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February 8, 2017

Kansas House Committee on Judiciary
Representative Blaine Finch, Chair

RE: 2017 HB ~~2201~~ 2101: Abolition of common law marriage

Hearing Date: February 8, 2017

TESTIMONY OF RONALD W. NELSON OPPOSING HB ~~2201~~ 2101

Chairman Finch and Members of the Committee:

I am a family law attorney in Johnson County. I've practiced family law for over 30 years. My practice is focused on complex issues in family law, including high conflict child custody litigation. My practice involves representing parents in family law disputes at the trial court level and, frequently, in the Kansas state appellate courts.

Similar to those presenting testimony in favor of abolishing common law marriage, over my 30 years practice, I've handled many cases in which common law marriage was alleged. Sometimes the court determined it existed; other times, the court determined it did not exist. Sometimes, I agreed with the court's conclusion; other times, I disagreed with the court's conclusion. Usually, my agreement or disagreement had to do with whom I represented. And, for a long time, I too thought that Kansas should abolish common law marriage because of the sometimes questionable claims of common law marriage pursued by an adverse party (or, more usually, attorney). During the past 30 years of my family law practice, however, I shifted my position from outright supporting the abolition of common law marriage to support the protection and continuation of common law marriage as a valid way to create marriage. And over the past 20 years, my support of common law marriage has only become stronger, the more instances I've seen where the non-recognition would have created a harsh and unjust result.

Unlike those testifying in favor of the abolition of common law marriage, I have what I believe a unique point of view on the subject – for I entered my current marriage at common law.

The proponents of the abolition of common law marriage cite numerous reasons for their opposition: the supposed perpetuation of fraud on the courts; the supposed difficulty in proving the non-existence of a common law marriage; supposed false claims of common law marriage after one party's death to secure insurance or other benefits – and perhaps most telling – that they have had courts find that a common law marriage existed in a situation they themselves do not believe it did.

Hs Judiciary
Attachment 13
2-8-17

RE: 2017 HB2201: Abolition of common law marriage
Ronald W. Nelson Testimony
February 8, 2017

The proposal to abolish common law marriage after a date certain is certainly well meaning. But the abolition of common law marriage would disproportionally hurt women and people with lower economic standing; would not change the public belief that common law marriage could be contracted; and would result in severe and unjust results in situations where the parties intended on entering into a common law relationship despite the legal abolition of the concept. Complicating the situation further is that the abolition of common law marriage in Kansas would also cut out the underpinnings of the ability of courts to make equitable determinations of property division between parties NOT married at common law and who never intended to enter into a common law marriage, creating further unjust results for those who depend on the courts to protect their rights and make sure inappropriate and unjust results don't occur. Further, contrary to the assertions of those supporting the abolition of common law marriage, research shows few cases in which judges aren't able to sort out the facts in a given case to decide whether a common law marriage actually exists. And those cases pointed to as examples of improper determinations of common law marriage seem to be more the view from a disgruntled litigant than from the standpoint of that cases place in overall legal structure. And the cases pointed to as instances where a judge improperly found a common law marriage existed can often be explained by the judge's lack of knowledge about common law marriage, and the lawyer's failure to properly bring out the required elements to show a common law marriage. Finally, instead of being a vestige of the past, the concepts at play in determining common law marriage are what will inform the creation of future binding relationships – as has occurred in a number of European countries.

1. "Common law marriage" as "too easy" to fall into.

One of the arguments used by those seeking the abolition of common law marriage is that it's "too easy" for people to "fall into" a common law marriage relationship. In support, they say that many believe that two people can become married at common law merely by living together for a certain time period (often thought to be 7 years) and that, therefore, it should be abolished. But we don't do away with legal remedies because some people – even a majority of people – misunderstand the legal requirements.

In fact, common law marriage is NOT easy to enter. It cannot be created by mistake, or jest, or lack of intention. The entry into a common law marriage requires a specific intent by *both* parties to enter into a marriage – not a mere "belief" by one of two parties that they "might" or should be married because of their circumstances.

A "common law marriage" is a marriage entered into between two people under "common law" rules. Not all states allow people to become married at "common law" in that state. But every state recognizes a common law marriage entered into by two people in another state. A couple that has entered a "common law marriage" can only divorce by court order. There is no such thing as a "common law divorce."

In Kansas (and most other states), common law marriage is valid if:

A. The couple is of sufficient age (18 years or older) and each has "mental capacity" (understands what they are agreeing to do).

B. The couple each has a "current intent" to be married to the other person (not an intent to "become" married at sometime in the future).

C. The couple each "holds themselves out to the public as husband and wife" (that is, they don't keep their marriage private).

"Living together" is not an element of common law marriage. So the fact that the couple lives together – or does not live together – is irrelevant to the creation of a valid common law marriage.

One person cannot create a valid common law marriage either by believing the couple lives in a "marriage like" relationship, wants to be married to the other person, tells other people that the couple is married, or anything else of the sort. Both parties to the common law marriage must independently form the intent to become common law married, must each satisfy the age and mental capacity requirement to enter into a common law marriage, and must each independently proclaim to "the public" that they are married – not merely that that are a "couple."

Proponents of abolition often say that too often people will file income tax returns claiming to be married. But the mere filing of income tax returns as "married" does not create a common law marriage unless the parties each independently intend that they are common law married. Representing to a third person (orally or in writing) that the couple is married when one or both parties don't actually believe they are married does not create a common law marriage – because all three elements of common law marriage must exist at the same time in order to create the relationship. Further, the abolition of common law marriage will not do away with people filing income tax returns and other documents claiming they are married so that they can obtain a benefit from that assertion.

2. Abolition of common law marriage does not mean the public is aware of the abolition.

Studies show that it is very difficult to keep the general public informed about changes in law. For example, despite the fact that Great Britain abolished common law marriage in 1753 by Lord Hardwicke's Act, a 2001 survey conducted by the British National Centre for Social Research on British Social Attitudes reported that 56% of respondents believed that "common law marriage" then existed and that unmarried people living together had the same rights and responsibilities to each other as those in traditional marriages.

It seems reasonable to expect, therefore, that even if Kansas abolishes common law marriage, Kansans will continue to act under the belief that common law marriage exists, and that they will continue to act under that understanding in ordering their day-to-day relationships.

3. Because the public will believe common law marriage continues, those who intend to enter into it will be harmed.

Eliminating common law marriage could mean litigating each break-up and the only apparent remedies for the parties would be based in case law i.e. *Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606, (1984), which does not provide any bright line rules for how to appropriately handle these situations. In essence, the *Eaton v. Johnston* case provides three methods for the division of property obtained during such a relationship where no marriage exists: division based on equity; division as a business partnership; or, division as the parties request. Whether the legislature continues to recognize common law marriage, couples will continue to enter into these relationships thinking that they are protected by the law – when, in fact, the weaker of the two parties will be disadvantaged by the law.

The right to alimony (spousal maintenance or support under current law), however, although based on the common–law obligation of a husband to support his wife, does not exist unless there is a

marital relationship between the parties and the award is authorized by statute. The Kansas Supreme Court held in *Ediger v. Ediger*, 206 Kan. 447, 454, 479 P.2d 823 (1971):

> Alimony is an allowance for support and maintenance of the divorced wife, or, as has been said, a substitute for marital support. It is an allowance which a husband may be compelled to pay to his former wife for her maintenance after there has been a divorce. (*Hendricks v. Hendricks*, 136 Kan. 69, 12 P.2d 804; *Garver v. Garver*, 184 Kan. 145, 334 P.2d 408; 24 Am.Jur.2d, Divorce and Separation, §514, pp. 640, 641.) Alimony is awarded not as a penalty, but as a substitute for the husband's duty to provide his former wife with adequate support.

And although the right to spousal support is based in the common law right of support between spouses, "the right of the courts . . . to grant alimony is statutory, and the general rule is that courts of equity have no power to decree permanent alimony in the absence of statutory authority." *Hendricks v. Hendricks*, 136 Kan. 69, 70, 12 P.2d 804, 805 (1932). See also *Fuller v. Fuller*, 33 Kan. 582, 585, 586, 587 (1885)("The action is not prosecuted under the statute authorizing alimony, and as the defendant in legal contemplation has never been the wife of the plaintiff, she is not entitled to alimony independent of the statute."); *Pitney v. Pitney*, 151 Kan. 848, 101 P.2d 933 (1940)(where there was no evidence that common law marriage existed, award of separate maintenance was error; judgment reversed with directions to enter judgment for defendant).

Without continued recognition of common law marriage, the dissolution of these relationships will likely result in increased litigation to settle these legal issues and with regard to property division, having three possible remedies will only serve to further muddy these waters.

As noted by a law review article published in 2009 found:

> The abolition of common law marriage often results in substantial injustices to women. In most cases there is genuine inequality between women and men. Women are more often the party seeking alimony or child support and men are often the party trying to avoid the obligation. Men tend to earn higher wages, while women tend to be more economically dependent upon men. Women tend to be very vulnerable in these types of relationships.
>
> J. Thomas, Comment, COMMON LAW MARRIAGE, 22 AAML Journal 151, 162 (2009)

The article notes that this effect doesn't only effect support and property division rights after a relationship breakup, but that women are much more affected in the long term.

Without continued recognition of common law marriage, the dissolution of these relationships will likely result in increased litigation to settle these legal issues and with regard to property division, having three possible remedies will only serve to further muddy these waters.

4. Abolition of common law marriage could weaken underpinnings of established Kansas law on equitable division.

Unmarried, cohabiting parties in Kansas do have the ability to seek equitable distribution of jointly obtained assets under *Eaton v. Johnston*. And if common law marriage is abolished, that will continue. The difference, however, is that if Kansas does away with common law marriage, those couples who intended to enter into a common law marriage will not be able to obtain spousal support and will also

not be able to obtain division of all the properties the couple obtained while they were together. Instead, the couple will have to litigate over each and every item of property and debt obtained during their relationship to determine if that item was "obtained jointly or intended to be obtained jointly" before that item can then be considered by the court in an overall equitable distribution of those properties between the parties. As one Kansas appellate court case instructed:

> (1) As to each piece of property, real or personal, which is involved in the division between the parties, the trial court is instructed to find:
>
> (a) whether the item in question was involved in the original divorce action,
>
> (b) when the property was acquired with regard to the parties' decision to cohabit,
>
> (c) why the property was acquired,
>
> (d) by whom the property was acquired,
>
> (e) in whose name the property is titled if the item in question is susceptible to a formal title document,
>
> (f) whose funds were used to pay for the property,
>
> (g) if the property was not jointly held, whether the parties intended it to be jointly held, indicating the evidence is available on the subject.
>
> In re Marriage of Lambeth, #81076, Unpublished Slip Op at 8 (Kan. App. May 7, 1999)(Attached)

But it is also likely that without the underpinnings provided by Kansas's historic acceptable of common law marriage, that the Kansas courts will interpret the Legislature as having an intent to also do away with court power to equitably divide property between unmarried cohabiting couples – drastically changing the legal rights of cohabiting parties to the extreme detriment of the weaker and less economically secure partner and enabling dependence in a possibly abusive relationship. As noted in Jennifer Thomas's comment on Common Law Marriage:

> For example, consider the negative effects a woman involved in a domestic violent relationship would face if she were living in a state that does not recognize common law marriage. She could leave the relationship, but would not have access to monetary or property rights that would otherwise be provided to her and her children.
>
> J. Thomas, Comment, COMMON LAW MARRIAGE, 22 AAML Journal 151, 162 (2009)

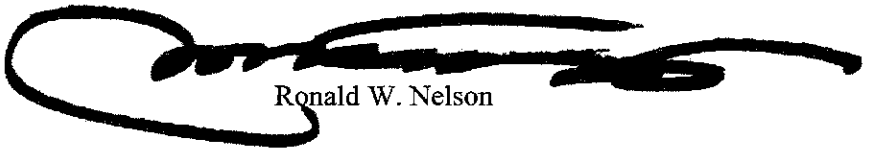
5. Abolition of common law marriage would significantly impair the rights of women surviving their common law partner.

Although the proponents of abolishing common law marriage cite potential fraud in inheritance situations, the effect of abolition would have a much more devastating effect on those who rely on the relationship than those who are inconvenienced by the assertion of common law marriage in after death proceedings.

In her article on common law marriage, Jennifer Thomas puts forward the following effects:

> The non-recognition of common law marriage also has a significant effect on inheritance. Take for instance a couple who has lived their whole life together and then one of them suddenly dies. If they happen to live in one of the states that has abolished common law marriage, the remaining "spouse" would have no inheritance rights. On the other hand, if the couple lives in a state that recognizes common law marriage and the "husband" has not terminated the common law marriage by divorce, the "wife" remains his heir under the state's intestacy laws.
>
> The recognition of common law marriage is also very important for social security and wrongful death benefits. The abolition of common law marriage negatively impacts social security benefits for women for two reasons. First, women have a greater life expectancy than men and second, men earn higher wages than women.136 Women consistently outlive their "husbands" and depend on social security survivor benefits to get by. Women who live in states that have abolished common law marriages will probably not be able to collect benefits, even if they have lived with their deceased "spouse" and held themselves out as being married. The collection of wrongful death benefits also negatively affects women because women are more likely to be economically dependent on men. When a woman loses her "husband," she is left to survive without the high wage earner's support.
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> J. Thomas, Comment, COMMON LAW MARRIAGE, 22 AAML Journal 151, 162 (2009)

For all of these reasons and more, I urge the committee not to advance this bill abolishing common law marriage. There are too many bad effects from the abolition that will befall women, minorities, and the disadvantaged. I have faith in the courts and the ability of individual judges to sort out truth from fiction, and to deal appropriately with allegations of common law marriage. Kansas judges have been doing so for 150 years. There is no reason now not to trust that they can do it for another 150 more.



Ronald W. Nelson