex. App. 1987).

2.11(b). EXAMPLE. Martha and Matt reside in a jurisdiction that recognizes common law marriages. They have agreed that they are husband and wife and their reputation in the community is that of husband and wife. They are concerned, however, that without a proper church ceremony their relationship will not be legally recognized. They plan such a ceremony but before it occurs, Matt dies. Martha now seeks her intestate share of Matt's estate as his wife. Will Martha be successful?

EXPLANATION. Most likely a court will recognize the relationship as a common law marriage. They had an agreement *in presenti* to be husband and wife, lived together, and held themselves out to the community as such. Their reputation in the community was that of husband and wife. There is no common law requirement that they go through a formal wedding ceremony before a court will recognize the relationship. Martha will be successful in persuading a court she is Matt's common law wife.

2.11(c). EXAMPLE. Assume that Rachel, age 15, and Rex, at 21, reside in a jurisdiction that recognizes common law marriages. Rachel uses her own name in school and publicly represented to her friends at school and at work that she was a single person. When Rex unexpectedly died in a motorcycle accident, Rachel sought her intestate share as his common law wife. How will a court rule?

EXPLANATION. In a case similar to these facts, the Supreme Court of Texas held that there was insufficient evidence to support a common law marriage. It found an absence of evidence indicating they had ever moved into or occupied publicly a common residence or room. They did not have a reputation in the community as husband and wife and Rachel continued using her own name and publicly represented to those at her school and at her place of work that she was a single person. She did not establish that the couple lived together as man and wife or that they held themselves out to the public that they were man and wife. *Ex parte Threet*, 333 S.W.2d 361 (Tex. 1960).

EXAMPLE. Patricia sought a divorce from Pete in a common law jurisdiction. Prior to bringing the divorce action, the couple spent most of their time outside the forum. The jury was instructed as follows: "Do you find from a preponderance of the evidence that Petitioner and Respondent entered into a common law marriage? In connection with the foregoing question, you are instructed that the elements of a common law marriage are: 1. A mutual agreement to be husband and wife. . 2. After this agreement they lived together in this state as husband and wife. 3. They represented to others that they were married." The element of a common law marriage as set out in the state Code were as follows: (1). There was a mutual agreement to be husband and wife, (2) After the agreement, they lived together in this state as husband and wife, and (3) and there represented to others that they were married.." The jury returned a verdict finding for Patricia and Pete appealed claiming the jury instruction was incorrect. It's a technical point but can you discover and argue the point made by Pete's lawyer?

EXPLANATION. This is a pretty technical problem. The only difference between the instruction given by the court and that found in the state code is the absence of the word "there" from the jury instruction. Pete will argue that this is crucial because the holding out must have occurred in the state where recognition of the common law marriage is sought – not outside the forum. In a case almost identical to this example, a Texas appellate court held that the instruction was in fact error. It went on to find that there was not sufficient evidence to sustain a finding of a common law marriage within the forum because the couple spent most of their time outside the state. *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App. 1991).