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A New Look at Common Law Marriages in Florida

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SPECIAL COMMENT

A NEW LOOK AT COMMON LAW MARRIAGES IN FLORIDA

In publishing the following comment, the Miami Law Quarterly is departing from its usual policy of publishing only the work of students attending our own law school. The author, Arthur Rothstein, studied under the guidance of Professor McDougal at Yale University and has written this comment as an example of the widely-discussed McDougal approach to legal theory. Briefly stated, Professor McDougal's approach is sociological, and attempts to relate the development of any field of law to the human and governmental forces which constantly interact. Professor McDougal has found it necessary to develop new terminology to accurately describe certain new concepts.

We believe this comment will be of interest both to legal theorists and to those concerned with the substantive law set forth.

Introduction—Value Orientation as a New Approach

The lawyer is a decision maker. He must decide what the "law" is in his case and how he must prove and argue the case so as to obtain a judicial ruling favorable to his client. A Flow of Decision study,[1] the new approach used in this paper, is a very practical aid to the lawyer in his endeavors along these lines. Through this approach he can find, very easily, the events similar to his case at hand, the technical theory which can be applied to it, and the previous court holdings and their effects—thereby being in a better position to serve his client, himself, and the society in which he lives.

The members of society are intermeshed by the interrelations and activities carried on between people who are seeking various values. While infinitely varied in their particulars, these values can be generalized into eight overall categories: affection, power, wealth, skill, enlightenment, well-being, rectitude, and respect.[2]

As these values are strived for, various decisions must be made to determine the course of action which would be the most effective in reaching the desired goal. Each individual, whether for himself or in an official capacity, is constantly making these decisions, which include both positive actions and limits on actions to be taken.[3]

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1. The author prefers this terminology in that it differentiates the ordinary study of case from the McDougal theoretical approach—wherein research and teaching of an overall approach to social studies is applied to the field of law.

2. The underlying theory employed in this paper is that expounded by Professors McDougal and Lasswell of Yale University Law School. Briefly, this theory involves a systematic approach to the study of social sciences, so that comparative studies of the same problem can be made in different areas of the world. See McDougal, The Comparative Study of Law for Policy Purposes, 61 Yale L.J. 915 (1952).

3. The individual decides, as well as his particular goals, the type of conduct which should be carried on to reach these values, and the limits to be put on the conduct directed toward these various goals. A member of an organized group, whether small or large, makes similar decisions, however, these are in the context of the organization's goals, conduct and limits. For example, as representatives of his society, the individual, at various levels of government, makes decisions which are designed to further the community's values.

The legislature is the part of society's Formal Authority which establishes the community's values by various written prescriptions as to preferred conduct on the part of the individual. It also prescribes the policy limits beyond which no action can be taken, for if the limits are violated community coercions are to apply by sanctions whose severity varies with the sanctity of the limits.

Since it is difficult, if not impossible, to prescribe for all possible relations between the vast numbers that make up a modern society, there is a branch of the Formal Authority, the courts, which will give the community's decision as to which values, ideas of conduct, and limits of conduct will prevail whenever individuals or groups are in conflict over these matters.

The differences of opinion, which may arise because the legislative prescriptions existing on the issue need interpretations as to particular facts, or because none exist at all, will be presented to the courts, with each party offering his claims as to the events which occurred and the technical legal theories in a manner designed to elicit the most favorable response from the judge. The judge, as the decision maker of a case, will be influenced in his response by his personal predispositions, and by the environment of the case, which includes the claims of both sides, their objectives, the events as the judge sees them, and the response of other decision makers, both of his and other jurisdictions.

The effects of a response will be felt at several levels. There will be the immediate effect upon the interested parties, whose goals and claims may be upheld or denied. The response will have a wider impact in that it sets the judicial prescription as to the community's notions of the proper values, conduct, and limits in these particular circumstances. It further may affect future responses of other decision makers who are presented with the same or similar events by parties who invoke the Formal Authority's favorable decision of their claims as to community values.

An examination of a number of these responses will establish with significant clarity that to which the decision maker is responding in the environment of a case, in the light of his elicited predispositions on a particular issue, or in general. The study will show the events, claims, technical theory, parties invoking the Formal Authority, plaintiffs' and defendants' objectives, and the responses of other decision makers, as well as the effect and trend of the various responses.

A Flow of Decision study in this form will enable a better understanding of the problems, responses, and effects in any area of the law. Such an understanding allows a new decision maker to have a clear picture of the values at stake in an issue, so that he can clarify his own values, and thus be able to decide on the best community policy to apply through any particular response.

The subject matter of this Flow of Decision study deals with a phase of affection value. The need for affection is basic to man, therefore the desire and search for it is a universal one. In our society the relation of affection between the opposite sexes is channelized in the institution of marriage.

The process leading to the formation of marriage, courtship, is the focus of a good portion of society's attention. The methods of formation have been prescribed and ritualized. Society provides varied means of terminating such a relationship when the affection between the parties has ended.

This study deals with the problem arising originally out of the scope or primary value of affection as crystalized in the marital relation, particularly—the formation of marriage.

Common Law Marriage—Disregard of Statutory Formalities

The legislature of Florida has prescribed certain formalities which should be carried out in order for a marriage to be formed. However, these marriage laws are not exclusionary, they are merely directory. The Supreme Court of Florida has held that since the statutes were merely directory, common-law marriage is valid in Florida(6).[4]

Because common-law marriages are valid, such marriages can be formed in Florida—by-passing all legal requirements of the statutes. As a result, there have evolved judicial rulings as to the formalities required for the establishment of marriage by common-law. The basic judicially established formalities of a common-law marriage were stated by the Florida Supreme Court in *Chaves v. Chaves*(11) as follows:

> There are at least two essentials of a common-law marriage; (1) mutual consent, and (2) capacity. It is the agreement itself, and not the form in which it is couched, which constitutes the contract, and the words used or the ceremony performed are, like cohabitation and repute, merely evidence of marriage. There must be an agreement to become husband and wife immediately from the time when the mutual consent is given.

Of course, unlike statutory formalities, whether the common-law ones have been satisfied or not cannot be known until a judicial determination occurs.

Legislative Enactments

Procedure

The statutes of Florida[5] establish a formal process by which persons, so desiring, can become husband and wife. The process for a ceremonial

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4. To facilitate the study of the Florida cases involving common-law marriages, the writer has given each case a symbolic notation. The key to the notations will be found in the chronological case table at the end of the article, and will aid in a discussion of the parties, claims, objectives, events and effects of the cases.

5. Florida statutes governing marriage are Fla. Stat. §§ 741.01-741.22 (1953). The bigamy statutes are Fla. Stat. §§ 799.01-03 (1953).

marriage is as follows. A marriage license is issued by the County Judge upon the couple's meeting the statutory requirements as to age, physical examination and blood tests. The applicants for a license must satisfy the judge that they are above twenty-one. If one or both are younger than twenty-one, written consent to the marriage must be given by the parents or guardian of the under-age party. Anyone under age who has had a previous marriage is exempt from the consent requirement.

Before a license can be issued, the applicants must have a blood test and physical examination to discover syphilis within thirty days prior to the application. The certified results of the test and examination must be presented to the County Judge. A condition precedent to the issuance of the license is a negative finding as to syphilis.

After a three day waiting period and public notice, the applicants receive their license which is valid for thirty days. The rights of the matrimonial contract may be solemnized, thereafter, by any regularly ordained minister or elder, or judicial officer or notary public of Florida, or any person performing the marriage ceremony according to the rites and ceremonies of the Society of Friends or Quakers.

Whoever performs the marriage ceremony must, within ten days, certify the license and return it to the County Judge, who keeps a record of all such licenses and certifications. If no certification is made, proof of the marriage may be made by affidavits of two witnesses to the ceremony, and this shall be recorded and have the same effect and force as if a proper certification had been made.

Policy Limits

The legislature has excluded certain classes from the right to be married under the regulations as prescribed by law. Miscegenation and incestuous marriage are prohibited and penalized in Florida. Penalties are provided against both one guilty of bigamy and one who knowingly marries someone already married to another.

A license will not be issued to an applicant who has syphilis in a communicable stage. However, an exception may be made when the female applicant is pregnant. A license cannot be obtained by a male under eighteen or a female under sixteen, with or without parental consent, unless the applicants swear, under oath, that they are parents, or expectant parents of a child.

Effect

In spite of these statutes it is not necessary to comply with the detailed regulations in order to be legally married in Florida. The Florida Supreme Court has held that the formal statutory requirements are merely directory and do not exclude the common-law marriage (6,2). As a result, the Supreme Court, by judicial decree, has had to establish the require-

ments for the formation of a common-law marriage to complement the statutory regulations for a ceremonial marriage.

Events of a Common-Law Marriage Formation

The basic fact creating the issue of common-law marriage in the courts of Florida, is that a man and woman enter into a relationship, usually of cohabitation, without conforming to legal requirements as to license or ceremonial marriage.

The circumstances surrounding the cohabitation and alleged marital relation vary greatly. These circumstances play an important role in influencing a court's response to the question of whether or not a common-law marriage was entered into by the parties.

Proof of a ceremonial marriage relation is evidenced by the certified license as required by statute. The various Florida decisions on the creation of common-law marriage show what is required for the proof, and therefore establishment, of a common-law marriage. These requirements can be determined by discovering how the pattern of changing circumstances will alter the judicial ruling from case to case.

Below are described the variegated types of cases on common-law marriage which have been before the Supreme Court of Florida. In any particular case there usually was a combination of events with some favoring the existence of a common-law marriage while others negate it.

Events Which Favored the Existence of a Common-Law Marriage

1. The alleged parties to the common-law marriage cohabitated as man and wife, lived together, were known and recognized by friends and acquaintances as husband and wife, and were generally held out to the public as such (1,3,6,11,13,19,16,33,35,39,40,43,7,8,10,2,15,17).

2. The parties had capacity to marry (this was present or implied in most of the cases except 38 and 25).

3. There was clearly, between the parties, a present agreement to be married (6,9,32,33,39,27,31).

4. The actions of the parties indicated that a marriage relationship existed.

(a) They joined in signing mortgages or other legal instruments as husband and wife (6,33).

(b) They introduced, acknowledged, and recognized each other as husband and wife (7,1,2,43,27).

(c) The husband so acted by putting the wife in his will and taking out insurance in her favor (19,27), by sending birthday cards to his wife, acknowledging her as such (33), by giving the wife engagement and wedding rings (43,33), or by givng and attending "wedding" parties and donating to charity as "Mr. and Mrs." (43).

5. Children were born to the alleged common-law spouses (35,38,28,16, 12,2,8).

Events Which Negated the Existence of a Common-law Marriage

6. The alleged spouses merely cohabited and, or lived together (22,23, 24,34,36,37,43,41,20,33,4).

7. One of the parties had no capacity to marry due to the existence of a living spouse (38,25).

8. There was no agreement to marry (36,40).

9. There was an agreement to marry but it could have been interpreted as a future agreement (10,34,23).

10. The cohabiting and passing as husband and wife existed for only a short time (14,36).

11. A ceremonial marriage between the parties was,

(a) Merely discussed (13).
(b) Planned in the immediate future (23).
(c) Promised by the alleged husband for the future (10).

12. Either or both of the parties took positive actions indicating that there had been no marriage,

(a) by signing documents or official papers as a single person, or claiming not to be married (17,43,21,22,18,11,41).
(b) by the man referring to the woman otherwise than as his wife (24).

13. There was a meretricious relationship and cohabitation before the alleged common-law marriage,

(a) since one of the parties had a living spouse (24,31,29),
(b) as established by the evidence (43).

Events-Miscellaneous

14. The parties had been previously married and then divorced, however,

(a) before the decree there was a reconciliation which amounted to an agreement (32), or with no agreement and no attacks on the decree (40),
(b) after the decree the parties merely lived together (41).

15. After a ceremonial marriage it was discovered that one of the parties originally had an impediment to marriage, and,

(a) after the discovery the other party tried to annul the marriage (16),
(b) after the discovery the other party continued the marriage relationship (28).

16. One of the parties to the alleged common-law marriage died and the other wished to testify that there was an agreement to be man and wife (12,39).

17. The alleged husband was killed while at work and his heirs collected compensation (40,32).

Plaintiff

Suits asking for the aid of the courts to determine whether or not a marriage has been effectuated, have been instituted by a variety of parties.

Among the plaintiffs who have brought these actions, have been alleged wives, seeking to obtain the benefits of the marital status (9,39,40, 41,29,40,1,4,7,10,11,14,15,20,21,22,28,32); alleged husbands (6,16,38,31); heirs of the alleged common-law marriage (8,13); ceremonial spouses of the parties (5,16,28); and heirs of the individual spouses (2,18,23,24,12,43). Common-law marriage was a crucial issue in two cases where the State of Florida prosecuted crimes (6,19); where a bank held a property mortgage (17); and where the United States was interpleading as an insurer (27).

Claims

The plaintiffs often manipulate the events of the particular case, along with the technical doctrines previously enunciated by the Supreme Court, in an attempt to give body to a basic claim of the existence, or inexistence, of a common-law marriage.

Objectives

The basic goal for which the plaintiff strives, and usually the ultimate question which the court decides, is who is to take possession or share in some type of wealth involved in the alleged marital relation. This goal may be sought through divorce, and temporary or permanent alimony (1,4,10,28,34,35,36,31,43,5,7,11), or by a claim of dower (14,15,21,22,33,41), or by an attempt to control or share in an estate (6,18,24,39,43,23,31). The possession of property is often an objective (2,8,13,12,37,28), as is the sharing of a workmen's compensation award (32,40), or of a pension fund (20) or of an insurance payment (27).

Some further objectives have been annulment (16,5) and damages for libel (26). The State of Florida has also sought convictions of polygamy (3) and accessory to murder (19).

Defendant

Those against whom the pressure of the courts has been invoked are parties similar in position to the invokers. However, they are usually the other participants in the contest over some wealth and will do their best to obtain this objective themselves.

The alleged common-law husband is often in this category (1,6,4,7,10, 11,17,18,28,34,35,36,9,43,27,29). Other defendants may be the alleged wife

(19,23,24,17,38,39,43,27,16), the heirs of one or both of the alleged spouses (6,13,21,22,33,27,41,39,2,15,12), those in possession of an alleged spouse's land (2,8,13), the administrator of the alleged husband's estate (14,15,21, 22,23,39,43), and a spouse by a ceremonial marriage (5,16,28,37). An employer liable for Workmen's Compensation (32,40) and a Police Pension Fund have also been involved in this type of suit.

Claims

The defendant will answer the claims of the invoker by presenting the events of the case in a manner, with reference to the technical doctrines of prior cases, so as to elicit a response which will prevent the attainment of the plaintiff's objective. This manipulation will include the presenting of positive claims of his own in the hopes of more effectively influencing the court.

Objectives

The defendant desires to thwart the objectives of the plaintiff, and to prevent any transference or possession of wealth which is claimed on the grounds of the alleged common-law marriage.

EFFECTS OF PRIOR DECISIONS ON THE ISSUE OF COMMON-LAW MARRIAGE

A holding by the court that a common-law marriage took place 1,6,8,13,19,21,28,32,33,35,39,9,27,42,31), or that there was none (3,10,11,14, 18,12,20,22,23,24,34,36,37,38,41,40,29,30), has, of course, much wider ramifications than merely a final, official adjudication of the marital status of the parties to the alleged marriage.

A holding that a marriage existed has been the basis for a divorce (1,35,31); or on the establishment of a prima facie case for a common-law marriage (33,43,7,13) the husband had to pay temporary alimony, attorney's fees and court fees *pendente lite*, in a divorce suit (7,43). The effect may be that the wife has dower rights (21,33,42), or that a spouse is the heir of a deceased spouse (6,21,39), or that a piece of land may become the property of the wife (28,31), or the property of the children of the marriage (8,13). The wife may become the beneficiary of insurance on the husband's life (27), or of a workmen's compensation award (32). It may or may not prevent an annulment of a voidable ceremonial marriage.

A holding of no marriage, or of no prima facie case being presented (4,34), will prevent a divorce (36,38) and eliminate the need for the husband to make any payments *pendente lite* (4,10,11,34). Since there was no marital status on which to base any marital rights, an alleged spouse will not be an heir (18,14), have dower rights (14,17,22,23,24,29,43), collect a pension (20), or a workmen's compensation award (40), nor take a share in land (37).

RESPONSE OF THE SUPREME COURT OF FLORIDA

1. *Judicial Predispositions*

At various times, through their decisions, the judges of Florida have indicated their general feelings on the problem of marriage and common-law marriage. These predispositions, as described below, and other personal attitudes which remain undisclosed, will affect the judicial reaction to the settlement of a case—thereby resulting in a holding as to the formation, or not, of a common-law marriage.

Most important, the court has often expressed its lack of enthusiasm for common-law marriage (11,17,24,32,39). While favoring the abolishment of common-law marriage, the court feels that the legislature is the proper branch of the government to prescribe its creation in Florida (11,24,39).

Society's participation and interest in every marriage is recognized by the court as part of its public policy, so that the court feels that there must be some public recognition of a valid common-law marriage as evidence of the existence of the marriage—for the protection of the parties, their children, and the public (11,15). Further, the court feels that to conserve the welfare of human society and good public order, its policy is to require a common-law marriage to be proven with clearness and exactness, to the end that injustice may be avoided and family and property rights be protected (17).

One of the reasons why the court merely "tolerates" common-law marriage is that its purposes and needs have disappeared. In Florida's early development, it was a frontier state, with difficult travel and sparseness of settlements, and those authorized to perform marriages being relatively inaccessible, there was good reason for this method of marriage. However, the court points out that today's conditions differ; distances have shrunk by modern travel, and all facilities for ceremonial marriage are easily available, therefore there is no logical reason for the continued existence of common-law marriage (24).

With reference to divorce, the court feels that the increase in recent years, in the number of suits based on a common-law marriage, is directly due to the elimination by the legislature of various causes of action such as breach of promise to marry, in the so-called "heart-balm" statute.[6] As a result a new procedure was established in *Fincher v. Fincher* (34), to be discussed below, which made it more difficult for an alleged common-law wife to get temporary alimony.

The overall effect of the Supreme Court's negative predisposition toward marriages consummated without following statutory procedures is to examine the evidence with increasing caution—placing a greater burden on the party trying to establish the marriage (24).

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6. FLA. STAT. § 771 (1953).

2. *Judicial Prescriptions—Technical Doctrine*

Substantive Law

The "law" of common-law marriage is well established in Florida (22); it is clearly valid (6,2,7,10,11,14,21,23,39). It is in force unless expressly modified by statute (6,2,7,39), and the Supreme Court has held that the existing statutes are merely directory and therefore do not void common-law marriage (6,2). The courts cannot abolish it by judicial fiat; rather, it is up to the legislature to take the necessary steps to end common-law marriage (11,24).

The court originally defined common-law marriage as a civil contract relation that is valid when consummated by consent and cohabitation of competent parties (6,2). This was later qualified in that once a present agreement had been made, consummation was not required (9). However, some public recognition of the existence of the relationship is required, as the state is a party to every such agreement (15,11).

The two essentials of common-law marriage are capacity and mutual consent. It is formed by words of common assent—*per verba de praesenti*—when the parties are in each other's presence. It may be without legal ceremony or witness, and may recite any form of words of ceremony which give evidence of the present intent of the parties (10,11,13,14,17,19, 20,23,24,36). The Florida Supreme Court refused to recognize a future agreement to be married, with physical consummation—*per verba de futuro cum copula*—on the grounds that it was fraught with serious consequences to the innocent who might enter marriage on a basis so nearly illicit (10,11,23,34).

Once a marriage is effectuated, it remains in full force, thereafter, until it is dissolved by law, or the death of one of the parties (15,21,39). The only difference between a common-law marriage and a formal marriage is the method of expressing consent, and once married, the parties are as effectively married as if by a legal ceremony (15,26). It follows, therefore, that even if a common-law marriage is for business and convenience purposes, this is not enough to hold it illegal (43).

A common-law marriage is valid, though incepted and consummated in a state where it is not recognized, if the parties returned to Florida and continued to live openly as man and wife (32). If one of the parties has a living spouse, a common-law marriage is incapable of being contracted (25).

A federal district court, interpreting the Florida decisions, held that a proxy marriage created a valid common-law marriage since it satisfied the requirements of intent, consent, agreement, and proof (27).

Presumptions

The Supreme Court of Florida has established a number of presumptions which are to be applied whenever the issue of common-law

marriage appears in a case. A person alleging a common-law marriage has to prove a prima facie case, and once this is done the burden shifts to those attacking the marriage (33,36,39,43) for, generally, the burden of proof is on he who asserts the illegality of a marriage (5,21,24,33,39,43). It is not required that there be a preponderance of the evidence to prove that a common-law marriage was formed (41).

A presumption of marriage may be established by cohabitation and repute of the parties as husband and wife, and this will make out a prima facie case of marriage (1,3,13,36). Cohabitation as man and wife means living together—having the same habitation—and is not a mere sojourn, visit, or living together for a short time (13). Repute is a general understanding by neighbors and the public that the parties are living as man and wife and their relations are not meretricious (13).

Proof of clandestine or concubinage relations between the parties will rebut any presumptions of marriage (13). Whenever a relationship is shown to have been meretricious in its inception, it is presumed to have continued in this manner and the burden shifts to the party alleging the marriage to show the metamorphosis from concubinage to marriage (24,37). However, a discussion of ceremonial marriage from time to time does not overcome the presumption of marriage (13).

Once a marriage is formed, whether common-law or legal, there is a presumption that the parties were competent and legally qualified to consent (21).

A formal marriage, originally invalid because one of the parties had an impediment, presumably ripens into a common-law marriage when the impediment is removed (16,29). However, if information of the impediment was fraudulently withheld by one of the parties, the innocent party may get an annulment in spite of the ratification (28).

When the state is prosecuting under the criminal statutes, it always has the burden of proof on any question of common-law marriage, whether to prove or disprove its existence (13,19).

Procedure

As has been described earlier, the person alleging the existence of a common-law marriage must prove a prima facie case and then the burden shifts to the attackers of the marriage (33,36,39,43). The person claiming the marriage must establish the agreement between the parties (36).

Normally, in divorce suits, an order of temporary alimony, attorney's fees, and court costs *pendente lite*, is awarded on the establishment of a marriage between the parties (4,5,11). When, however, the divorce was based on an alleged common-law marriage, the original requirement in Florida was that at least a prima facie case of the marriage appear, by proof or admission, before taking testimony to determine the amount of

the temporary payments, since if the marriage relationship did not exist, the defendant husband was not liable (5,11,34). In a recent reaction to what it termed an increase in divorce suits founded on alleged common-law marriages, the highest court of Florida, in the *Fincher* case (34), established a new procedure—on the ground that a stronger rule was needed to handle this type of case. The court said that the chancellor should sever the issues, and, before any other hearing, should determine conclusively whether or not a common law marriage actually exists. As an alternative, the chancellor can defer a hearing on temporary payments *pendente lite* until the final hearing, unless the exigencies of the particular case should, in equity and good conscience, dictate severance immediately.

The court felt that the new procedure was one consonant with public policy and equitable principle. However, it was very emphatically pointed out that the new procedure did not abrogate or modify the rule that when a prima facie case was established the burden shifted to the defendant. Therefore the *Fincher* case did not alter any substantive prescriptions on common-law marriage; it merely established a new procedure in divorce cases.

Evidence

The best evidence of a common-law marriage is the testimony of the contracting parties or those present at the time of the agreement (13,36). However, when the parties so desire, a common-law marriage can be established by cohabitation and repute when the best evidence is not available (13,36). Cohabitation and repute are merely evidence of the agreement and their proof is not required. Nevertheless, these circumstances, even when present, do not establish a common-law marriage *if there has been no consent or desire to create one* (11,18,36).

Since the marriage may be in any form of words or ceremony, the only requirement is that the circumstances give evidence of present intent and agreement of the parties (11,13,14,17,19,20,23,34,36).

Because there can be no common-law marriage by future agreement, any express future agreement is absolutely fatal to a claim of marriage, for it shows mental reservations incompatible with consent (10,11,23,34). However, discussion of ceremonial marriage, from time to time, is not necessarily inconsistent with a prior common-law marriage (13).

The evidence of cohabitation which is necessary to show the marriage, is the living together of the parties in the same habitation (13). Repute must be supported by positive proof that, generally, it was understood by friends, neighbors, and acquaintances that the parties are living as man and wife, and their relations were not meretricious (13). It is clear that the cohabitation and repute which will show a common-law marriage must be open and public, so that by their conduct, the parties are known as husband and wife (15,11).

Once a marital status is formed, subsequent acts of concealment or maintenance of secrecy concerning the marriage are not sufficient evidence to destroy it (15,21,39). Evidence of a meretricious relationship is established when an alleged spouse was ineligible to marry (24,37). For example, if a party is shown to have a living spouse, then this fact may be used as evidence that the party was incapable of contracting a common-law marriage (25).

Under Florida's "deadman's statute," a party cannot testify with reference to the alleged marriage when the other party is deceased, if the party is interested in the outcome of the suit (15,12). "Interest" means interest in the cause, and in the outcome of action (12). However, if the interested party is questioned about the agreement on cross examination, the bars are down, so to speak, and his testimony is admissible (21,33,39).

Response in Florida Decisions to All Factors

The environment of each case seemingly influences decisions on the issue of common-law marriage. A careful study of the cases indicates that the future effects of a decision also appear to be influential.

The Supreme Court of Florida shows a tendency to find that the events in doubtful cases show no common-law marriage, when the effect of an opposite decision would be to give an alleged wife a share in the man's estate, or a divorce and alimony. Of course, as discussed below, if the events clearly show a marriage to be either formed or not formed, the court will rule accordingly. This tendency to hold against the formation of a common-law marriage is to be expected in the light of the court's negative predispositions toward non-statutory marriage formation.

The court may effectuate the result of "no common-law marriage" by upholding the decision of the lower court (8,20,29,30,22); by finding that a prima facie case of marriage was not made out (37,41,4); or that a clandestine relationship rebutted the presumption of marriage (24). The court also has held that there was no present agreement (14,18,36,40), or that the agreement was a future one (10,11,23,34).

The events which elicited the holding that no common-law marriage was formed, were the lack of a present agreement (10,23,34); a meretricious relationship between the parties (24,29); and acts by either, or both, of the parties indicating that there was no marriage (11,18,22,24). The fact that the parties merely lived together without repute of man and wife (18,20,23,24,34,36,37,41,40,30), or that the living together was for just a short time (12,32), carried great weight.

The court has ruled in favor of a common-law marriage by holding that the presumption in favor of marriage has not been overcome (1,8,13, 21,28,33,35); by finding that a prima facie case of marriage was made out (43,7); or by a decision that a present agreement took place (6,32,39,31,9,27).

The events which caused the court to declare that a marriage was formed, included a clear, present agreement between the parties (32,6,33, 39,31,9,27); acts by the parties which show that a marriage took place (1,19,43,7,27); and, of course, cohabitation and repute of marriage (1,6,8, 13,19,21,33,35,39,43,7,15).

Often the presentation of the events by the parties, appear conflicting as to the circumstances of the marriage. When there is little conflict, and the events are clearly favorable to one side or the other, the court responds along the line indicated by the events. However, as already noted, when the claims of the events, as put in evidence by the parties, are not positive in one direction, the court appears to give more weight to the negative aspects against formation of the marriage.

Probably, most important, is the public recognition of an alleged marriage as shown by cohabitation and repute as man and wife, since in most instances there is no clear evidence as to the alleged agreement. Public acceptance of a couple as husband and wife, and the couple's constant actions as man and wife, appear to have great influence on responses by the Supreme Court.

Influence of Decisions of Other Jurisdictions

The Florida Supreme Court has been greatly influenced by the decisions of other jurisdictions on the issue of common-law marriage. These decisions have had their greatest impact in the original establishment of the basic technical doctrine of common-law marriage. They were given as authority for the introduction of the doctrine as part of the judicial prescription of Florida. However, as the number of Florida cases increased, the Supreme Court has relied less and less on external responses but rather looked to Florida cases for its authority.

The authority for the validity of common-law marriage, unless expressly modified by statute, is a United States Supreme Court decision (6,2). The essentials of common-law marriage, *per verba de praesenti*, were enunciated with reference to technical doctrine, of the United States Supreme Court, Rhode Island, New York, Texas, Colorado, Illinois, Oklahoma, and Alabama. These same authorities were cited, by the Florida courts, as authority for the proposition that marriage *per verba de futuro cum copula* was outside the policy limits of a common-law marriage (10).

The legal effect of a common-law marriage being equivalent to a ceremonial marriage is based on decisions of Wisconsin (10), Missouri, New York, Minnesota, Colorado, and the United States Supreme Court (21). The need for public recognition of the common-law marriage was found in the cases of Texas, Michigan, and Illinois (15), while the putting of the burden of proof on the party alleging the illegality of the marriage was a doctrine of Iowa (13).

The Supreme Court referred to decisions of the United States Supreme Court, and of Colorado, in establishing the rule that clandestine relations rebutted the presumption of marriage (13). A Washington decision first

stated that discussion of a ceremonial marriage did not overcome a presumption of marriage (13). The doctrine that cohabitation and repute will not establish a marriage, if there was no consent or desire to do so, has Texas authority (11).

The most recent reference to a decision of another jurisdiction came in 1951 when the authority of the United States Supreme Court was invoked for the proposition that a common-law marriage was valid in Florida though its inception was in a state which did not recognize such marriages (32).

Trends

There has been an apparent shift in attitude, of the Supreme Court of Florida, over the years, from the acceptance of common-law marriage as perhaps necessary in a sparsely settled large state, to the present disfavor with which the court looks at non-statutory formation of marriage.

Through the many cases which have decided this issue, the court has established the judicial requirements for the formation of common-law marriage. Unlike statutory marriage, the satisfaction of legal requirements is not determined before the alleged marriage, but rather by a court's ruling, usually long after the event took place. There is a present tendency for the Supreme Court to be more stringent in its approach, when determining whether the requirements were met.

In one area, divorce, this trend of negativism has clearly shown itself. In establishing the *Fincher* (34) procedure, the court has made it more difficult for an alleged common-law wife to obtain a divorce. She will get all or nothing under the new procedure. If the ruling is that no common-law marriage existed, the wife must bear all the varied expenses of the litigation, which would ordinarily be born by the defendant husband in the case of a ceremonial marriage.

The number of cases presenting the issue of common-law marriage to the Supreme Court has been on the increase. In the seventy-one years, from 1869 until 1940, twenty cases were before the court. From 1940 to 1954, twenty-three cases were heard—more than in the entire history of the Florida court up to that time. It is interesting to note that of the twenty-three cases, nineteen took place after 1945. Finally, from 1950 to 1954, there were a total of fourteen cases on common-law marriage before the Supreme Court.

The search for affection has led to the establishment of relationships which at a later date are alleged to have been common-law marriages. The trend of the litigation in this area shows that the courts are called upon to decide whether or not the relationship actually was a marriage, so that it may be decided if the parties are entitled to the rights which would arise out of the marital status.

Clarification of Goals

The need for affection is basic to the human personality, therefore, the proper objective for this value is to allow the widest possible oppor-

tunities for its realization. However, these opportunities must necessarily be limited by the community's prescriptions as to the proper institutionalization of the affection value.

Marriage is the institution which is accepted by our society as the proper crystallization of the goal of affection. By legislative prescription, certain policy limits have been placed on the formation of marriage. These limits should be observed for all marriages and there should not be a method of marriage which ignores these limits. If the limits are unrealistic, and they do not appear to be so, a proper procedure is to have the legislature re-evaluate them.

The judicial prescriptions on common-law marriage have, for the most part, been necessary due to a conflict over wealth which arises because the rights growing out of the marital status are at issue. It is better to require statutory marriage, for then the formation problem is clearly settled and litigation over this point would be ended.

Under the existing law, where the issue of the formation of a common-law marriage is before the courts, and where there is a satisfactory showing that a marriage took place, those having rights under the marriage should be fully protected. However, where a woman is trying to use a meretricious relationship, in fact and intent, as a springboard towards obtaining wealth under an invalid claim of right, the courts should be very strict in scrutinizing the claim. The tendency of the courts, in making a formation difficult to establish in border-line cases, is acceptable, since common-law marriage does not meet with favor.

Common-law marriage is no longer necessary in Florida. Licenses and persons who can perform ceremonies are easily obtained throughout the state, so that there is no valid reason why the legislative procedure for the formation of a marriage should be ignored.

Recommendations

It is suggested that action be taken by the legislature to abolish common-law marriage, by providing as valid only those marriages that conform to statutory formalities.[7] There is no point to establishing detailed requirements for the formation of a marriage—for society's protection—if these requirements are to be ineffective. Today the limits on marriage, as prescribed by the legislature, may be safely ignored.

A law invalidating the common-law marriage in Florida would end the conflict which normally arises when there is a common-law marriage.

7. There are a number of alternatives to allowing the common-law marriage situation to continue on as before. These are possibilities open to either the legislature or the courts.

The legislature could end common-law marriage by adding to the present policy limits the further limit that only marriages which are formed under statutory regulations are valid.

A less stringent regulation would be to provide for the registration of common-law marriages. This would be done by both parties to the marriage swearing affidavits to the effect that the formation took place. Unless this were done the marriage would

It would stop unnecessary litigation over wealth; the usual occurrence after the affection relation is terminated.[8]

It would be better for the legislature to act, rather than for the Supreme Court, for example, to alter the presumptions, or add a blood test requirement. The attendant publicity—to a statute making common-law marriage invalid—would give fair warning to those who contemplate entering such a status. Whereas, if the courts made it increasingly difficult to prove the common-law marriage, injury might result to the parties of a bona fide common-law marriage, inasmuch as the litigation on the matter could readily arise long after the parties entered into the relationship.

If the legislature fails to act, the new procedure for divorce, established in the *Fincher* case, should be followed. If there actually was a common-law marriage, the woman loses nothing by the severance of the issues, for on the determination of a valid marriage she will receive support and other necessary payments. On the other hand, if there was no marriage, the defendant does not have to make any payments, and his property is not tied up by the possibility of dower rights. The procedure protects the worthy and does not allow others to gain unwarranted benefits.

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not be considered a legal one. This regulation could be made stricter if the requirements were added that before a registration could be made, the parties would also have to prove they had negative blood tests before the marriage took place, similarly to the statutory rules.

The Supreme Court might continue to uphold common-law marriage with its present attitude of carefully scrutinizing such claims so that it is very difficult to establish the marriage.

There are some alternative steps the court could take to make proving a common-law marriage still more difficult. The first would be to change the presumptions so that in all cases the presumption would be against the formation having taken place. The effect would be that the person claiming the marriage took place would have to prove it by a preponderance of the evidence.

Another step the court could take would be to alter the essentials of a common-law marriage to conform to those evident in the statute. At present the essentials are capacity and consent, which originally were the only effect of statutory formation. However, the legislature in 1945 added the blood test requirement. The court, too, could now add the blood test as one of the essentials necessary to prove common-law marriage. This unquestionably would make it very difficult to prove the formation of a common-law marriage.

The greater the burden that any of these alternatives placed on the parties, the greater would be the pressure towards conforming to the statutory procedure for marriage.

8. If the legislature abolished common-law marriage, as a means of protecting women who have been held out as legal wives, the Supreme Court might introduce the New York doctrine, as established in *Kranse v. Kranse*, 282 N.Y. 355, 26 N.E.2d 290 (1940), that, in these circumstances, the man has some obligation of support. Since this doctrine has not been fully elaborated, it is only tenatively offered with the further suggestion, that if used, the holding out ought to be for a long time and the obligation of support be for a relatively short time. Under this doctrine, the woman could have no claim to the benefits derived from the status of a wife.

In summation, the abolishment of common-law marriage is in the hands of the legislature. It should take this step in order that the policy limits on marriage formation, already established for the protection of the community, should be obeyed and effectively carried out.

ALAN H. ROTHSTEIN*

TABLE OF CASES WITH SYMBOLIC NOTATION

The cases are arranged chronologically so that any particular judicial response may be located in time context as well as the environment of the individual case.

1. Burns v. Burns, 13 Fla. 369 (1869).
2. Daniel Sams v. Sams, 17 Fla. 487 (1880).
3. Green v. State, 21 Fla. 403 (1885).
4. Banks v. Banks, 42 Fla. 362, 29 So. 318 (1900).
5. Arendall v. Arendall, 61 Fla. 496, 54 So. 957 (1911).
6. Caras v. Hendrix, 62 Fla. 446, 57 So. 345 (1912).
7. Warren v. Warren, 66 Fla. 138, 63 So. 726 (1913).
8. Bagdad Land & Lumber Co. v. Poston, 69 Fla. 340, 68 So. 180 (1915).
9. Green v. Green, 77 Fla. 101, 80 So. 739 (1919).
10. Marciano v. Marciano, 79 Fla. 278, 84 So. 156 (1920).
11. Chaves v. Chaves, 79 Fla. 602, 84 So. 672 (1920).
12. Madison v. Robinson, 95 Fla. 321, 116 So. 31 (1928).
13. Le Blanc v. Yawn, 99 Fla. 328, 126 So. 789 (1930).
14. Edge v. Rynearson, 107 Fla. 461, 145 So. 180 (1932).
15. Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1933).
16. Jones v. Jones, 119 Fla. 824, 161 So. 836 (1935).
17. Garcia v. Exchange National Bank of Tampa, 123 Fla. 726, 167 So. 518 (1936).
18. *In re* Price's Estate, 129 Fla. 398, 176 So. 492 (1937).
19. Orr v. State, 129 Fla. 398, 176 So. 510 (1937).
20. State *ex rel.* Foster v. Anders, 135 Fla. 59, 184 So. 515 (1938).
21. *In re* Thompson's Estate, 145 Fla. 329, 199 So. 352 (1940).
22. Mendel v. Mendel, 147 Fla. 167, 1 So.2d 571 (1941).
23. Thompson v. Harris, 148 Fla. 329, 4 So.2d 385 (1941).
24. McClish v. Rankin, 153 Fla. 324, 14 So.2d 714 (1943).
25. Greene v. Greene, 156 Fla. 342, 22 So.2d 792 (1945).
26. Budd v. J. Y. Gooch Co., 156 Fla. 716, 27 So.2d 72 (1946).
27. United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946).
28. McMichael v. McMichael, 154 Fla. 413, 28 So.2d 692 (1947).
29. Scales v. Scales, 37 So.2d 695 (Fla. 1948).
30. Laramore v. Laramore, 49 So.2d 517 (Fla. 1950).
31. O'Connell v. O'Connell, 45 So.2d 883 (Fla. 1950).
32. Navarro, Inc. v. Baker, 54 So.2d 59 (Fla. 1951).
33. Lambrose v. Topham, 35 So.2d 557 (Fla. 1951).
34. Fincher v. Fincher, 55 So.2d 800 (Fla. 1952).
35. Spinella v. Spinella, 57 So.2d 588 (Fla. 1952).
36. Caretta v. Caretta, 58 So.2d 439 (Fla. 1952).
37. Maliska v. Dion, 62 So.2d 4 (Fla. 1953).
38. Porter v. La Fe, 68 So.2d 602 (Fla. 1953).
39. *In re* Colson's Estate, 72 So.2d 57 (Fla. 1954).
40. Persico v. Samac Corp., 74 So.2d 683 (Fla. 1954).
41. *In re* Klinger's Estate, 73 So.2d 50 (Fla. 1954).
42. *In re* Campbell's Estate, 73 So.2d 883 (Fla. 1954).
43. Chaachou v. Chaachou, 73 So.2d 830 (Fla. 1954).

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