

ADVISORY NO. 122

TOPIC: COMMON LAW MARRIAGE - A PRIMER

Marriage by common law is as valid and effective as a marriage by ceremony. It possesses the same requirements: The parties must be of opposite sex, legal age, may not be disqualified because of kinship, or existing marriage.

A common law marriage may be proved by a declaration filed with the county clerk. A declaration simply formalizes a common law marriage that already exists. It is not necessary to create a common law marriage.

The basic elements of a common law marriage are: cohabitation (implying conjugal relations), a holding out of each other as husband and wife, and a subjective intent that each is married to the other. An intention to marry in the future is not sufficient. A "spouse" must affirmatively prove that the parties agreed during the cohabitation to live together as husband and wife.

Significantly, the Legislature has imposed a statute of limitation for proof of common law marriage:

A proceeding in which a marriage is to be proved under this Section must be commenced not later than one year after the date on which the relationship ended.... TEX. FAM. CODE § 1.91 (Vernon 1994).

Failure to file suit to prove the existence of the marriage within one year after the date of the death of one of the parties, or a separation, cuts off any opportunity to claim that the parties were married during the period of cohabitation.

In absence of a declaration filed with the county clerk, or a pending suit to establish the relationship as a common law marriage, a contest of the status of the widow as the beneficiary should be filed. We recommend that you consider filing it as a formal notice of refusal on a TWCC-21. Be sure to list any other defenses to payment that might otherwise exist in the case.