

1997

Michael Loy Hansen v. Laura T. Hansen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970321-CA

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

MICHAEL LOY HANSEN,

Plaintiff/Appellant,

vs.

LAURA T. HANSEN,

Defendant/Appellee.

CASE NO. 970321-CA

ARGUMENT PRIORITY
CLASSIFICATION NO. 15

APPEAL FROM A FINAL ORDER OF THE FOURTH DISTRICT COURT
OF UTAH COUNTY, UTAH, THE HONORABLE ANTHONY SCHOFIELD

BRIEF OF APPELLANT MICHAEL LOY HANSEN

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FILED

Utah Court of Appeals

AUG - 8 1997

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h) (1996).

STATEMENT OF THE ISSUES PRESENTED AND STANDARD OF REVIEW

STATEMENT OF THE ISSUES PRESENTED:

1. Preponderance of the evidence as the correct standard:

Whether the general standard of proof required in civil actions, proof by a preponderance of the evidence, is the correct standard to establish the existence of a common law marriage pursuant to Utah Code Ann. § 30-1-4.5 (1995)?

Issue Preservation and Standard of Review. This issue was preserved in the trial court in Mr. Hansen's Memorandum in Support of Motion to Alter or Amend Findings of Fact and Conclusions of Law. Record at 325. The trial court's conclusions of law should not be provided any particular deference and should be reviewed for correctness. The Court of Appeals is free to render its own independent interpretations of legislative intent and statutory applications on matters of law. Steele v. Breinholt, 747 P.2d 433, 434-35 (Utah Ct. App. 1987).

2. Violation of the Utah Constitution: Whether a statute, Utah Code Ann. § 30-1-4.5(2) (1995), which requires a determination of a common law marriage within one year of the

termination of the relationship violates Article 1, Sections 7, 11, and 24 of the Utah Constitution?

Issue Preservation and Standard of Review. This issue was preserved in the trial court in Mr. Hansen's Memorandum in Support of Motion to Alter or Amend Findings of Fact and Conclusions of Law. Record at 321. The trial court's conclusions of law should not be provided any particular deference and should be reviewed for correctness. The Court of Appeals is free to render its own independent interpretations of legislative intent and statutory applications on matters of law. Steele v. Breinholt, 747 P.2d 433, 434-35 (Utah Ct. App. 1987).

CONSTITUTIONAL PROVISIONS AND STATUTES DETERMINATIVE ON APPEAL

Section 30-1-4.5, Utah Code Ann. (1995) is determinative on appeal and is set forth in the Addendum to this brief. Articles 7, 11, and 24 of the Utah Constitution are also determinative on appeal and are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from an order signed and dated the 8th of May, 1997. Record at 350.

Course of Proceeding and Disposition Below

Mr. Hansen filed a complaint on October 12, 1995. Mr.

Hansen's cause of action was for a determination of a common law marriage between Michael Hansen and Laura Hansen. The court dismissed Mr. Hansen's Complaint December 20, 1996. The court ruled that the burden of proof for a determination of the existence of a common law marriage is clear and convincing evidence and that Mr. Hansen had not met this standard. Mr. Hansen moved on the 18th of February to alter or amend the court's findings of fact and conclusions of law. The district court denied the Motion to Amend, concluding that the correct burden of proof is proof by clear and convincing evidence. Mr. Hansen appeals the district court's order.

Statement of Facts

1. The parties were previously married for a period of approximately nine years. Their divorce was final in March 1994. Record at 246-247.

2. In October 1994, Mr. Hansen moved back into the marital home with Mrs. Hansen and resided there with her and their children until at least May 1995. Record at 246.

3. From May 1995 through September 22, 1995, Mr. Hansen did not live at the marital home nor cohabit with her. Record at 246.

4. Judge Hansen previously made a finding in a protective order action between the parties that Mr. Hansen lived in the marital home again from September 22, 1995, through December 27, 1995 at the request of Mrs. Hansen. Record at 246.

5. During the periods of cohabitation Mr. Hansen routinely turned over his paycheck to Mrs. Hansen and then received back some cash as "walking around money." Record at 246.

6. During the periods of cohabitation Mrs. Hansen worked and pooled her money with the money that she received from Mr. Hansen. Record at 246.

7. Mrs. Hansen used the money she and Mr. Hansen earned to pay a credit card debt Mr. Hansen had incurred during the period of separation preceding their divorce. She also used this pooled money to pay the home mortgage, to pay family living expenses and obligations and to pay her own debts. Record at 246.

8. During the period of cohabitation the parties acted much like a family. Record at 246.

9. When the parties' son was of age to be baptized into the L.D.S. church, the parties met with the local Bishop to arrange for the son's baptism. Neither party dispelled the appearance that they were a family. Record at 246.

10. After Mr. Hansen moved back in with Mrs. Hansen, a membership clerk from the L.D.S. church came to inquire concerning Mr. Hansen's church membership records and was told that Mr. Hansen lived in the marital home. The appearance was that they were back together. Record at 245-46.

11. Mrs. Hansen used Mr. Hansen's medical and dental insurance to cover the cost of some of her medical treatments. The coverage was only available to her as a wife and she claimed

the benefit of this coverage. Record at 245.

12. During the time the parties cohabited Mrs. Hansen held herself out as Mr. Hansen's wife to the insurance carrier. Record at 245.

13. During the period of cohabitation Mrs. Hansen frequently wore a ring on the finger of her left hand, traditionally viewed as her marriage finger. Record at 245.

14. During the time the parties cohabited each was capable of giving consent to a marriage and each was legally capable of entering into a solemnized marriage. Record at 245.

15. During the time the parties cohabited they each assumed marital rights, duties, and obligations. Record at 245.

16. Mr. Hansen filed the Complaint of this matter, on or about the 12th of October, 1995, requesting a determination of the existence of a common law marriage between the parties. The Complaint was filed within one year of the termination of the Hansen's relationship. Record at 4.

17. On the 20th of December, 1996, also within one year of the termination of the relationship, the court dismissed the Complaint for determination of a common law marriage. The court found that Mr. Hansen had failed to prove by "clear and convincing" evidence either that Mrs. Hansen consented to a marital relationship or that the parties acquired a general reputation as husband and wife. Record at 247.

18. On the 18th of February, 1997, Mr. Hansen made a Motion

to Alter or Amend Findings of Fact and Conclusions of Law.
Record at 316.

19. In an Order signed the 8th of May, 1997, the court denied Mr. Hansen's Motion to Amend. The court concluded as a matter of law that the standard of proof for the existence of a common law marriage is by clear and convincing evidence. Record at 350.

SUMMARY OF THE ARGUMENT

The correct burden of proof to determine the existence of a common law marriage is proof by a preponderance of the evidence. Proof by a preponderance of the evidence is the general burden of proof in civil matters. This burden has been adopted by a majority of Utah's sister states that recognize common law marriage. Public policy favors proof by a preponderance of the evidence for determining the existence of a common law marriage.

The Utah statute authorizing common law marriage is unconstitutional under Article 1, Sections 7, 11, and 24 of the Utah Constitution. The statute requires that the establishment of such a marriage be made within one year of the termination of the relationship. If the district court were to be reversed, the statute would deprive Mr. Hansen of due process, uniform operation of the laws, and his right to open courts because his rights would be extinguished by the one-year statute of limitations.

ARGUMENT

INTRODUCTION

The statute in question in this case is Section 30-1-4.5, Utah Code Annotated (1995). This section provides:

- (1) A marriage which is not solemnized according to this chapter shall be legal if a court or administrative order establishes that it arises out of a contract between two consenting parties who:
 - (a) are capable of giving consent;
 - (b) are legally capable of entering a solemnized marriage under the provision of this chapter;
 - (c) have cohabited;
 - (d) mutually assume marital rights, duties, and obligations; and
 - (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.
- (2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

Utah Code Ann. § 30-1-4.5 (1995) (emphasis added).

If a court finds that a marriage arose out of a contract between two consenting parties who meet the above requirements, then in the eyes of the law, they are married.

The following arguments address the findings and conclusions reached by the district court in the present case. The arguments

point out why the court incorrectly found the burden of proof for determining the existence of a common law marriage to be clear and convincing evidence, and why the statute authorizing common law marriage violates the Utah Constitution.

POINT I.

PREPONDERANCE OF THE EVIDENCE AS THE CORRECT STANDARD: THE GENERAL STANDARD OF PROOF REQUIRED IN CIVIL ACTIONS, PROOF BY A PREPONDERANCE OF THE EVIDENCE, IS THE CORRECT STANDARD TO ESTABLISH THE EXISTENCE OF A COMMON LAW MARRIAGE.

A. The general standard of proof in civil actions is proof by a preponderance of the evidence.

The district court concluded that the correct burden of proof for determining the existence of a common law marriage is proof by clear and convincing evidence. Record at 350.

Although the language in Section 30-1-4.5(2) does not articulate the exact standard of proof required, it does require evidence be proved under "the same general rules of evidence as facts in other cases." According to the Utah Supreme Court, the general rules of evidence in Utah civil cases dictate that evidence be proved by a preponderance of the evidence. In Johns v. Shulsen, the Supreme Court explained, "[i]t is universally recognized that the standard of proof required in civil actions is by a preponderance of the evidence." 717 P.2d 1336, 1338 (Utah 1986) (citing Morris v. Farmer's Home Ins. Co., 500 P.2d 505 (Utah 1972)).

While Utah Appellate courts have yet to specifically interpret the meaning of Section 30-1-4.5 to apply a preponderance of the evidence standard, the Montana Supreme Court has referred to a similar Montana statute when determining that such common law marriages are to be proven by a preponderance of the evidence.¹ In Miller v. Townsend Lumber Co., 448 P.2d 148 (Mont. 1968), the Montana Supreme Court referred to the Montana state common law marriage statute containing similar language to Utah's Section 30-1-4.5(2), saying that evidence of such a marriage "may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases." Id. at 151. After referring to this language, which is almost identical to the language found in Utah's statute, the Montana Supreme Court went on to apply a preponderance of the evidence standard of proof to determine the existence of a common law marriage. Id. at 152.

Based on the language of Section 30-1-4.5(2) requiring the use of the same general rules of evidence as in other cases, and based on the standard of proof required in Utah civil actions, the Court should have applied the preponderance of the evidence

¹ The Utah statute reads: "Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases." Utah Code Ann. § 30-1-4.5(2) (1995). The Montana statute reads: "Consent to and consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases. Cited in Miller v. Townsend Lumber Co., 448 P.2d 148, 151 (Mont. 1968).

standard.

B. A majority of sister states which recognize common law marriage require proof by a preponderance of the evidence.

While Utah's own statutes and cases have already outlined the appropriate burden of proof, the district court in the instant case relied on a survey of the law of sister states to determine the burden of proof necessary to establish a valid common law marriage. The district court's survey, however, was flawed.

The district court found fourteen jurisdictions which have adopted a clear and convincing standard and nine jurisdictions which have adopted a preponderance of the evidence standard. Record at 241. However, there are only fifteen jurisdictions, including Utah, which recognize common law marriage, and only six of these states, including Utah, recognize common law marriage by statute.² In its survey, the district court cited court decisions in states which have either abolished common law

² Six states have statutes recognizing common law marriage, Montana, Texas, South Carolina, Idaho, Georgia and Utah. See MONT. CODE ANN. § 40-1-403 (1995); TEX. FAM. CODE ANN. § 1.91 (Vernon, 1995); S.C. CODE ANN. § 20-1-360 (1996); IDAHO CODE § 32-201 (1996) (recognizing marriages contracted before January 1, 1996); GA. CODE ANN. § 19-3-1.1 (1996) (recognizing marriages contracted before January 1, 1997); UTAH CODE ANN. § 30-1-4.5 (1995). Ten other jurisdictions judicially recognize common law marriage as part of the state's general common law. See Record at 241 (citing cases for Alabama, Oklahoma, Colorado, Iowa, Pennsylvania, Rhode Island, District of Columbia, and South Dakota); Driscoll v. Driscoll, 552 P.2d 629, 632 (Kan. 1976) (applying Kansas law).

marriage and the courts were applying former rules or courts which were applying the law of other states.

If a survey of other states is the proper method of determining the appropriate burden of proof, states with common law marriage statutes similar to Utah's statute ought to be the proper states to survey. Of the five other states which recognize common law marriages by statute, Montana, Texas, South Carolina, Idaho, and Georgia, all use a preponderance standard. Of the other nine jurisdictions which recognize common law marriage judicially, five (Alabama, Rhode Island, Pennsylvania, Oklahoma, South Dakota) use a clear and convincing standard.

The other five states, which like Utah, recognize common law marriages by statute are unanimous in applying a preponderance of the evidence standard. Looking to all fifteen states which recognize common law marriage either judicially or by statute, only five apply a clear and convincing standard. The weight of authority from sister states which recognize common law marriages is that the appropriate burden of proof is proof by a preponderance of the evidence.

C. Public policy favors establishing a common law marriage using the preponderance of the evidence standard.

In concluding as a matter of law that public policy favored the establishment of common law marriages by clear and convincing evidence, the district court compared common law marriage to

other civil judicial proceedings. The court stated that while most civil claims need only be proved by a preponderance, there are some exceptions:

[T]he clear and convincing standard has been applied in the following types of civil proceedings, among others: civil commitment; termination of parental rights; civil contempt; denaturalization, and deportation. A common element in these civil proceedings is the presence of contested individual interest deemed worthy of extra protection.

Record at 238(citations omitted).

In comparing common law marriage to the judicial proceedings it listed, the district court found a common element of a "contested individual interest deemed worthy of extra protection," which justified a higher burden of proof. However, the proceedings that the district court compared common law marriage to are clearly distinguishable.

The first civil proceeding to which the court compared common law marriage, civil commitment, demands the clear and convincing standard only because it is written into the statute. See Utah Code Ann. § 62A-12-234(10)(1997) ("The court shall order commitment of an individual...if...the court finds by clear and convincing evidence that....").

Likewise, the termination of parental rights is governed by a statute defining the burden of proof as clear and convincing evidence. See Utah Code Ann. § 78-3a-406(3) (1996) ("The court shall in all cases require the petitioner to establish the facts by clear and convincing evidence..."). Because the standard is

written into the statutes, these proceedings are not comparable to the common law marriage statute, which states that the requisite burden of proof required is "the same general rules of evidence as facts in other cases."

Civil contempt, another proceeding cited by the district court as comparable to common law marriage, is distinguishable because it is considered "quasi-criminal," thus requiring a higher standard than a standard civil proceeding. Powers v. Taylor, 378 P.2d 519, 520 (Utah 1963).

The other civil proceedings cited by the court, denaturalization and deportation, are also distinguishable from common law marriage. In both cases, the standard of proof has been set down by the United States Supreme Court.

Denaturalization has demanded a higher standard because a certificate of citizenship is "an instrument granting political privileges" which should "not be lightly revoked" especially when "the rights are conferred by solemn adjudication, as is the situation when citizenship is granted." Scheiderman v. United States, 320 U.S. 118, 125 (1942). To revoke citizenship is to rescind rights conferred by "solemn adjudication." Common law marriage, however, does not require a court to rescind "political privileges" previously conferred by a court. Common law marriage is merely the judicial recognition of a previous relationship. There are no "political privileges" involved, nor is there a recision of judicially conferred rights.

Likewise, deportation is also distinguishable from common law marriage. The United States Supreme Court has required a higher burden of proof in deportation matters because "[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores." Woodby v. Immigration Service 385 U.S. 276, 286 (1966). Deportation forces the defendant to "forsake all the bonds formed here and go to a foreign land." Id. at 285. The finding of a common law marriage does not inflict the hardship envisioned by the Supreme Court when it required the clear and convincing standard for deportation. There, the heightened protection is warranted because of the heightened danger and hardships that can result from such proceedings. When that heightened danger is lacking, such as the case with common law marriage, public policy does not demand a higher standard of proof than the general standard of proof required in other civil matters.

Because the standard of proof required in the proceedings cited by the district court are either defined by statute, by the United States Supreme Court, or seen by the courts as "quasi-criminal" in nature, the proceedings cited by the district court are incorrect comparisons to common law marriage. Public policy does not require a higher standard of proof than the preponderance standard that governs other civil cases.

The Hansens were once formally married. They then divorced,

but subsequently returned to living together. A Wyoming case, Jim's Water Service v. Eayrs, 590 P.2d 1346 (Wyo. 1979), is helpful because it is factually similar. In that case the Wyoming Supreme Court addressed the issue of whether an employer could deny worker's compensation benefits to a common law spouse under Montana law. As in the present case, the husband and wife had divorced and then later resumed living together. They did not formally remarry. Montana had a statute recognizing common law marriage similar to Utah's statute. In its opinion, the Wyoming Court stated that the burden necessary to prove the elements of a valid Montana common law marriage is by a preponderance of the evidence. Id. at 1350. In so ruling, the court relied in part on the public policy of "a strong presumption in favor of the legality of a common-law marriage." Id. This presumption and burden should apply in this case.

Some courts, even in states disfavoring common law marriage, have relaxed the burden of proof required to prove the existence of a common law marriage when couples, like the Hansens, divorce and then later resume living together. The Colorado Supreme Court stated that "[i]n such a case we think that the law's role of mere toleration of the common law relationship should be reversed and the status of remarriage favored, even if acquired with common law informality." In re Peterson's Estate, 365 P.2d 254, 256 (Colo. 1961). The Colorado Court later affirmed this ruling saying that it "holds that the evidence in such cases may

be less than the positive and convincing proof necessary to establish a common law marriage." Ward v. Terriere, 386 P.2d 352, 355 (Colo. 1963).

While it may be argued that common law marriage is disfavored in some states, in Utah the Legislature chose to recognize common law marriages in 1987. This recent recognition of common law marriages evidenced a shift in the light by which such marriages are to be seen.

The language of the statute points the courts to the proper burden of proof required to show the existence of a common law marriage. Proof by a preponderance of the evidence is the general burden of proof in civil matters and has been adopted by a majority of Utah's sister states that recognize common law marriage.

POINT II.

VIOLATION OF THE UTAH CONSTITUTION: UTAH CODE 1953 SECTION 30-1-4.5(2), WHICH REQUIRES A DETERMINATION OF A COMMON LAW WITHIN ONE YEAR OF THE TERMINATION OF THE RELATIONSHIP VIOLATES ARTICLE 1, SECTIONS 7, 11, AND 24 OF THE UTAH CONSTITUTION.

A. Section 30-1-4.5(2) violates the due process clause of Article 1, section 7 of the Utah Constitution.

Section 30-1-4.5(2) provides "[t]he determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship...." (Emphasis added).

The Utah Court of Appeals has noted the potential constitutional problems with Section 30-1-4.5. The court stated:

We do note, however, that [Section 30-1-4.5] might present a constitutional question in a different context. If a trial court were to enter a judgement denying a common-law marriage within one year of separation, and that judgement were reversed on appeal and the matter remanded, the parties might be denied a reasonable opportunity to comply with the plain meaning of the statute.

Bunch v. Englehorn, 906 P.2d 918, 921 n.3 (Utah Ct. App. 1995).

As noted by the district court, the present case presents the very situation identified in Bunch (the decision is set forth in the Addendum to this brief). Record at 339.

The Bunch court recognized that the plain meaning of the statute is that the determination, not simply a filing, must be made within one year of the termination of the relationship. In Bunch, the Plaintiff proposed that she complied with the statute by filing her complaint within one year of the parties' separation. "That interpretation of the statute, however, is contrary to its plain meaning. Under the plain meaning of the statute, Bunch did not obtain a timely determination of her relationship with Englehorn." Bunch, at 920-21. It is within this context that the Court of Appeals noted the potential constitutional problems.

Should Mr. Hansen obtain a favorable result on appeal, the statute would effectively deprive Mr. Hansen of a remedy since the determination must be made within one year. It is possible

for him to prevail on appeal, reverse the trial court, and still lose the right to assert his claim.

Section 7 of the Utah Constitution states, "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. Art 1 § 7 (1896).

The district court ruled that Mr. Hansen's constitutional challenge was premature because the appellate court had not yet reversed the trial court. Record at 338. However, by the time the trial court would find the constitutional issue relevant, Mr. Hansen would have already been deprived of his rights.

Mr. Hansen has standing to immediately challenge the constitutionality of the statute even though it has not yet been applied to his detriment. Parties may challenge the validity of a statute if their interests have been or are "about to be prejudiced by the operation of the statute." Cavaness v. Cox, 598 P.2d 349, 352 (Utah 1979) (citation omitted). Should this court reverse the district court, it may rule that Mr. Hansen's interests are "about to be prejudiced" because it will be impossible for him to comply with the statute. The impending prejudice gives Mr. Hansen standing to challenge the statute.

Under a literal reading of the statute as interpreted by the court in Bunch, the only way to comply with the statute's one-year expiration clause would be to both file within one year of the termination and prevail at the district court level. If the party must appeal, regardless of a subsequent reversal, it will

be impossible in all practicality to comply with the statute. If a party must wait for the court of appeals to reverse, there is little chance of compliance with the statute.

Mr. Hansen's rights ought not be determined by the fact that trial and appellate courts have very busy schedules. See, e.g. Ellis v. Social Services Dept. of Church of Jesus Christ of Latter-Day Saints, 615 P.2d 1250, 1256 (Utah 1980) (noting that when it is impossible to comply with a statute through no fault of the party, due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply); Matter of K.B.E., 740 P.2d 292 (Utah Ct. App. 1987) (holding that application of statute to invalidate father's acknowledgment of paternity would violate his due process rights because he did not have reasonable opportunity to comply with the statute, despite his failure to timely file an affidavit acknowledging paternity).

Because Mr. Hansen will be deprived of a chance to comply with Section 30-1-4.5(2) as a result of the practical impossibility following a denial at the trial court level, the statute violates the Due Process clause of the Utah Constitution.

B. Section 30-1-4.5(2) violates the open courts provision of Article 1, section 11 of the Utah Constitution.

Section 11 of the Utah Constitution states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or

unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

Utah Const. Art 1 § 11 (1896).

The analytical framework under which section 11 challenges are examined is a two step process. A court determines first, whether a statute removing an existing remedy provides an "effective and reasonable alternative remedy," and second, if no alternative remedy is provided, whether the statute eliminates a "clear social or economic evil" through means which are not unreasonable or arbitrary. See Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985); Condemarin v. University Hosp., 775 P.2d 348, 358 (Utah 1989).

The first prong of the test demands a reasonable alternative remedy because an attempt to "bar the existing rights of claimants without affording this opportunity [to try rights in the courts]...would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." Currier v. Holden, 862 P.2d 1357, 1365 (Utah Ct. App. 1993) (citations omitted).

If there is no substitute remedy, as in the case of section 30-1-4.5(2), the statute must be justified by its elimination of a clear economic or social evil through a reasonable and non-arbitrary means. Berry, 717 P.2d at 680.

In this case, there is no alternative remedy provided by the

statute once a party has failed to meet the one-year provision. The question is then one of deterring clear social or economic evil.

By restricting common law marriages to those which can be proven before a court within one year of termination of the relationship, the legislature has not deterred any clear social or economic evil. The statute also does away with the rights of a party seeking to establish a common law marriage through unreasonable and arbitrary means.

This type of statute is what the court in Condemarin had in mind when it said:

Legislative attempts to abrogate [the special class of protected rights under article I, section 11] should be closely examined and struck down when the disability they seek to impose on individual rights is too great to be justified or when the legislation is an arbitrary and impermissible shifting of collective burdens to individual citizens.

Condemarin, 775 P.2d at 358.

C. Section 30-1-4.5(2) violates the uniform operation provision of Article 1, section 24 of the Utah Constitution.

Section 24 of the Utah Constitution provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. Art 1 § 24 (1896).

When evaluating a legislative measure under Section 24, a court must determine whether the classification is reasonable, whether the objectives of the legislature are legitimate, and whether there is a reasonable relationship between the

classification and the legislative purposes. Blue Cross & Blue Shield of Utah v. State, 779 P.2d 634, 637 (Utah 1989).

The practical effect of 30-1-4.5(2) is to limit those parties who may prove the existence of a common law marriage. As previously noted, the only means by which one may comply with the statute is to file a Complaint within one year of the termination of the relationship and prevail at the trial court level, and complete all administrative requirements to have the judgement entered by the court.

If the party must appeal, there is little chance of complying with the one-year restriction of the statute. These parties are without remedy and are unreasonably classified differently from those who may prevail at the trial court. This unreasonable classification violates Section 24 as interpreted by Blue Cross, 779 P.2d at 637.

CONCLUSION

The inquiry into the existence of a common law marriage is made under Section 30-1-4.5 of the Utah Code. The legislature did not explicitly express the burden of proof required beyond stating that the evidence should be proved "under the same general rules of evidence as facts in other cases." Utah Code Ann. § 30-1-4.5(2) (1995). Those general rules include the general burden of proof in civil matters, proof by a preponderance of the evidence. When read literally, the statute

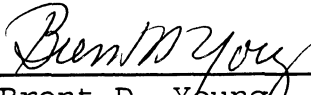
itself provides the burden of proof necessary. The district court incorrectly applied the higher standard of clear and convincing evidence. This Court should reverse and restate the correct burden of proof for determining the existence of a common law marriage under Utah law: proof by a preponderance of the evidence.

Beyond a literal reading of the statute, a survey of sister states with similar common law marriage statutes to Utah's statute shows that the weight of judicial authority is that proof by a preponderance of the evidence is the correct standard.

The statute itself is unconstitutional when the facts of this case are applied to its provisions. As the district court noted, the hypothetical constitutional problems envisioned by the court in Bunch v. Englehorn, 906 P.2d 918 (Utah Ct. App. 1995), are realized in the present case. If the district court is reversed, Mr. Hansen will be deprived of due process because of his inability to comply with the one-year requirement of the statute. Mr. Hansen will also be deprived of his rights under the open courts provision in Section 11 of the Utah Constitution because there is no reasonable alternative remedy provided and the statute fails to eliminate a clear social or economic evil through means that are not unreasonable or arbitrary. Through an unreasonable classification of those that are unable to comply with the one-year provision, Section 30-1-4.5(2) violates the uniform operation clause of the Utah Constitution.

Accordingly, it is requested that the Court rule on all issues presented and hold as a matter of law that the correct standard required to establish a common law marriage is proof by a preponderance of the evidence. In addition, this Court may declare Section 30-1-4.5(2) unconstitutional.

Dated this 8 day of August, 1997.



Brent D. Young
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that on this 8 day of August, 1997,
I caused to be mailed, first-class mail, postage prepaid,
the foregoing Brief of Appellant to ANDREW MCCULLOUGH,
Attorney for Defendant/Appellee, addressed as follows:

ANDREW MCCULLOUGH
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BRENT D. YOUNG

ADDENDUM

- A. Section 30-1-4.5 Utah Code Ann. (1995)
- B. Utah Constitution Art 1 § 7 (1896)
- C. Utah Constitution Art 1 § 11 (1896)
- D. Utah Constitution Art 1 § 24 (1896)
- E. Ruling, December 20, 1996 (Record at 229-247)
- F. Ruling, April 14, 1997 (Record at 337-339)
- G. Bunch v. Englehorn, 906 P.2d 918 (Utah Ct. App. 1995)
- H. Miller v. Townsend Lumber Co., 448 P.2d 148 (Mont. 1968)
- I. Jim's Water Service v. Fayrs, 590 P.2d 1346 (Wyo. 1979)
- J. In re Peterson's Estate, 365 P.2d 254 (Colo. 1961)

A. Section 30-1-4.5 Utah Code Ann. (1995)

30-1-4.5. Validity of marriage not solemnized.

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

- (a) are capable of giving consent;
- (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
- (c) have cohabited;
- (d) mutually assume marital rights, duties, and obligations; and
- (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

B. Utah Constitution Art 1 § 7 (1896)

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities. 8 A.L.R.3d 301.

Key Numbers. — Constitutional Law ⇨ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes. — Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.

Regulation of right to bear arms.

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.

C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

A.L.R. — Gun control laws, validity and construction of. 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Key Numbers. — Constitutional Law ⇨ 82; Weapons ⇨ 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

C. Utah Constitution Art 1 § 11 (1896)

Utah State Constitution, 1986 Utah L. Rev. 319.

Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

Am. Jur. 2d. — 47 Am. Jur. 2d Jury § 7 et seq.

C.J.S. — 50 C.J.S. Juries § 9 et seq.

A.L.R. — Driving while intoxicated or similar offense. right to trial by jury in criminal prosecution for, 16 A.L.R.3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Automobiles: validity and construction of legislation authorizing revocation or suspen-

sion of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations. 48 A.L.R.4th 367.

Jury trial waiver as binding on later state civil trial. 48 A.L.R.4th 747.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment. 52 A.L.R.4th 1141.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Jury trial rights in, and on appeal from, small claims court proceeding, 70 A.L.R.4th 1119.

Key Numbers. — Jury ⇌ 9 et seq.

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

History: Const. 1896.

NOTES TO DECISIONS

ANALYSIS

Action under Civil Rights Act of 1871.

Actions by court.

Actions by state.

Actions not created.

Arbitration Act.

Assignments.

Attorneys' duties.

Criminal law.

—Suspension of execution of death sentence.

Debt collection.

District court jurisdiction.

Election contest.

Forum non conveniens.

Injury or damage to property.

Intoxicating liquor.

Land Registration Act.

Limitations.

—Limitations of actions.

—Statutory limitation of review.

Occupational disease law.

Sovereign immunity.

Torts.

—Action by wife against husband.

—Loss of consortium.

Unlicensed law practice.

Waiver of rights.

Workmen's compensation law.

Cited.

Action under Civil Rights Act of 1871.

Jurisdiction over actions brought under the Civil Rights Act of 1871. 42 U.S.C. 1981 et seq., is vested originally in the federal courts, but the exercise of concurrent jurisdiction by state courts is not thereby prohibited; in view of the provisions of this section, therefore, it was error for trial court to dismiss for lack of jurisdiction otherwise proper action brought under 42 U.S.C. 1983. *Kish v. Wright*, 562 P.2d 625 (Utah 1977).

Trial court would not err in dismissing action brought under 42 U.S.C. 1983 on the ground of forum non conveniens in a proper case, but such dismissal should be without prejudice so that the plaintiff might move his suit to another forum without harm to his claim. *Kish v. Wright*, 562 P.2d 625 (Utah 1977).

Actions by court.

Court of equity has jurisdiction to open probate proceeding and to proceed against bond of administratrix where she has practiced extrinsic fraud on the court. *Weyant v. Utah Sav. & Trust Co.*, 54 Utah 181, 182 P. 189, 9 A.L.R. 1119 (1919).

Actions by state.

This section did not alter the law with respect to certain rights which are vested in the

D. Utah Constitution Art 1 § 24 (1896)

project did not unconstitutionally grant benefits to private individuals; any benefits were strictly incidental to the public purpose of ter-

mination of urban blight. *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975).

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d Franchises §§ 9 to 23.

C.J.S. — 37 C.J.S. Franchises § 26.
Key Numbers. — Franchises ☞ 11.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

History: Const. 1896.

Cross-References. — Prohibition on pri-

vate or special laws, Utah Const., Art. VI, Sec. 26.

NOTES TO DECISIONS

ANALYSIS

In general.

Age of majority.

Agent for service of process.

Automobile license law.

Construction with Art. VI, § 26.

Contract carrier permit.

Cosmetologists' license law.

Criminal actions.

—Investigations.

—Prosecution.

—Sentence.

Criminal sentence.

Disparate tax assessments.

Excess revenue refunds.

Guest statutes.

Inheritance Tax Law.

Insurance premium tax exemption.

Intoxicating liquor.

Licenses.

Massage parlor ordinance.

Municipal employment prerequisites.

Notice requirements.

Property.

—Responsibility for water service.

Public employees' retirement system.

Public officers' bonds.

Public officers' salaries.

Road poll tax.

School activities.

Search warrants.

Sunday closing laws.

Tax sales.

Unfair Practices Act.

In general.

All laws shall operate uniformly wherever uniform laws can be enacted. *State v. Holtgreve*, 58 Utah 563, 200 P. 894, 26 A.L.R. 696 (1921).

Objects and purposes of law present touchstone for determining proper and improper

classifications. *State v. Mason*, 94 Utah 501, 78 P.2d 920, 117 A.L.R. 330 (1938); *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

One who assails legislative classification as arbitrary has burden of proving it to be such. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for differentiation between classes or subject matters included, as compared to those excluded, provided differentiation bears reasonable relation to purposes of act. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Before legislative enactment can be interfered with, court must be able to say that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Only where some persons or transactions excluded from operation of law are, as to the subject matter of the law, in no differentiable class from those included in its operation, is the law discriminatory in the sense of being arbitrary and unconstitutional, and if reasonable basis to differentiate can be found, law must be held constitutional. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Inability of legislature to make perfect classification does not render statute unconstitutional. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

In determining whether classification made by legislature is unconstitutional, discrimination is very essence of classification and is not objectionable unless founded upon unreasonable distinctions. *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P.2d 464 (1948).

An act is never unconstitutional because of

E. Ruling, December 20, 1996 (Record at 229-247)

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
12-20-96 18 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL L. HANSEN, Plaintiff, vs. LAURA T. HANSEN, Defendant.	CASE NUMBER: 954402169 DATED: DECEMBER 20, 1996 RULING ANTHONY W. SCHOFIELD, JUDGE
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Trial on plaintiff's complaint for determination of a common law marriage was held October 24, 1996 and was continued on October 26, 1996. At trial the Court also heard evidence on an order to show cause issued at the request of plaintiff. Brent Young represented plaintiff Michael Hansen ("Mike"), and Andrew McCullough represented defendant, Laura Hansen ("Laura"). Closing arguments were heard on November 27, 1996. Kelly Frye, guardian ad litem, was present and participated in both proceedings. At issue is whether the parties' relationship constitutes a common law marriage and contempt allegations claimed by each party against the other.

FINDINGS OF FACT

I find that the following facts have been proven by clear and convincing evidence:

1. These parties previously were married for a period of approximately

nine years. Their divorce was final in March 1994.

2. In October 1994 Mike moved back into the former marital home with Laura and resided there with her and the children of the parties until at least May 1995.

3. From May 1995 through September 22, 1995 Mike did not live at Laura's home nor cohabit with her.

4. Judge Hansen previously made a finding in a protective order action between these parties that Mike lived in Laura's home at her request from September 22, 1995, through December 27, 1995.

5. During the periods of cohabitation Mike routinely turned over his paycheck to Laura and then received back some cash as "walking around money."

6. During the periods of cohabitation Laura worked and she pooled her money with the money which she received from Mike.

7. Laura used the money she and Mike earned to pay the significant credit card debt which Mike had incurred during the period of separation preceding their divorce, to pay the home mortgage, to pay family living expenses and obligations and to pay her debts.

8. During the period of cohabitation the parties acted much like a family.

9. When the parties' son was of age to be baptized the parties met with the local L.D.S. Bishop to arrange for the son's baptism. In the process neither party dispelled the appearance that they were a family.

10. After Mike moved back in with Laura the membership clerk from the

L.D.S. Church came to visit to inquire concerning Mike's church membership records and was told that Mike lived in the marital home. The appearance was that he and Laura were back together.

11. During the periods of cohabitation the parties spent time with several family friends, including going on trips, like one particular Lake Powell trip. During all of those trips the parties did not refer to each other as husband or wife.

12. The friends who knew the parties best believed that the parties were living together as a couple but not as husband and wife.

13. During the period of cohabitation Laura had an intimate relationship with one of these friends, contradicting any notion that she was married to Mike, although he was living in the marital home.

14. Laura used Mike's medical and dental insurance to cover the cost of some of her medical treatments. This insurance coverage was claimed by her as Mike's wife. The coverage was only available to her as a wife and she claimed the benefit of that coverage.

15. During the time the parties cohabited Laura held herself out as Mike's wife to the insurance carrier.

16. During the time the parties cohabited each was capable of giving consent to a marriage and each was legally capable of entering into a solemnized marriage.

17. During the time the parties cohabited they each assumed marital rights, duties and obligations.

18. During the period of cohabitation Laura frequently wore a ring on the finger of her left hand traditionally viewed as her marriage finger.

19. During the period of cohabitation Laura admitted to Mike that she felt he had received an inequitable distribution in the divorce. She agreed with him that if the parties subsequently separated that each would be entitled to one-half of the equity in the home.

20. On several occasions during the period of cohabitation Mike told Laura that he wanted to be married to her and asked her to remarry him. On each of those occasions Laura declined to enter into a new marriage with Mike.

21. The parties filed separate tax returns for 1994 and 1995.

22. The complaint in this case was filed on October 12, 1995, during the course of the cohabitation and alleged common law marriage of the parties.

23. Each of the parties have violated terms of one or more orders of the Court.

24. This Court previously entered a mutual protective order limiting contact between the parties and specifically restraining any harassing or threatening behavior. In defiance of that order Laura has struck Mike and Mike has spit on Laura.

25. Further, Laura has entered into a pattern of baiting Mike. On one recent occasion she arranged visitation for Mike. When he came to pick up the children with a third-party witness they saw the children enter the home but no one would answer the door when the third party knocked. Mike then went with the third party to a phone and the friend called Laura. A police officer was on the other end of

the phone and he asserted that Mike had violated the protective order. Then the officer found out it was not Mike on the phone. This pattern of conduct constitutes baiting by Laura of Mike in an effort to get him in trouble with the courts for violating protective orders.

26. Laura also has made complaints to law enforcement at times when she knew that protective orders have been dismissed by the Court.

27. Laura has denied visitation when there has been a clear, detailed, written order setting forth the visitation schedule. For example, she denied Mike his UEA visitation with Zeb.

28. At least some of Laura's denials of visitation to Mike have been made in response to rulings by the Court that went against Mike.

29. Almost all of the actions of Mike and Laura in each violating the orders of the Court, in harassing each other, in involving the police and in fighting and spitting at each other, have been witnessed by the children. That alone is grounds for a stern response by the Court as the children have been significantly impacted by the continual fighting of the parents.

ANALYSIS AND RULING

I. COMMON LAW MARRIAGE

EVIDENTIARY BURDEN BORN BY PLAINTIFF.

In cases seeking the determination of a common law marriage I previously have ruled that the plaintiff has the burden of establishing the existence of the common law marriage by clear and convincing evidence. As that is the evidentiary

standard which I apply in this case, I offer this explanation of the legal analysis for the use of that evidentiary standard

A. Background: Common-law marriage generally is disfavored.

For nearly a century before the enactment of Utah Code Ann § 30-1-4.5 in April of 1987, Utah courts consistently refused to validate common-law marriages.¹ Legal recognition of common-law marriage apparently was precipitated by the legislature's desire to curb abuse of welfare programs.² Thus, one cannot assume that the State's recognition of common-law marriages reflects approval of them. Such recognition runs counter to the national trend of abolishing the doctrine.³ Although Idaho itself continues to recognize common-law marriages, the Idaho Supreme Court, in Metropolitan Life Ins. v. Johnson, 645 P.2d 356, 359-60 (Idaho 1982), noted that common-law marriage increasingly is disfavored in other jurisdictions.

The trend toward abolition of common law marriage indicates an obvious hostility to the doctrine. That hostility is not confined to those states which do not recognize common law marriages. The courts of many jurisdictions recognizing the doctrine also view it with disfavor. Texas Employers' Ins. Ass'n v. Elder, 274 S.W.2d 144, 147 (Civ. App. 1954) ("the law does not favor, but merely tolerates, common law marriages") aff'd 155 Tex. 27, 282 S.W.2d 371 (1955), In re Redman's Estate, 135 Ohio St. 554, 21 N.E.2d 659, 661

¹See David F. Crabtree, Development, Recognition of Common Law Marriages, 149 Utah L. Rev. 273, 275 (1988) (discussing the legislature's enactment of Utah Code Ann § 30-1-4.5.)

Id. at 280-81

³Crabtree, writing in 1988, stated that common-law marriage was then recognized in the following jurisdictions: Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Utah and the District of Columbia. Id. at 276 n. 15. Since that time, at least one of these jurisdictions (Ohio) has abolished the doctrine. See In re Estate of Shepherd, 646 N.E. 2d 561, 563 (Ohio App. 10th Dist. 1994) (stating that Ohio abolished common-law marriage in 1991).

(1939) ("So-called common law marriage contravenes public policy and should not be accorded any favor; indeed, it is quite generally condemned."); Baker v. Mitchell, 143 Pa. Super. 50, 17 A-2d 738, 741 (1941) ("The law of Pennsylvania recognizes common law marriages. But they are a fruitful source of perjury and fraud, and in consequence, they are to be *tolerated, not encouraged.*")

B. An apparent majority of jurisdictions require that common-law marriage claims be proved by clear and convincing evidence.

The distrust with which common-law marriage is viewed in most jurisdictions finds expression in the higher evidentiary standard many of them in pose on litigants seeking to prove the existence of such marriages. Research of case law from other jurisdictions indicates that at least fourteen have adopted a clear and convincing standard of proof. Alabama (Crawford v. State, 629 So.2d 745, 748 (Ala. Crim. App. 1993)); Ohio (Mullins v. Mullins, 590 N.E.2d 311, 313 (Ohio App. 3d Dist. 1990)); Oklahoma (Mueggenborg v. Walling, 836 P.2d 112, 114 (Okla. 1992); Connecticut (Collier v. City of Milford, 537 A.2d 474, 479 (Conn. 1988)); Rhode Island (Souza v. O'Hara, 395 A.2d 1060, 1061 n.2 (R.I. 1982)); Michigan (In re Leonard's Estate, 207 N.W.2d 166, 168 (Mich. App. 1973)); Indiana (In re DeWitte's Estate, 222 N.E. 2d 285, 291 (Ind. App. 1966)); Pennsylvania (In re Estate of Miller, 448 A.2d 25, 38 (Penn. Super. Ct. 1982)); Florida (In re Estate of McClenahan, 476 So.2d 1289, 1292 (Fla. App. 2d Dist. 1985, *rev. denied*, 486 So.2d 597)); Nebraska (Binger v. Binger, 63 N.W.2d 784, 787 (Neb. 1954)); South Dakota (Seger v. Erickson, 64 N.W. 2d 316, 318 (S.D. 1954)); New Jersey (In re Jacobsen's Estate, 39 A.2d 704, 707 (N.J. Surr. Ct. 1994)); Mississippi (Paschall v. Polk, 379 So.2d 316, 317 (Miss. 1980)); and New York (In re Arbuthnot's Estate, 157 N.Y.S.2d 712, 714 (Surr. Ct. Nassau Cty. 1956,

aff'd, 6 A.2d 1048)).⁴

By contrast, the same research revealed only nine jurisdictions that have adopted a preponderance of the evidence standard: Georgia (Arnold v. State, 247 S.E. 2d 207, 208 (Ga. App. 1978)); Texas (Richardson v. State, 744 S.W.2d 65, 73 (Tex. Crim. App. 1987)); South Carolina (Yarborough v. Yarborough, 314 S.E.2d 16, 18-19 (S.C. App. 1984)); Louisiana (Bloom v. Willis, 60 So.2d 415, 417 (La. 1952)); West Virginia (In re Estate of Foster, 376 S.E.2d 144, 150 (W. Va. 1988)); District of Columbia (Murphy v. McCloud, 650 A.2d 202, 211-12 (D.C. App. 1994)); Montana (Miller v. Townsend Lumber Co., 448 P.2d 148, 151 (Mont. 1968)); Arkansas (Brissett v. Sykes, 855 S.W. 2d 330, 332 (Ark. 1993)); and Idaho (Metropolitan Life Ins. Co., 645 P.2d at 360)). Thus, the weight of judicial authority appears to favor imposition of the higher standard of proof.

C. Public policy favors imposing a clear and convincing standard of proof.

Regardless of the number of jurisdictions favoring one standard over the other,

⁴In addition, although Iowa requires that unsolemnized marriages be proved by a preponderance of the evidence, such claims are subject to heightened scrutiny. See Matter of Estate of Stodola, 519 N.W.2d 97, 98 (Iowa App. 1994) (Unsolemnized marriages must be proved by a "preponderance of clear, consistent, and convincing evidence"); In re Marriage of Winegard, 257 N.W.2d 609, 615 (Iowa 1977) (Claims are to be "closely scrutinized and regarded with suspicion").

Colorado has been cited as having imposed the clear and convincing standard of proof. See Employers Mut. Liab. Ins. Co. v. Indus. Comm'n, 234 P.2d 901, 903 (Colo. 1951) (Evidence of unsolemnized marriage should be "clear, consistent and convincing"). However, in People v. Lucero, 747 P.2d 660, 664 n.6 (Colo. 1988), the Colorado Supreme Court explained that "[t]his language was not chosen in order to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must be present more than vague claims unsupported by competent evidence."

there are persuasive reasons for adopting the clear and convincing standard in Utah. Among them is the need to establish with certainty legal rights and obligations that derive from the legal status of marriage. Such rights and obligations may be at stake in the context of divorce, estate distribution, assertion of evidentiary privileges, and survivors' claims for various forms of public assistance. Solemnized marriages are thought to define such rights with a degree of certainty not characteristic of unsolemnized, unrecorded marriages.⁵ As noted by the Utah Supreme Court, the fact that persons possessing no clear legal record of marriage can assert claims to such rights as common-law spouses creates a potential for fraud, especially where the claimant stands to gain financially.⁶ Imposition of a high standard of proof minimizes the risk of fraud by requiring claimants to establish the existence of such marriages with a high degree of definiteness.

⁵In In re Veta's Estate, 170 P.2d 183, 186 (Utah 1946), the Utah Supreme Court stated:

The purpose of enactments requiring the solemnization of marriage before an authorized person, together with those dealing with the prior procurement of a license, is doubtless to protect the parties to the marriage contract in the rights flowing therefrom, and likewise to protect their offspring. A solemn record of the contract is made to which recourse may be had when rights or obligations of the husband or wife arising from the marriage are in issue. So, too, are the interests of third parties in dealing with either of the contracting parties, subsequent to the marriage, thus protected.

⁶In Whyte v. Blair, 885 P.2d 791, 795 (Utah 1995), the court stated:

Care must be given to guard against fraudulent marriage claims, especially where a declaration of marriage would reap financial rewards for an alleged spouse. When a reward is available, human nature may choose to strengthen and augment, in retrospect, the consent to marry that was only tentative before the reward became available.' (citations omitted)

There is support in other areas of the law for the higher standard of proof. Although most civil claims need only be proved by a preponderance of the evidence,⁷ the clear and convincing standard has been applied in the following types of civil proceedings, among others: civil commitment (State v. Drobek, 815 P.2d 724, 728 n.5 (Utah App. 1991)), termination of parental rights (Woodward v. Fazio, 823 P.2d 474, 477 (Utah App. 1991)), civil contempt (State v. Drobek, 815 P.2d 724 (Utah App. 1991)), denaturalization (Chaunt v. United States, 364 U.S. 350 (1960)), and deportation (Woodby v. INS, 385 U.S. 276 (1966)). A common element in these civil proceedings is the presence of contested individual interests deemed worthy of extra protection. Given the seriousness of the rights and obligations that derive from marriage and the importance traditionally accorded to marriage by our legal system,⁸ it is reasonable to require those seeking to prove common-law marriages to do so by the same standard used to determine other interests of substantial importance.

⁷Maxfield v. Denver & Rio Grande Western R.R. Co., 330 P.2d 1018, 1021 (Utah 1958).

⁸See Norton v. MacFarlane, 818 P.2d 8, 18 (Utah 1991), where Justice Howe in concurrence and dissent, stated:

While marriage is in one sense a private contract between the parties, it is also a relationship in which the state is vitally interested and, because of such interest, the law attaches thereto certain rights and duties, irrespective of the wishes of the parties. Marriage is in its nature a permanent status and has been properly referred to as the most important of all civil relations. (citation omitted)

See also, Crawford v. State, 629 So.2d 745, 758 (Ala. Cr. App. 1993) ("[D]ue to the serious nature of the marriage relationship, the courts will closely scrutinize a claim of common-law marriage and require clear and convincing proof thereof.")

D. The benefits of imposing a clear and convincing standard of proof outweigh its disadvantages.

Arguments can be made in favor of imposing a lower standard of proof. One such argument might be that the higher standard prejudices cohabitants who live for long periods of time as though married but then find themselves unable to establish entitlement to benefits reserved for lawful spouses. Upon termination of common-law marriage by death or separation, this problem could arise in the context of claims for government benefits for surviving spouses,⁹ or in connection with claims for spousal support. In addition, some jurisdictions have concluded that it is appropriate to presume valid marriage, instead of cohabitation, as a matter of moral principle.¹⁰ Finally it could be argued that imposing the higher standard of proof may make it more difficult for the State to prove welfare fraud under the statute.

These arguments, though not without merit, are not persuasive. Although the clear and convincing standard may make it more difficult for persons who live in genuine common-law marriages to claim benefits reserved for legal spouses, it should have the concomitant effect of making it more difficult to claim such benefits fraudulently. Obviously, the public has an interest in minimizing fraud with respect to

⁹Crabtree, supra, at 275, has stated that "[o]ne context for the refusal to recognize common-law marriage, and the most inequitable consequence of that policy, has been the denial of workers' compensation benefits to spousal equivalents of deceased employees. With few exceptions, cohabitants have consistently been denied any benefits afforded a legally marriage spouse."

¹⁰See Metropolitan Life Ins. Co., 645 P.2d at 361 (stating that in Idaho "the law presumes morality, and not immorality; marriage, and no concubinage; legitimacy, and not bastardy, every intendment of the law leans to matrimony.").

publicly financed benefit programs. Given the ease with which solemnized marriage may be obtained, society's interest in reducing fraud outweighs the prejudice to the minority of persons which chooses to rely upon the traditionally disfavored doctrine of common-law marriage.

Whether the law as a matter of principle should favor finding unsolemnized marriages where possible instead of cohabitation alone is debatable; the legislature has not expressed approval of this position. Again, there seems little reason to accord favor to unsolemnized marriage when solemnized marriage is readily available. As concerns the potentially diminished ability of the State to use the common-law marriage statute to reduce welfare fraud, whatever disadvantage this may produce should be offset by the State's enhanced ability to defend against fraudulent claims to benefits for which eligibility is dependent upon lawful marriage.

E. Conclusion.

Because of the importance of legal rights and obligations deriving from marriage, the need to establish these rights and obligations with certainty, and the potential for fraud inherent in claims based upon common-law marriage, it is appropriate to require that such claims be proven by clear and convincing evidence.

THE FACTORS WHICH PLAINTIFF MUST PROVE.

Utah Code Ann. § 30-1-4.5 sets forth the following factors which must be established in order for the Court to find the existence of a common law marriage:

The claimed common law marriage must arise out of a contract between two consenting parties who:

- 1) are capable of giving consent,
- 2) are legally capable of entering a solemnized marriage under the provisions of this chapter,
- 3) have cohabited,
- 4) mutually assume marital rights, duties, and obligations, and
- 5) hold themselves out as and have acquired a uniform and general reputation as husband and wife

By clear and convincing evidence the facts bear out that both parties are and were capable of giving consent, that they are and were capable of entering a solemnized marriage under the provisions of law, that they cohabited, and that they mutually assumed marital rights, duties, and obligations. I spend little further time with those issues. What remains, therefore is whether they held themselves out as and have acquired a uniform and general reputation as husband and wife and whether they consented to a common law marital contract.

Whether the parties held themselves out as husband and wife is a fact sensitive question. In this case the more persuasive evidence is that for a time they did hold themselves out as husband and wife. When she used insurance forms to claim medical benefits for herself from Mike's insurance carrier Laura was holding herself out as Mike's wife. When they were visited in the home by the membership clerk of their local church unit regarding Mike's status in the ward and when they took their son to a local church leader to prepare the son for baptism in their church they each held themselves out as husband and wife. Finally, for a time Laura wore a ring on the

finger of her left hand traditionally viewed as the marriage finger. I conclude that for a time Mike and Laura held themselves out as husband and wife.¹¹

While they may have held themselves out as husband and wife, the statute also requires that they acquire a uniform and general reputation as husband and wife. This did not happen.

Several of Mike's witnesses testified that they were friends of the parties and frequently visited with the parties in the residence during the period of cohabitation. These witnesses testified that they viewed the parties as a couple but never viewed the couple as married. In other words, in the home where the parties were residing they were not viewed by their most intimate friends as a married couple. Yet these were the friends of the parties, those who knew them best. If they did not view Mike and Laura as husband and wife, one well may wonder who did view them as husband and wife. Because among their closest associates they did not have a uniform reputation as husband and wife it is impossible for me to conclude that Mike has carried his burden on this issue by clear and convincing evidence.¹²

¹¹ It is appropriate in this context to look to the motivations of the parties. Laura asserts now that there was no common law marriage. She has a financial incentive to avoid a common law marriage--she wants to keep the home free of any claim by Mike. At the same time Mike has a financial incentive to establish a common law marriage--he wants to establish an interest in the home. Each of these appear offsetting. On the other hand, Laura had a direct financial incentive at the time she represented to the insurance provider that she was Mike's wife--she wanted her medical bills paid by an insurance carrier which owed her no legal duty. In that setting she held herself out as Mike's wife.

¹² To Mike's apparent surprise at trial, one of his witnesses admitted to an intimate relationship with Laura during the time she was cohabiting with Michael. Obviously Laura's participation in such a relationship indicates that she did not consider her relationship with Mike to be of sufficient strength to avoid a different, entangling relationship. More importantly, however, none of these witnesses viewed the parties as husband and wife.

Not only does Mike fail to establish by clear and convincing evidence that the parties acquired a uniform and general reputation as husband and wife, he has failed to establish that each party consented to a common law marriage relationship.

In this case there is no single, clear fact demonstrating that Laura consented to a common law marital contract. In fact, the evidence is to the contrary. On several occasions Mike asked Laura to marry him. Each time she refused. That she rejected his several proposals is evidence that she had not consented to a marital relationship.

While consent must be established, as noted by the Supreme Court in Whyte v Blair, 885 P.2d 791, 794, n. 3 (Utah 1994), mutual consent can be shown by acquiescence. The facts establish that for her own financial benefit Laura affirmatively held herself out to the insurance company as Mike's wife. To avoid embarrassment she held herself out to the church representatives as Mike's wife. For a time she wore a ring on her marriage finger. For several months she allowed Mike to live in the home, enjoying a conjugal relationship and sharing family expenses. All of these demonstrate some measure of acquiescence by her in the existence of a marital relationship. On the other hand, that acquiescence is overcome by her own continued insistence that the parties not remarry. She knowingly chose not to accept Mike's marriage proposals. That evidence, which is clear and convincing, offsets any alleged acquiescence in a marital relationship. Laura knew Mike wanted to remarry and repeatedly declined. Rather than evidencing consent, this evidences just the opposite, an insistent lack of consent.

Finally, a word about the inequity in the prior divorce decree. During the

period of cohabitation at issue now Laura admitted to Mike and to third parties that Mike had not received a fair share of the equity of the home in the divorce. That she acknowledged that inequity but did nothing meaningful to remedy the inequity, such as remarrying or transferring an interest to Mike, speaks against Mike's claim that Laura acquiesced in the marriage. Had she acquiesced in a marital relationship it is likely she would have taken some affirmative action to remedy the inequity. Instead, she maintained some continued distance between each of their financial situations as she did not remedy the inequity by transfers of property and she declined to join in any joint tax returns.

While I am troubled by the inequity that Laura acknowledges existed following the divorce, I do not have the discretion to find a common law marriage in a case where the facts do not warrant that conclusion.

In determining whether a relationship satisfies the requirements of Utah Code Ann. § 30-1-4.5(1)(a) through (e), numerous factors should be considered. No single factor is determinative. See People v Lucero, 747 P.2d 660, 665 (Colo. 1987) (en banc). *Evidence of each element is essential.* Consenting parties must show cohabitation, assumption of marital rights and duties, a general reputation as husband and wife, capacity to marry, and capacity to give consent.

Whyte v Blair, supra, at ____ (emphasis added).

Taking all of this evidence together, I find that Mike has failed to prove by clear and convincing evidence either that Laura consented to a marital relationship or that the parties acquired a uniform and general reputation as husband and wife. Mike's complaint for the determination of a common law marriage must be dismissed.

II. CONTEMPT.

Both parties have alleged the other is in contempt of existing orders of the

court by their continual harassing actions during and surrounding visitation. In that claim each is correct. Each of the parties have acted contemptibly in the way that they have dealt with the other during the necessary interactions between them arising from their being co-parents of two children. Obviously they have developed a worthless bitterness between them that has fueled actions which are both obnoxious and in contempt of the orders of the court. Each party merits sanction by the Court.

I have strong feelings about the extent of Laura's contempt. She has discounted the extent of her contempt by pointing an accusatory finger at Mike for his claimed or actual violations of the protective orders issued by the Court. She has feigned innocence. Yet the record is clear that she has baited Mike in an effort to cause him continuing problems with the criminal courts and frequently she has exacted her own punitive response against Mike when she has not liked the result of Court rulings. While she asserts excuse, those excuses are without merit. What she did is impose her own rules on Mike's visitation in violation of the direct orders of the court. She is in contempt of the Court.

Upon reaching the conclusion that Laura is in contempt of court, and believing that the sting of either a fine or a jail sentence for Laura may fall most heavily on the children, I had intended to take away essentially all of Laura's Christmas vacation visitation in order to make clear to her that she, too, has been in open violation of the orders of the Court. Since reaching that conclusion I have received a detailed report by the guardian ad litem which addresses a claimed action by Mike which places in question his continued unsupervised visitation of the children. That matter is set for

hearing on Monday, December 23, 1996. As a result, I decline today to impose any sanction on either Mike or Laura for their contempt of the court's orders, but will wait until the conclusion of the December 23, 1996 hearing to impose the sanctions which seem appropriate. Each must know, however, that a sanction is forthcoming.

Pursuant to Rule 4-504, Utah Code of Judicial Administration, Laura's counsel is directed to prepare findings of fact, conclusions of law and a judgment of dismissal of Mike's common law marriage claim.

Dated this 20th day of December, 1996.

BY THE COURT:



ANTHONY W. SCHOFIELD, JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was ^{*faxed*} ~~mailed~~ to the following, postage prepaid, this 20 day of December, 1996:

W. Andrew McCullough, Atty.
853 West Center Street
Orem, UT 84057

Brent D. Young, Atty. *hand delivered*
PO Box 672
Provo, UT 84603

Kelly Frye, Atty.
32 West Center #205
Provo, UT 84601

CARMA B. SMITH
CLERK OF THE COURT

By *Christine James*
Deputy Clerk

F. Ruling, April 14, 1997 (Record at 337-339)

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL LOY HANSEN, Plaintiff, vs. LAURA T. HANSEN, Defendant.	CASE NUMBER: 954402169 DATED: APRIL 14, 1997 RULING ANTHONY W. SCHOFIELD. JUDGE
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Pursuant to Rule 4-501, Utah Code of Judicial Administration, this matter is before the Court on plaintiff's motion to amend findings of fact and conclusions of law. Having considered the memoranda of counsel, I deny the motion to amend, concluding as I previously did, that the correct burden of proof is proof by clear and convincing evidence.

Plaintiff also raises a constitutional argument. He is correct in his analysis that his case has the potential to present the very case identified by example in the opinion in Bunch v. Englehorn, 906 P.2d 918, 921, n. 3 (Utah App. 1995), where the Court said:

We do note, however, that [Section 30-1-4.5] might present a constitutional question in a different context. If a trial court were to enter a judgment denying a common-law marriage within one year of separation, and that judgment were reversed on appeal and the matter remanded, the parties might be denied a reasonable opportunity to comply with the plain meaning of the statute.

This constitutional argument is premature as there is no assurance that on appeal the appellate courts will reverse the trial court judgment. If they do and do not address the constitutional argument in their reversal, then the issue of the constitutional argument will be ripe for consideration.

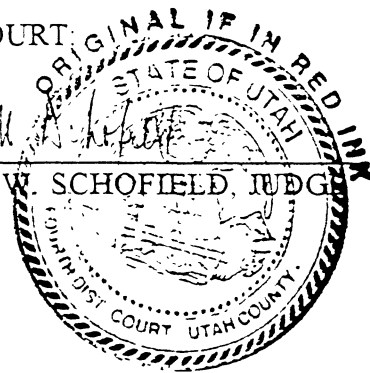
Pursuant to Rule 4-504, Utah Code of Judicial Administration, defendant's counsel is directed to prepare an appropriate order.

Dated this 14th day of April, 1997.

BY THE COURT:

Anthony W. Schofield

ANTHONY W. SCHOFIELD, JUDGE



G. Bunch v. Englehorn, 906 P.2d 918 (Utah Ct. App. 1995)

only those circumstances affecting the best interests of the children or the public can be considered. See Utah Code Ann. § 78-3a-47 (1992). The juvenile court concluded that the children's best interests would be served by denying the father's petition and granting permanent custody to the aunt. We agree.

CONCLUSION

The juvenile court incorrectly concluded that section 78-3a-47 required a material change of circumstances in the currently existing custodial relationship. Any change of circumstances affecting the interests of the children was sufficient for purposes of the statute.

Nevertheless, the father also had the burden to show that, in light of the changed circumstances, the best interests of his children or the public require a change in the custody arrangement. He has failed to meet this burden. The juvenile court adequately addressed the children's best interests. The court determined that, in light of those interests, the father's petition for restoration of custody should be denied and the aunt's petition for permanent custody granted.

The court did not exceed the scope of its discretion in reaching this all-important conclusion. The father had no right to assert the parental presumption in this case. Thus, despite the juvenile court's incorrect interpretation of section 78-3a-47, we affirm its decision on the proper grounds of the children's best interests. See *Maertz v. Maertz*, 827 P.2d 259, 262 (Utah App.1992) ("We may affirm the trial court on any proper ground.").

BENCH and GREENWOOD, JJ., concur.



Barbara Lynn BUNCH, Plaintiff,
Appellant, and Cross-
Appellee,

v.

Brian Lynn ENGLEHORN, Defendant,
Appellee, and Cross-Appellant.

No. 930707-CA.

Court of Appeals of Utah.

Nov. 22, 1995.

Appeal was taken from order of the Fifth District Court, Iron County. J. Philip Eves, J., dismissing divorce complaint on grounds complainant had not met statutory criteria for establishing marriage. The Court of Appeals, Bench, J., held that: (1) statutory requirement that determination or establishment of unsolemnized marriage occur during relationship or within one year following termination of that relationship was not satisfied by filing of divorce complaint within one year of parties' separation, and (2) claims challenging constitutionality of statute establishing procedure by which parties validate unsolemnized marriage relationship could not be raised for first time on appeal.

Affirmed.

1. Appeal and Error ⌘370

Failure to timely pay filing fee on appeal from district court did not deprive Court of Appeals of jurisdiction. Rules App.Proc., Rule 3(a).

2. Divorce ⌘177

Order dismissing divorce complaint was final and appealable, despite purported husband's oral request for attorney fees, where court declared in judgment that purported husband could claim attorney fees through filing of appropriate motion, and no motion was ever filed with trial court. U.C.A.1953, 78-20-56.

3. Marriage ⌘55

Statutory requirement that determination or establishment of unsolemnized marriage occur during relationship or within one

year following termination of that relationship was not satisfied by filing of divorce complaint within one year of parties' separation. U.C.A.1953, 30-1-4.5.

4. Marriage ⇨55

Statute governing validation of unsolemnized marriage relationship applied to relationship that began before statute's enactment but lasted beyond enactment. U.C.A. 1953, 30-1-4.5.

5. Statutes ⇨190

When statutory language is plain and unambiguous, Court of Appeals will not look beyond it to surmise legislature's intent.

6. Appeal and Error ⇨170(2)

To assert constitutional claims on appeal, parties generally must assert them first in trial court.

7. Divorce ⇨179

Claims challenging constitutionality of statute establishing procedure by which parties can validate unsolemnized marriage relationship could not be raised for first time on appeal from dismissal of divorce complaint. U.C.A.1953, 30-1-4.5.

Gary Bell, Salt Lake City, and Stephen W. Julien, Cedar City, for Appellant.

Willard R. Bishop, Cedar City, for Appellee.

Before Judges ORME, BENCH and JACKSON.

OPINION

BENCH, Judge:

Bunch appeals the trial court's dismissal of her divorce complaint, claiming that the trial court erred when it ruled that she had not met the statutory criteria for establishing a marriage. See Utah Code Ann. § 30-1-4.5 (1995). We affirm.

FACTS

Bunch and Englehorn lived together for several years, without ever solemnizing a marriage. In August 1990, they separated.

In May 1991, Bunch filed a divorce complaint against Englehorn.

In June 1993, a trial was held. After opening statements, Englehorn orally moved the trial court to dismiss Bunch's complaint. The trial court granted Englehorn's motion, determining "that no court or administrative order was ever obtained establishing the parties' relationship as a marriage within the required time limits" of section 30-1-4.5 of the Utah Code. The trial court concluded that it did not have subject matter jurisdiction, and therefore dismissed the case with prejudice.

ANALYSIS

Bunch appealed from the trial court's order of dismissal and Englehorn counter-appealed claiming that this court does not have jurisdiction over the appeal. We first address Englehorn's jurisdictional issues. We note that it is unnecessary to file a separate notice of appeal as a prerequisite to challenge the jurisdiction of appellate courts. See Utah R.App.P. 10(a)(1).

[1] Englehorn contends that this court does not have jurisdiction because Bunch did not timely pay her filing fees. However, the Utah Supreme Court has declared that "the timely payment of [filing] fees on an appeal from the district court to this [c]ourt is no longer jurisdictional." *State v. Johnson*, 700 P.2d 1125, 1129 n. 1 (Utah 1985); see also Utah R.App.P. 3(a), (f).

[2] Englehorn also contends that the trial court did not issue a final judgment or order because a question involving attorney fees is still pending. The trial court dismissed Bunch's complaint "with prejudice and upon the merits." In response to Englehorn's oral request for attorney fees, the trial court declared in its Judgment of Dismissal with Prejudice, "[t]hat should Defendant desire to claim attorney fees pursuant to UCA 78-27-56 (1953, as amended), he may do so through the filing of an appropriate motion, with appropriate supporting affidavit and memorandum, in order to give Plaintiff ample opportunity to respond." No motion was ever filed with the trial court. Thus, the trial court's order to dismiss conclusively disposed of all

claims pending before the trial court.¹ This court, therefore, has jurisdiction over the appeal.

[3, 4] Bunch contends that the trial court incorrectly determined that she had not met the requirements of section 30-1-4.5 to establish a marriage by merely filing her complaint for divorce. We disagree.

Until passage of section 30-1-4.5, Utah did not recognize unsolemnized relationships as marriages. *Walters v. Walters*, 812 P.2d 64, 67-68 (Utah App.1991), cert. denied 836 P.2d 1383 (Utah 1992). In 1987, the legislature enacted section 30-1-4.5 of the Utah Code.² In section 30-1-4.5, the legislature established the only procedure by which parties can validate an unsolemnized marriage relationship. That section provides as follows:

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

- (a) are capable of giving consent;
- (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
- (c) have cohabited;
- (d) mutually assume marital rights, duties, and obligations; and
- (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same

general rules of evidence as facts in other cases.

Utah Code Ann. § 30-1-4.5 (1995) (emphasis added).

[5] This court reviews the trial court's interpretation of section 30-1-4.5 (1995) under a correctness standard. *Utah Sign. Inc. v. Utah Dept of Transp.*, 896 P.2d 632, 633-34 (Utah 1995). "When interpreting statutes, this court is guided by the long-standing rule that a statute should be construed according to its plain language." *Id.* at 633. Thus, when the statutory language is plain and unambiguous, we will not look beyond it to surmise the legislature's intent. *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989). Moreover, "[u]nambiguous language in the statute may not be interpreted to contradict its plain meaning." *Bonham v. Morgan*, 788 P.2d 497, 500 (Utah 1989) (per curiam).

Section 30-1-4.5 requires that those who wish to establish their relationship as a marriage recognized by the state must obtain "a court or administrative order establish[ing]" their relationship. Utah Code Ann. § 30-1-4.5(1) (1995). Moreover, the statute requires that any such order be obtained within one year of the termination of the relationship. *Id.* § 30-1-4.5(2). Subsection (2) specifically provides that "determination or establishment of a marriage . . . must occur during the relationship . . . or within one year following the termination of that relationship."

Bunch admittedly did not obtain a determination during her relationship with Englehorn or within one year after the termination of their relationship. The parties separated in August 1990 and the trial court dismissed the case in June 1993, nearly three years after the parties separated. Bunch proposes that she complied with the statute by filing her complaint in May 1991, within one year

1. During oral argument before this court, counsel for Englehorn conceded that the trial court's order was a final judgment if Englehorn chose never to file for attorney fees.

2. Englehorn cites *Whyte v. Blair*, 885 P.2d 791, 793 n. 2 (Utah 1994) for the proposition that the parties' relationship could not be established pursuant to section 30-1-4.5 because Englehorn and Bunch began their relationship before 1987.

Englehorn misreads the supreme court's language in footnote 2 of *Whyte*. The supreme court merely stated that relationships that began and ended prior to 1987 were not valid, since common-law marriages were not recognized in Utah prior to the enactment of section 30-1-4.5. Because the parties' relationship indisputably lasted beyond 1987, the statute could apply in the present case. *Id.*

of the parties' separation. That interpretation of the statute, however, is contrary to its plain meaning. Under the plain meaning of the statute, Bunch did not obtain a timely determination of her relationship with Englehorn.

Bunch suggests that this interpretation of the statute renders it unconstitutional under Article I, Sections 7 and 11 of the Constitution of Utah. Bunch never presented these arguments to the trial court, but raises them for the first time on appeal.

[6, 7] To assert constitutional claims on appeal, parties must generally assert them first in the trial court. In *State v. Bobo*, 803 P.2d 1268 (Utah App.1990), this court declared that "the proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court, not, as typically happens . . . for the first time on appeal." *Id.* at 1273. The closest Bunch came to making a constitutional argument to the trial court occurred when the trial court asked counsel whether the facts of the case reflected any order that had timely established a marital relationship. Counsel responded that there was no order, but "I guess I would have some concerns about the constitutionality of such a statute when it would make it—when a person files a Complaint to have that determination made, and simply because of the delays and court time and that sort of thing, it can't get it to court." There is no thoughtful or probing analysis of a state constitutional question in Bunch's statement. Bunch merely alludes to the fact that there may possibly be a constitutional question. "Nominally alluding" to constitutional questions "without any analysis

before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal." *State v. Johnson*, 771 P.2d 326, 328 (Utah App.1989), *rev'd on other grounds*, 805 P.2d 761 (Utah 1991).

Bunch also claims that she was surprised by Englehorn's oral motion to dismiss, despite the fact that Englehorn had asserted this position as an affirmative defense in his verified answer. Assuming, *arguendo*, that Bunch was surprised by the motion, she could have asked the trial court for a continuance and/or made a post-judgment motion to present her issues to the trial court. She did nothing to preserve the issues in the trial court. Having failed to argue her constitutional issues to the trial court, we refuse to consider them. *See id.*; *accord Bobo*, 803 P.2d at 1273.³

CONCLUSION

This court has jurisdiction over this appeal. Bunch did not meet the requirements of section 30-1-4.5 to establish a marriage with Englehorn and her constitutional challenge was improperly raised for the first time on appeal. Therefore, the trial court did not err in dismissing the case.

Affirmed.

ORME, P.J., and JACKSON, J., concur.



³ For the reasons stated, we do not review the constitutionality of section 30-1-4.5. We do note, however, that the statute might present a constitutional question in a different context. If a trial court were to enter a judgment denying a

common-law marriage within one year of separation, and that judgment were reversed on appeal and the matter remanded, the parties might be denied a reasonable opportunity to comply with the plain meaning of the statute.

H. Miller v. Townsend Lumber Co., 448 P.2d 148 (Mont.
1968)

**Mona Carter MILLER, Claimant
and Respondent,**

Charles D. Carter, Deceased,

v.

**TOWNSEND LUMBER COMPANY, Inc.,
Employer, and Pacific Compensation Com-
pany, Insurance Carrier, Defendants and
Appellants.**

No. 11230.

Supreme Court of Montana.

Submitted Nov. 22, 1968.

Decided Dec. 5, 1968.

Proceeding on claim for workmen's compensation benefits. The First District Court, Lewis and Clark County, James D. Freebourne, J., rendered judgment reversing the action of the Industrial Accident Board and determining that claimant was common-law wife of deceased workman and was therefore entitled to benefits. The Supreme Court, James T. Harrison, C. J., held that instances of cohabitation on part of parties could support conclusion of meretricious relations as easily as any other and were insufficient to show course of conduct to establish reputation as husband and wife.

Judgment reversed and order of Board reinstated.

1. Marriage ⇨20(2)

To constitute a "marriage per verba de praesenti", the parties must agree to become husband and wife presently, and the consent which is the essence of such marriage contract must be mutual and given at same time, and it must contemplate a present assumption of marriage status. R.C.M. 1947, §§ 48-101, 48-103.

See publication Words and Phrases for other judicial constructions and definitions.

2. Marriage ⇨22

A lawful marriage must have been entered into by the parties at some particular time and such marriage does not result from

mere cohabitation alone. R.C.M.1947, §§ 48-101, 48-103.

3. Marriage ⇨22

The date of a marriage, established by conduct, cohabitation and repute, is the date of the commencement of such conduct and repute and not afterwards. R.C.M.1947, §§ 48-101, 48-103.

4. Marriage ⇨13

Mutual consent of parties able to consent and competent to enter into ceremonial marriage and assumption of marital relationship by consent and agreement as of a time certain, followed by cohabitation and repute, are necessary to effect a "common-law marriage". R.C.M.1947, §§ 48-101, 48-103.

See publication Words and Phrases for other judicial constructions and definitions.

5. Marriage ⇨22

To effect common-law marriage, parties must enter upon course of conduct to establish their repute as man and wife, and such course of conduct must be complete and sincere and not partial. R.C.M.1947, §§ 48-101, 48-103.

6. Marriage ⇨22

By "repute" essential to effect common-law marriage is meant reputation or the character and status commonly ascribed to one's actions by public. R.C.M.1947, §§ 48-101, 48-103.

See publication Words and Phrases for other judicial constructions and definitions.

7. Workmen's Compensation ⇨1474

It was incumbent upon woman who sought to collect workmen's compensation benefits on ground that she was common-law wife of workman at time of his death to prove by preponderance of evidence that mutual and public assumption of marital relation existed. R.C.M.1947, §§ 48-101, 48-103.

8. Marriage ⇨22

Instances of cohabitation on part of parties could support conclusion of meretricious relations as easily as any other and

were insufficient to show course of conduct to establish reputation as husband and wife. R.C.M.1947, §§ 48-101, 48-103.

9. Workmen's Compensation ⇨ 1939

District Court is not justified in reversing findings of Industrial Accident Board if there is sufficient evidence to sustain them.

10. Workmen's Compensation ⇨ 1474

Evidence sustained finding of Industrial Accident Board that woman who sought to collect workmen's compensation benefits payable to survivor of deceased workman was not common-law wife of deceased workman. R.C.M.1947, §§ 48-101, 48-103.

Patrick F. Hooks (argued), Townsend, Ross Cannon (argued), Helena, for defendants and appellants.

Lloyd J. Skedd (argued), Helena, for claimant and respondent.

JAMES T. HARRISON, Chief Justice.

This is an appeal from the district court of Broadwater County in a case arising under the Workmen's Compensation Act. It raises the sole question of whether a valid marriage existed between Mona Miller and the deceased Charles D. Carter at the time of his death in an industrial accident on February 26, 1964.

The Industrial Accident Board held that there was no marriage and Mona's claim was denied. Deceased's mother survived him and her claim for the benefits provided by the Workmen's Compensation Act was approved. An appeal was taken by Mona to the district court and that court entered findings of fact, conclusions of law and judgment reversing the action of the Industrial Accident Board and determining that Mona was the common-law wife of the decedent. This appeal followed.

We will set forth a brief recitation of the fact situation prevailing. Charles D. Carter, hereafter referred to as Charles, and Mona Miller, being Mona Miller McWilliams and referred to in this case as

Mona Miller Carter, hereafter referred to as Mona, met in January of 1963 in California at which time both were married to other persons. Within two or three weeks following this meeting they commenced living together. Charles' wife, Mary Carter, was killed in an automobile accident on June 24, 1963. About the 5th day of July, 1963 Charles and Mona arrived in Townsend, Montana, and stayed at a truck stop known as the Beacon, owned and operated by Charles' sister. While they stayed there Mona worked for Charles' sister and her pay checks were made out to her as Mona Miller.

Along about September 4th or 5th, 1963, they went to Billings where for a time they resided at the Blue Motel. Mona's husband divorced her on October 18, 1963, but she did not know of a possible divorce until she received a letter from her mother around November 4, 1963, in which her mother wrote that she had heard a divorce had been granted. Mona did not receive a copy of the decree, nor did she know the date or place of granting the divorce, until after Charles' death. About January 17, 1964, Charles came back to Townsend, Mona remained in Billings and moved to the Harris Apartments, where she registered as Mona Miller and her apartment utilities were under the name of Mona Miller. On January 27, 1964, Charles assigned a car title to Mona showing her name as Mona G. Miller. Mona went to work in the Turf Cafe in Billings and her pay checks were made out to Mona Miller. She registered for general delivery at the Billings post office as Mona Miller, received mail from Charles under that name, as well as from other persons.

On February 14, 1964, Charles went to Billings and Mona came back to Townsend with him and on the 15th of February took up residence at the Beacon Motel. Eleven days later Charles was killed.

Charles wrote his mother a letter from Billings, dated January 18, 1964, and we quote portions thereof:

"Well, I don't know for sure when I will be leaving here. But I was planning on

going around the 5th of Feb. But Mona and I are having troubles now too. So I may just up and go next week. But I doubt it for I won't have enough money to get me there. So I suppose I will have to wait until around the 5th of Feb.

"Her and I were figuring on getting married this spring. But I don't think we will, for we just can't seem to get along for very long at a time. She is pretty hot headed, and so am I and one thing just leads to another, until we are at it.

"I met her last March, when Mary and I were having our trouble. And we got along real swell, until Mary got killed and we came up here, and its been a fight seems like ever since."

The letter then referred to the death of his wife, Mary, and continued: "And from then on it seems like Mona and I have done nothing but argue. So as I say I may be leaving here by myself before or around the 5th of Feb."

There is considerable testimony in the record as to quarrels and arguments between Charles and Mona.

At the hearings in this cause, besides herself, Mona presented two witnesses in her behalf. Iona Pauley, operator of the Blue Motel, testified on direct examination as to Charles and Mona living together in the motel and she thought they were husband and wife, that Mona had told her they were married in April of 1963. On cross-examination she testified that sometime after Christmas Charles said to her: "I guess you know Mona and I aren't married." She further testified that following the death of Charles she received a letter from Mona in which she said that Charles had been killed and that she was his common-law wife.

Art Olson, a resident of Helena for the past seven years and before that a resident of Townsend, testified as to his acquaintance with Charles over many years but he had not seen him for six or seven years when he met him on Main Street in Townsend on February 8, 1964, at which time they had a conversation and Olson asked about his wife Mary and Charles replied:

"Mary is dead, I have a new wife, Mona." They did not see each other again.

On cross-examination it developed that after Charles' death Olson had gone to see Charles' sister and brother-in-law to find out what was going on, what was the deal. He said he had met Mona and he was trying to find out what this insurance was, who was supposed to get the money. He further admitted that he was a married man but not living with his wife and while he denied going with Mona he admitted they had been out together for dinner six or eight times in the preceding two months.

Offsetting this testimony was that of fellow workers and residents of Townsend whose testimony reflected that Charles never held Mona out as his wife, nor did Mona hold Charles out as her husband previous to his death. Of course there are exhibits of various kinds indicating that on occasion Mona used the name Carter instead of Miller but most of these are after the death of Charles.

On this record the district court reversed the holding of the Industrial Accident Board and held that Mona was the common-law wife of Charles within the meaning of section 48-101, R.C.M.1947.

The district judge filed an opinion in this cause outlining his reasons for arriving at his judgment and we quote:

"Claimant and deceased commenced to live together in January, February or July, 1963. From that time until January 18, 1964, the evidence introduced showed conditions existed very similar to those set forth in *Morrison, et al., v. Sunshine Mining Company*, 64 Idaho 6, 127 P.2d 766, and *Albina Engine and Machine Works, etc., v. J. J. O'Leary, et al.*, 9 Cir., 328 F.2d 877. Both cases held a common law marriage existed.

"We can accept the relationship between claimant and Charles Carter as illicit in 1963. It is agreed by all that claimant and Charles Carter did live together and carried on certain relations as if they were husband and wife.

"Sometime immediately prior to January 18, 1964, claimant, over a dispute, left deceased and went to live alone in Billings. Decedent on January 18, 1964, wrote his mother that he intended to marry Nona (sic) if all could be straightened out. Six weeks before his death Charles Carter went to Billings and returned to Townsend with Nona (sic). They did not return to live in the sister's bar, but rented an apartment and claimant and Charles Carter lived in the relationship he described in his letter to his mother, that of husband and wife, Section 48-101, R.C.M.1947, being fully satisfied."

[1-6] The two cases cited by the court are both interpretations of the Idaho statutes. There is no reason to discuss either case herein for the reason that our laws are not the same and this court in *Miller v. Sutherland*, 131 Mont. 175, 309 P.2d 322, reviewed the Montana statutes and cases and this cause is to be determined under the rulings laid down therein. In that case we stated:

"Our statute with regard to marriage is R.C.M.1947, § 48-101, which provides:

"'Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by mutual and public assumption of the marital relation.'"

"R.C.M.1947, § 48-103, provides: 'Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.'

"In construing our statutes this court in *Welch v. All Persons*, 85 Mont. 114, 133, 278 P. 110, 115, stated:

"'Marriage is defined by our statute as a "personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary". Section 5695, R.C.1921 [§ 48-101, supra]. This terse definition embraces the essential elements recognized by the authorities generally. See 38 C.J. 1272 et seq.; 18 R.C.L. 381 et seq.

" 'The consent of the parties must be mutual. *Shepherd & Pierson Co. v. Baker*, 81 Mont. 185, 262 P. 887. While the consent need not be expressed in any particular form (section 5697, R.C.1921 [§ 48-103, supra]), as we said in *State v. Newman*, 66 Mont. 180, 213 P. 805, it must always be given with such an intent on the part of each of the parties that marriage cannot be said to steal upon them unawares. "One cannot become married unwittingly or accidentally. The consent required by our statutes, as well as the statutes of every state, and by the common law, must be seriously given with the deliberate intention that marriage result presently therefrom." "There must be an agreement between the parties that they will hold toward each other the relation of husband and wife, with all the responsibilities and duties which the law attaches to such relation, otherwise there can be no lawful marriage." *Williams v. Williams*, supra [46 Wis. 464, 1 N.W. 98, 32 Am.Rep. 722]. The absence of such consent renders the relations of the parties meretricious. 38 C.J. 1316.' * * *

"We stated in *State v. Newman*, 66 Mont. 180, 188, 213 P. 805, 807:

" 'The necessary consent need not be expressed in any particular form. Section 5697 Rev.Codes 1921. In a proper case it may even be implied from the conduct of the parties. *University of Michigan v. McGuckin*, 64 Neb. 300, 89 N.W. 778, 57 L.R.A. 917. But the consent, whether in express words, or implied from conduct, must always be given with such an intent on the part of each of the parties that marriage cannot be said to steal upon them unawares. * * * The words manifesting the consent may be spoken in the face of the church, or immediately preceding an act of sexual intercourse, as claimed in this case. But they must always be spoken by those who know and intend that matrimony in full form shall be the result. Marriage cannot be created piecemeal. It comes instantly into being, or it does not come at all. If anything remains to be done before the relationship is completed in contemplation of the parties themselves, there is no marriage.

"“In order to constitute a marriage *per verba [de] praesenti* the parties must agree to become husband and wife presently. The consent which is the foundation and essence of the contract must be mutual and given at the same time, and it must not be attended by an agreement that some intervening thing shall be done before the marriage takes effect, or that it be publicly solemnized. That is to say, it must contemplate a present assumption of the marriage status, in distinction from a mere future union.” Lord Brougham in *Queen v. Millis*, 10 Cl. & F. 534, 708, 730; *Clark v. Field*, 13 Vt. 460. *Beneficial Ass’n v. Carpenter*, 17 R.I. 720, 24 A. 578.’

* * * * *

“As was stated in *Welch v. All Persons*, 78 Mont. 370, 386, 254 P. 179, 183:

“‘Every lawful marriage must have been entered into by the parties at some particular time. It does not result from mere cohabitation alone. “As a general rule, when a marriage is sought to be proved by conduct, cohabitation and repute, the date of the marriage in fact, which such conduct and repute tends to establish, is the date of the commencement of such conduct and repute, and not afterwards”. *Williams v. Williams*, 46 Wis. 464, 1 N.W. 98, 32 Am. Rep. 722.’

* * * * *

“As was stated in *Elliott v. Industrial Accident Board*, 101 Mont. 246, 254, 53 P.2d 451, 454:

“‘One of the disputable presumptions in this state is “that a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage”. Subdivision 30, sec. 10606, Rev. Codes 1921 [R.C.M.1947, § 93-1301-7].

“‘The so-called “common-law marriage” is recognized as valid in this state, but, to be effective there must be the mutual consent of parties able to consent and competent to enter into a ceremonial marriage, and the assumption of such relationship, by consent and agreement, as of a time certain, followed by cohabitation and repute.’

“Thus the parties must enter upon a course of conduct to establish their repute as man and wife. This course of conduct cannot be partial, it must be complete and sincere. * * *

“When we speak of repute we mean reputation, being the character and status commonly ascribed to one's actions by the public. * * * The burden of establishing the marriage was on appellant * * *.”

Returning to the court's opinion the judge accepted the relationship as illicit in 1963 and went on to state that six weeks before his death Charles brought Mona to Townsend, although the record shows it was only 12 days; further, that they did not return to live in the sister's bar, although the record shows that the sister's business was a cafe and motel; further, that they rented an apartment, although the record shows that they stayed there but a single night and then went to the sister's motel. There the record shows they occupied a room with a hot plate for cooking but it was little used since their meals were either taken at the cafe or carried from the cafe to their room. The court finally observed that Charles and Mona lived in the relationship he, Charles, described in his letter to his mother, that of husband and wife. We have heretofore quoted the only portions of this letter which directly deal with Mona and that states exactly the opposite.

[7,8] It was incumbent upon Mona to prove by a preponderance of the evidence that a mutual and public assumption of the marital relation existed. Instances of cohabitation on the part of the parties, and admittedly the record is replete with such instances here, can support the conclusion of meretricious relations as easily as any other. The parties must enter upon a course of conduct to establish their repute as man and wife. By repute we mean reputation, being the character and status commonly ascribed to one's actions by the public. The evidence herein falls far short of establishing a reputation by Charles and Mona that they were husband and wife.

[9] We have many times held that the district court is not justified in reversing findings of the Industrial Accident Board if there is sufficient evidence to sustain them. See *Stordahl v. Rush Implement Co.*, 148 Mont. 13, 417 P.2d 95, and cases therein cited.

[10] Our determination is that the facts disclosed by the record here do not preponderate against the findings of the Industrial Accident Board and the district court erred when it held that the order of the Industrial Accident Board was not sustained by the evidence, was unreasonable and ordered the same to be set aside.

Accordingly the judgment is reversed and the order of the Industrial Accident Board herein is ordered reinstated.

HASWELL, ADAIR and CASTLES, JJ., concur.

record disclosed that other charges, some of them even more serious, had been dismissed.

Writ denied.

Habeas Corpus \Rightarrow 25.1(3)

Claims that defendant's plea of guilty to burglary charge was obtained by fraud, deceit and trickery and that his retained counsel advised him that if he went to trial he would receive 50-year sentence but if he pled guilty would receive suspended sentence or at most one year afforded no ground for habeas corpus relief where counsel had been active in criminal defenses for many years and every member of the firm knew that maximum penalty for burglary was 15 years, counsel's statement indicated knowledgeable, active defense work to defendant's advantage, and record disclosed that other charges, some of them even more serious, had been dismissed. R.C.M.1947, § 94-903.



Thomas F. Holliday pro se.

MEMO OPINION

PER CURIAM:

Thomas F. Holliday, an inmate of the state prison at Deer Lodge, Montana, appearing pro se, files with this Court a petition for writ of habeas corpus. Petitioner was sentenced to a term of ten years in the district court of Yellowstone County, Montana, on February 1, 1968, following his plea of guilty to the crime of burglary.

The court file discloses that on December 6, 1967, an information was filed charging petitioner with the crime of burglary alleged to have been committed on December 3, 1967. Petitioner appeared before the court on December 6, was given a copy of the information and he informed the court he desired counsel and that he would obtain his own counsel. The arraignment was then continued until December 11, 1967.

On December 11, 1967, he appeared in court in company with one of his counsel, Russell Fillner, of the firm of Sandall, Moses and Cavan. A copy of the informa-

Petition of Thomas F. HOLLIDAY.

No. 11598.

Supreme Court of Montana.

Dec. 12, 1968.

Proceeding on petition for writ of habeas corpus. The Supreme Court held that claims that defendant's plea of guilty to burglary charge was obtained by fraud, deceit and trickery and that his retained counsel advised him that if he went to trial he would receive 50-year sentence but if he pled guilty would receive suspended sentence or at most one year afforded no ground for habeas corpus relief where counsel had been active in criminal defenses for many years and every member of the firm knew that maximum penalty for burglary was 15 years, counsel's statement indicated knowledgeable, active defense work to defendant's advantage, and

I. Jim's Water Service v. Eayrs, 590 P.2d 1346 (Wyo. 1979)

and that of defendant Hospital, the complaint alleges defendant Fishburn to be a member of the staff of defendant Hospital and that he was "acting as Defendant Hospital's agent and employee and performing within the scope and course of that agency and employment, and within the scope of his position as a member of the Defendant Hospital Staff." In their answers, defendants Fishburn and Hospital denied the allegations. The only reference to this allegation in the interrogatories and the answers thereto, is an affirmative answer by defendants Fishburn and Hospital to plaintiff's question as to whether or not defendant Fishburn was a member of the staff of defendant Hospital on June 6 and 7, 1976. Since there is an issue as to the fact of employment which may involve the application of the doctrine of respondeat superior, defendant Hospital's position with reference to the summary judgment cannot be different than that of defendant Fishburn.

Reversed.

ROONEY, Justice, separate opinion, with whom RAPER, C. J., joins.

Although the foregoing is determinative of this case, I believe it proper to address the application of the so-called "locality rule" inasmuch as I believe the record indicates the probability that the question will arise again in connection with the trial of this matter.¹ Justices McClintock, Thomas, and Rose do not agree with my belief and feel that discussion of the "locality rule" is unnecessary to the disposition of the case. They do not join herein for that reason.

The so-called "locality rule" was an alternate premise upon which the summary judgment was granted. The rule is to the effect that an opinion concerning the propriety of medical action taken by a physician must be prefaced by a showing of knowledge of the standards of practice in the community in which the physician practices, since a rural community, for example, did not have the equipment, opportunities for consultation and learning, and facilities

afforded by large cities. Although the rule may have been premised upon an acceptable basis at one time, it is now without logical basis in view of availability of modern communication methods whereby mechanical readings of body functions and reactions can be transmitted immediately to other centers for reading and diagnosis, available telephonic consultations, widespread dissemination of medical literature, and means of rapid transportation. This is not to say that testimony as to the standards in a similar community and the availability and use of modern communication and transportation methods are not to be considered in determination of the existence or nonexistence of negligence, but they should be merely one of the factors to be considered in making this determination, and not a single controlling factor. Negligence cannot be excused on the ground that others in the same locality practiced the same kind of negligence. *Hundley v. Martinez*, 151 W.Va. 977, 158 S.E.2d 159 (1967); *Pederson v. Dumouchel*, 72 Wash.2d 73, 431 P.2d 973 (1967). This is said in full recognition of the statements made by this court in *Govin v. Hunter*, Wyo., 374 P.2d 421 (1962).



JIM'S WATER SERVICE, Appellant
(Employer-Defendant below),

v.

Judith Marie EAYRS, on behalf of
James Clinton Eayrs, Appellee
(Employee-Plaintiff below).

No. 5037.

Supreme Court of Wyoming.

March 6, 1979.

Employer appealed from judgment of the District Court, Weston County, Paul T.

1. In such instance, " * * * it is our right, if it is not our duty, to decide the question."

Chicago & N. W. Ry. Co. v. City of Riverton, 70 Wyo. 119, 127, 247 P.2d 660, 663 (1952).

Liamos, Jr., J., awarding death benefits, under Workers' Compensation Law, to widow and her three children. The Supreme Court, McClintock, J., held that: (1) the required nexus between exertion and stress, exerted by truck driver, and the resulting coronary occlusion which occurred when driver and another were attempting to extricate truck from snow, was established by substantial evidence; (2) exertion of truck driver in an extended effort to extricate his truck from snow exceeded normal routine and thus, while not different in kind, was greater in degree than normal sufficiently to establish that exertion occurred during a period of stress unusual or abnormal to working conditions as basis for recovery of death benefits following trucker's heart attack; (3) evidence established valid common-law marriage under Montana law between truck driver and his widow and thus widow was "legally married" for purposes of receipt of death benefits under Wyoming's Workers' Compensation Laws; (4) Legislature intended to make substantial dependency the test of eligibility of allegedly dependent children for death benefits under Workers' Compensation Law, thus eliminating prior confusion and dispute regarding stepchildren, adoption, legitimacy, lineage and alienage, and (5) testimony of surviving widow sufficiently supported finding that truck driver had provided substantially all of financial support for children so as to entitle children to death benefits, notwithstanding that widow did not state in dollar figures how much truck driver had earned or contributed.

Judgment and order of award affirmed.

1. Workers' Compensation ⇐1536

The required nexus between exertion and stress, exerted by truck driver, and the resulting coronary occlusion which occurred when driver and another were attempting to extricate truck from snow, was established by substantial evidence in worker's compensation case for recovery of death benefits. W.S.1977, § 27-12-603.

2. Workers' Compensation ⇐571

Exertion of truck driver in an extended effort to extricate his truck from snow exceeded normal routine and thus, while not different in kind, was greater in degree than normal sufficiently to establish that exertion occurred during a period of stress unusual or abnormal to working conditions as basis for recovery of death benefits following trucker's heart attack, in worker's compensation case. W.S.1977, § 27-12-603.

3. Workers' Compensation ⇐433, 1474

Evidence established valid common-law marriage under Montana law between truck driver and his widow who sought worker's compensation death benefits, and thus widow was "legally married" for purposes of receipt of death benefits under Wyoming's Workers' Compensation Laws. R.C.M.1947, § 48-314; W.S.1977, §§ 20-1-111, 27-12-102, 27-12-408(a).

4. Workers' Compensation ⇐458

Legislature intended to make substantial dependency the test of eligibility of allegedly dependent children for death benefits under Workers' Compensation Law, thus eliminating prior confusion and dispute regarding stepchildren, adoption, legitimacy, lineage and alienage. W.S.1977, §§ 27-12-102, 27-12-408(a).

5. Workers' Compensation ⇐1478

Testimony of surviving widow sufficiently supported finding that truck driver, who died of heart attack during employment, had provided substantially all of financial support for children so as to entitle children to death benefits under Workers' Compensation Law, notwithstanding that widow did not state in dollar figures how much truck driver had earned or contributed.

Francis E. Stevens, Gillette, for appellant.

Gordon W. Schukei, Newcastle, for appellee.

Before RAPER, C. J., McCLINTOCK, THOMAS and ROSE, JJ., and GUTHRIE, J., Retired.*

McCLINTOCK, Justice.

Jim's Water Service, employer, appeals from judgment of the district court of Weston County awarding death benefits to Judith Marie Eayrs and her three children. The claim had its basis in the death of James Clinton Eayrs. Employer contends that the death was not compensable under our Worker's Compensation statutes because of failure to prove a proper causal relation between the death and abnormal working conditions; that Judith is not entitled to benefits as a surviving spouse because no formal marriage existed between her and the decedent and no common-law marriage was proved; and that award of benefits to the children should have been denied since their dependency upon decedent was not shown. We shall affirm, reciting the facts as they become pertinent to the particular issue involved.

The Cause of Death

The cause of the death was determined to be an occlusive coronary atherosclerosis. The employer contends that the evidence was insufficient to prove the required direct causal connection between the condition of the work and the death.¹

On November 10, 1977 James was employed by Jim's Water Service, Inc. in Gillette. He started work the next day as a driver of a water truck which was employed hauling water to oil rigs in the area. His duties basically included the driving and some simple maintenance of the truck.

* At the time of oral argument Guthrie, J., was Chief Justice. He retired from the court on December 31, 1978. By order of the court, entered on January 1, 1979, he has been retained in active judicial service pursuant to § 5, Art. V, Wyoming Constitution and § 5-1-106(f), W.S.1977, and has continued to participate in the decision and opinion of the court in this case.

1. Section 27-12-603, W.S.1977 provides in pertinent part:

"(b) Benefits for employment-related coronary conditions except those directly and

James worked long hours, sometimes driving up to 18 hours a day. Nine days after he started to work he was hauling water to a drilling rig in Weston County and his truck became stuck in a snowdrift. It was a cold day, with strong winds and deep, blowing snow. James walked about one mile through the snow to seek help, arriving at the residence of Jack Dowdy between nine and ten o'clock that morning. William Riehemann drove with him back to the scene in Riehemann's Jeep at about three o'clock in the afternoon but they had to walk two to three hundred yards through the snow to the truck. They then shoveled vigorously for about one-half hour. About four o'clock James climbed into the cab to drive while Riehemann was to push. The motor began to race, and when Riehemann went to the cab he found James slumped over the wheel. James stopped breathing very shortly afterward and was pronounced dead at 5:50 p. m.

The manager of the employer's Douglas division testified that long hours for such drivers were ordinary and normal. It was not unusual or abnormal for drivers to become stuck in the snow or mud or to lift fairly heavy objects. Each truck carried a shovel and chains and drivers were expected to attempt to free their trucks from difficulties. If they were unable to do so they were expected to use a high-frequency radio in the truck to call for help. James made no such call.

[1] James D. Henry, M.D., a qualified pathologist, performed an autopsy upon the body and found the cause of death to be an occlusive coronary atherosclerosis. He

solely caused by an injury or disease are not payable unless the employee establishes by competent medical authority that there is a direct causal connection between the condition under which the work was performed and the cardiac condition, and then only if the causative exertion occurs during the actual period of employment stress clearly unusual to, or abnormal for, employees in that particular employment, and further that the acute symptoms of the cardiac condition are clearly manifested not later than four (4) hours after the alleged causative exertion."

found the heart to show existing marked occlusion of up to 90 per cent of all three major vessels. He declined to say that he could determine to a reasonable medical certainty that the stress caused or precipitated the death and stated that James could have died in his sleep just as easily as on the job. However, he also testified that the stress was a "contributing factor" and that the arrhythmia "very likely" and "probably" was due to the physical exertion and strain. That is sufficient evidence of the causal connection. The question that needs to be answered is whether the work effort contributed to a material degree to the precipitation, aggravation or acceleration of the existing disease and the resulting death. *Claim of Vondra*, Wyo., 448 P.2d 313 (1968); *Claim of Hill*, Wyo., 451 P.2d 794 (1969); *Claim of Brannan*, Wyo., 455 P.2d 241 (1969). See also, 1 Larson, Workmen's Compensation Law, § 12.20, p. 3-276. While it is not a compensation case, this quotation from *Rocky Mountain Trucking Company v. Taylor*, 79 Wyo. 461, 479, 335 P.2d 448, 453 (1959) is also pertinent:

"A belief entertained by an expert is a positive opinion about which he is entitled to testify. His belief is not a statement of mere possibility unless the witness so qualifies it."

The required nexus between the exertion and stress and the resulting coronary occlusion was found by the trier of fact and is supported by substantial evidence.

The second aspect of this question, whether the exertion of James occurred during a period of stress unusual or abnormal to his working conditions, must also be answered in claimant's favor. The manager's testimony concerning decedent's duties and the driver's obligations when

stuck does not completely answer the question. The best approach is first to ascertain the normal and usual task of the driver and then determine if the event in question exceeded that limit.

[2] James was expected to haul water and to maintain his truck. In the event he became snowbound he was expected to use reasonable efforts to extricate himself. The trier of fact had sufficient substantial evidence to find the normal routine was exceeded when James acted to the degree he did and that the stress or exertion, while not different in kind, was greater in degree than normal. It appears from the evidence James was involved in an effort that consumed the entire day of November 20 and involved extensive and strenuous efforts. In *Mor, Inc. v. Haverlock*, Wyo., 566 P.2d 219 (1977) we found the burden satisfied when the causative exertion was clearly something beyond the worker's normal and usual routine. We will not disturb the determination of facts here.

The Marital Relation of the Parties

In order for Judith to receive benefits under our law she must have been "legally married" to James. Section 27-12-408(a), W.S.1977.²

James and Judith were married in 1969 but divorced in 1974. For a while they maintained contact after their separation on a sporadic basis. James provided no support during these years because of inability to do so. In June of 1977 he returned to Kalispell and resumed living with Judith but they did not formally remarry. Judith was disabled and her only income was from disability benefits provided to her by the State. James worked periodically and pro-

2. This section as amended by Ch. 149, § 1, S.L. of Wyoming 1975 permits benefits to a "spouse to whom the employee was *legally married*." Under the law prior to the 1975 amendment, § 27-49[II](d), W.S.1957, no benefits were permitted to a surviving spouse "unless he or she shall have been married to the workman by a marriage duly solemnized by legal ceremony at the time of the injury." Section 27-87, W.S. 1957 permitted benefits to a widow or invalid widower to whom the decedent "has been regu-

larly married by a marriage duly solemnized by a legal ceremony." The constitutionality of the former statute was specifically left open in *Bowers v. Getter Trucking Company*, Wyo., 514 P.2d 837 (1973) and the cause remanded to the district court for a determination whether a valid common-law marriage had been effected in Texas. That determination has now been made and the case is again pending in this court.

vided such support as he could for her and the three children, although evidence is lacking as to the amount. They had no joint financial accounts or other joint property. His odd-job employment required him to leave Kalispell, and occasionally Montana, but he always maintained Judith and the children's residence as his own. The two shared expenses, care, work, and a home. They considered themselves man and wife and represented this to friends and the world. They were, in Judith's words, "still married; as far as God's law we had not been divorced."

The employer concedes that the residence of the parties and the marriage, if any, were in Montana and that the State of Montana still recognizes common-law marriage. Section 48-314, R.C.M.1975. He also concedes that under § 20-1-111, W.S. 1977 we must look to Montana as all marriages which are valid by the laws of that state are to be valid in Wyoming. *Hoagland v. Hoagland*, 27 Wyo. 178, 193 P. 343 (1920). If James and Judith were found to be validly married under the common law, she would therefore be entitled to benefits under our statute. The point of the employer's argument is that the facts here do not support the trial court's decision finding a valid common-law marriage and giving Judith her due.

As essential elements of such a marriage Montana requires mutual consent, assumption of a relationship by consent and agreement as of a certain time, cohabitation, and repute. *Welch v. All Persons*, 78 Mont. 370, 254 P. 179 (1927); *Elliott v. Industrial Accident Board*, 101 Mont. 246, 53 P.2d 451 (1936); *Miller v. Sutherland*, 131 Mont. 175, 309 P.2d 322 (1957). The burden to prove these elements is on the one asserting the validity of the marriage, and is satisfied by a preponderance of the evidence. However, there is a strong presumption in favor of the legality of a common-law marriage. *Welch v. All Persons*, supra; *In re Estate of Slavens*, 162 Mont. 123, 509 P.2d 293 (1973). The element of repute is a key term, and several cases where the Supreme Court reversed the finding turned on this issue. *Miller v. Townsend Lumber Co.*, 152 Mont.

210, 448 P.2d 148 (1968); *Estate of Slavens*, supra; *Matter of Estate of McClelland*, 168 Mont. 160, 541 P.2d 780 (1975). The cases make clear that repute means general community reputation, that is, did the parties consider themselves as married and so act as to all the world? It relates to the reputation, character and status of the relationship. *Welch v. All Persons*, 85 Mont. 114, 278 P. 110 (1929).

[3] On the evidence presented here we have no choice but to affirm. The only evidence on the issue was given by Judith and it supports the marriage. Not all the formalities were followed, but repute, consent and cohabitation were all proven sufficiently by uncontradicted testimony and presumption of law.

Cases cited in *Bowers v. Getter Trucking Company*, Wyo., 514 P.2d 837 (1973) may have required a different result, but they were decided before the amendment of § 27-12-408(a), W.S.1977. The statute in effect at the time of *Bowers* required a surviving spouse to have been "regularly married by a marriage duly solemnized by a legal ceremony" before benefits could be given. Our new statute, enacted shortly after the rendition of this undefinitive opinion, requires only that the parties have been "legally married." We hold that a common-law marriage valid in the state in which contracted is valid in Wyoming for purposes of receipt of benefits under our Worker's Compensation laws. We find no error by the trial judge in finding Judith to be James' legal widow.

The Dependency of the Children

[4] Finally, we review the award of benefits the district court made to the children, as dependents of the deceased. Tina and Julie Johnson were children of Judith's previous marriage. Hallie Eayrs was the natural child of Judith and James' marriage in 1969. Although James never formally adopted Tina and Julie there is evidence of his support and concern. After the divorce all three children continued to live in Kalispell. The statute under which the award

must be based is § 27-12-102, W.S.1977, which is the definitional section. A "child" is to include "any individual," except a parent or spouse, who receives "substantially all" of his or her financial support from the employee before the injury or death and who is an unmarried minor or physically or mentally incapacitated. The statute defines a "dependent" as any individual, except the employee, who is entitled to benefits under the act. There are no Wyoming cases that further define or interpret these sections, hence we look to authority from other states and the language of the statute itself. The previous decisions from this court, *In re Dragoni*, 53 Wyo. 143, 79 P.2d 465 (1938); *In re Trent's Claim*, 68 Wyo. 146, 231 P.2d 180 (1951); *Smith v. National Tank Company*, Wyo., 350 P.2d 539 (1960); and *Heather v. Delta Drilling Co.*, Wyo., 533 P.2d 1211 (1975), reh. denied, were decided under the law prior to amendment and that law was more restrictive. Now, we see the test as whether the individual benefited was substantially dependent upon the worker. As it is presumed that an amendment is made with the intent to change the law and that the legislature knows the law to be changed, *De Herrera v. Herrera*, Wyo., 565 P.2d 479 (1977), reh. denied, we conclude that the definition of a child was intended by the legislature to make substantial dependency the test of eligibility and to eliminate the confusion and dispute existing before regarding stepchildren, adoption, legitimacy, lineage, and alienage. Whether any individual is substantially dependent upon another is a question of fact not to be disturbed by this court when substantial evidence exists to support that finding.

It is true that the claimants bear the burden of proving the essential elements of their claim and by the preponderance of the evidence to establish their entitlement to award. *Pease v. Pacific Power & Light Company*, Wyo., 453 P.2d 887 (1969); *Black Watch Farms v. Baldwin*, Wyo., 474 P.2d 297 (1970); *Gifford v. Cook-McCann Concrete, Inc.*, Wyo., 526 P.2d 1197 (1974), and the rule of liberal construction does not relieve the burden, *Olson v. Federal American Partners*, Wyo., 567 P.2d 710 (1977);

Mor, Inc. v. Haverlock, supra; *In re Hardison*, Wyo., 429 P.2d 320 (1967). However, the worker is entitled to a contrary presumption after the district court makes a finding that the evidence at the hearing is sufficient to sustain that burden, *Wyoming State Treasurer ex rel. Workmen's Compensation Department v. Schultz*, Wyo., 444 P.2d 313 (1968), and we will not disturb the determination of the trier of fact if it is supported by substantial evidence. *Olson v. Federal American Partners*, supra; *Williams v. Northern Development Co.*, Wyo., 425 P.2d 594 (1967); *Standard Oil Co. of Indiana v. Sullivan*, 33 Wyo. 223, 237 P. 253 (1925). If the evidence is conflicting this court will only consider that evidence favorable to the claimant, *Richard v. George Noland Drilling Company*, 79 Wyo. 124, 331 P.2d 836 (1958); *In re Corey*, 65 Wyo. 301, 200 P.2d 333 (1948), and give it every favorable inference that might be reasonably and fairly drawn from it.

We note that by use of the language in the amendment the legislature changed the rule of *Heather*, supra, where we found a presumption of dependency. It appears the legislature intends to define a dependent as a child and proof of substantial dependency is required before any award can be made to such person. We also note that use of the term "substantially all" falls somewhere between "total" and "partial" dependency as required by other laws. *Padilla v. Industrial Commission*, 113 Ariz. 104, 546 P.2d 1135 (1976), vac. 24 Ariz.App. 42, 535 P.2d 634 (1975); *De Mendoza v. Worker's Compensation Appeals Board*, 54 Cal.App.3d 820, 127 Cal.Rptr. 173 (1976); 2 Larson, *Workmen's Compensation Law*. §§ 63:12, 63:13, pp. 11-63—11-76.

Webster's Third New International Dictionary, 1971, defines "substantial" as "material," "that of moment: important, essential." "All" is defined as "the whole amount or quantity." "Substantially" as used here is an adverb modifying the noun "all." The case law has not been helpful in the resolution of this question. In *Canada Dry Bottling Co. of Utah v. Board of Review*, 118 Utah 619, 223 P.2d

586, 22 A.L.R.2d 664 (1950) the Utah Supreme Court construed the phrase "all or substantially all" as contained in Utah's unemployment compensation law and noted that neither 25% nor 75% of the assets of a corporation comprised "substantially all" of the assets involved. Unfortunately, on the facts of this case a quantitative analysis of the financial support is impossible.

[5] The only evidence on this issue was given by Judith. She testified that her only sources of income were from James and from her Social Security disability benefits in the sum of \$177.80 monthly. She was not working. James was not working when he returned to Kalispell but had been employed in Gillette in June and July of that year. He had also worked for her brother-in-law. Her testimony conflicted for once she testified he only worked part time or periodically but that in June and July of 1977 he was working "at least" five or six days a week; "He worked a lot." At Jim's he was employed full time. He took the job to make more money and he promised to send most of it home when he was paid. He told her by letter that he "should have a good check to send you a week from Friday," but he died before he was paid. James, she testified, contributed financial support to her and the children, but never did she state in dollar figures how much he earned or contributed.

The evidence is far from overwhelming but the district court concluded that James did in fact provide substantially all of the financial support. The amount of Judith's disability benefits was not large and compared with that figure, James even working part time could have contributed substantially all of the support. The award provides us with no method to ascertain more, and with the rules of appeal in mind we must affirm.

We are mindful of the maxim that Worker's Compensation laws are to be interpreted and applied with reasonable liberality so that the purposes for which the law was enacted may be accomplished and where possible the industry and not the individual should bear the burdens of accidents suf-

fered. *In re McConnell*, 45 Wyo. 289, 18 P.2d 629 (1933); *In re Gimlin*, Wyo., 403 P.2d 178 (1965); *Mor, Inc. v. Haverlock*, supra. These ideas formed the policy upon which the Worker's Compensation laws were based and comport with its history in this country and state. A History of American Law, L. M. Friedman. Simon & Schuster, 1973, New York. N. Y., pp. 587-588; Prosser, Torts, 4th Ed., 1971: § 80, pp. 530-531.

The judgment and order of award is affirmed.



Rudy Patino MUNOZ, a/k/a Rudy Munoz, Appellant (Defendant below),

v.

Herb MASCHNER (Warden of Wyoming State Penitentiary), Honorable John T. Dixon (Fifth Judicial District Judge, Wyoming), Mr. J. E. Darrah and Mr. G. L. Simonton (Park County Prosecuting Attorneys), the People of the State of Wyoming, et al., Appellees (Respondents below).

No. 4973.

Supreme Court of Wyoming.

March 6, 1979.

Proceeding was instituted on petition for postconviction relief. The District Court, Park County, Harold Joffe, J., dismissed petition, and petitioner appealed. The Supreme Court held that: (1) procedural irregularity of failing to note value of stolen property on verdict did not constitute such an absence of fundamental fairness as to establish a basis for postconviction relief where evidence established without a doubt that petitioner stole property of a given money value, and (2) question whether

J. In re Peterson's Estate, 365 P.2d 254 (Colo. 1961)

Court of Oregon in rejecting the rule adopted by this Court in *Moore v. Skiles*, supra, pointed up what they felt would be the incongruous result that would follow in the situation where a passenger who jointly owned the car did not know how to drive it. Suffice it to say that Oregon elects to follow a rule of law in this particular contrary to that preferred and adopted by this Court in the *Moore* case.

As was stated in the *Moore* case, "The question is not solely whether the passenger actually exercised control over the driver, but whether the occupant had the right to exercise such control over the driver, or that the occupant and the driver * * * had a right jointly to control its operation." The "right to exercise * * * control" is not dependent upon the ability of the passenger to actually drive the vehicle. It is not contemplated that a co-owning passenger in exercising his right to control will physically wrest the wheel from the driver. Rather, verbal admonition, suggestions or even outright commands are the usual methods whereby the co-owning passenger exercises his right to control. It is a well-known fact that some of the better "back seat" drivers are those who know little, or nothing, about the actual driving of the vehicle, but can nonetheless still offer friendly advice, if not flat commands, to the driver.

In *Matheny v. Central Motor Lines, Inc.* et al., 233 N.C. 681, 65 S.E.2d 368 the Supreme Court of North Carolina stated: "The fact that the plaintiff was co-owner and occupant of the automobile, and that it was being driven at the time by her husband with her consent for the *common benefit and purpose* of both would seem to establish the essential elements of a joint enterprise." (Emphasis supplied.) In the instant case the *sole* purpose of the ill-fated journey was to render a benefit to the one plaintiff, Doloris Parres. We see no good reason to depart from the rule announced in the *Moore* case, and stare decisis dictates that we must reject the contention of Doloris Parres and hold that the trial court properly instructed the jury that the negligence, if

any, of Lennie Parres was as a matter of law transferred and imputed to Doloris Parres.

The judgment is affirmed.

DOYLE, J., dissents.



In the Matter of the Estate of Archie L. PETERSON, a/k/a A. L. Peterson, Deceased.

Elinor Bourne PETERSON, Plaintiff in Error,

v.

Elsie LEWIS, formerly Elsie Durham, Laurel A. Peterson, and E. G. Woodbridge, as Administrator of the Estate of Archie L. Peterson, a/k/a A. L. Peterson, Deceased, Defendants in Error.

No. 19283.

Supreme Court of Colorado.

In Department.

Sept. 25, 1961.

Rehearing Denied Oct. 23, 1961.

Proceeding on a petition to determine heirship wherein the party claiming to be the decedent's widow on the theory of a common law remarriage alleged heirship in herself. The District Court, Otero County, William L. Gobin, J., rendered a judgment adverse to the purported widow, and she brought error. The Supreme Court, Frantz, J., held that the policy disfavoring divorce and encouraging resumption and continuance of the marital tie enjoined relaxation in the matter of proof where the question of common law remarriage was involved.

Reversed with directions.

1. Appeal and Error ⇐1011(1)

Resolution of conflicting evidence is for trier of facts, not Supreme Court, but where standards for weighing evidence

upon which judgment was founded have been misapplied, reversal must follow.

2. Marriage ⇐1

It is policy of law to encourage permanency and continuity of marriage and to look with disfavor upon its dissolution.

3. Marriage ⇐50(1)

Policy disfavoring divorce and encouraging resumption and continuance of the marital tie enjoined relaxation in matter of proof where question of common law remarriage subsequent to interlocutory divorce decree was involved.

Theodore J. Kuhlman, Charles A. Murdock, Denver, for plaintiff in error.

Thulemeyer & Stewart, La Junta, Petersen, Evensen & Evans, Pueblo, for defendants in error, Elsie Lewis and Laurel A. Peterson.

FRANTZ, Justice.

Is the law as exacting and scrupulous respecting the proof necessary to establish a common law remarriage as it is regarding the proof required to make out a case of common law marriage? Does the policy of the law disfavoring divorce and encouraging resumption and continuance of the marital tie enjoin relaxation in the matter of proof where the question of remarriage is involved? Affirmance or reversal of the judgment entered in the trial of this case depends upon the answers to these questions.

A petition to determine the heirs of Archie L. Peterson, also known as A. L. Peterson, deceased, was filed in the county court by the sister of the deceased. Her brother joined in the relief sought. Elinor Bourne Peterson, claiming to be the widow of the deceased, alleged heirship in herself. A judgment adverse to Mrs. Peterson was appealed to the district court, where her claim was again denied.

In adjudging that Mrs. Peterson failed to establish that she was the common law wife of the deceased, the trial court concluded:

"If respondent hopes to establish her alleged status as a widow, it must be founded on proof of a common-law marriage subsequent to December 9, 1955. In *Klipfiel's Estate v. Klipfiel*, 41 Colo. 40, 92 P. 124, it was said that the existence of a common-law marriage may be proven by and presumed from evidence of cohabitation as husband and wife and general repute. It was further said, that 'It is necessary that there be evidence both of cohabitation and reputation before such marriage can be presumed. Proof of one alone is not sufficient to sustain the presumption.' The court further quoted with approval from another case: 'It is not a sojourn, * * * to cohabit is to live and dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell with him.' It further said that such a marriage contract must be established by convincing and positive evidence."

It is not necessary to relate the evidence in detail. On the issue of the relationship of the Petersons subsequent to the interlocutory decree of divorce, the evidence is in dispute and in many instances permits of contrary inferences. There is substantial evidence showing that the Petersons reunited after the entry of the interlocutory decree, and there is a body of evidence from which a common law remarriage could be deduced. There is admittedly substantial evidence from which opposite conclusions could be drawn.

[1] Generally this court, in reviewing the judgment of a trial court, refrains from doing anything more than ascertaining that such judgment finds support in the sum of irreconcilable evidence. Resolution of conflicting evidence is the function of the trier of the facts, not of this court. *Edwards v. Edwards*, 113 Colo. 390, 157 P.2d 616. But where standards for weighing the evidence upon which the judgment was founded have been misapplied, reversal must follow.

An often quoted statement from *Hynes v. McDermott*, 91 N.Y. 451, 43 Am.St. Rep. 67, is persuasive in our determination, particularly since it represents the essence of what this court has said in a number of decisions involving remarriage—*Githens v. Githens*, 78 Colo. 102, 239 P. 1023, 43 A.L.R. 547; *Jordan v. Jordan*, 105 Colo. 171, 96 P.2d 13; *Shreyer v. Shreyer*, 113 Colo. 219, 155 P.2d 990. It was there said, "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy."

[2] The law has been resourceful in developing policies which give stability to the marriage state and seek to preserve it as a basic institution in our society. So important is the marital relation that the state is said to be an unnamed but vitally interested party in all actions affecting its existence. It is the policy of the law to encourage the permanency and continuity of a marriage and to look with disfavor upon its dissolution. *Githens v. Githens*, *supra*.

[3] "Remarriage is sufficiently rare in human affairs to justify regarding it as *sui generis*." In *re Wagner's Estate*, 1960, 398 Pa. 531, 159 A.2d 495, 497. Thus regarded, Justice Bok fittingly distinguished between a common law marriage and a common law remarriage in these words:

"These doctrines are familiar enough. We are, however, not dealing with a first marriage but with a remarriage following divorce after twenty years of wedlock. In such case we think that the law's role of mere toleration of the common law relationship should be reversed and the status of remarriage favored, even if acquired with common law informality. If the law allows a spouse, in the generous amount of nine reasons, to establish by divorce that the marriage was a mistake, it should be at least equally eager to let both spouses discover that their divorce was also a mistake. We regard it bet-

ter to encourage remarriage than to leave such parties under judicial edict that they were living sinfully together for ten years. If children had been born of this relationship, the wisdom of regularizing it if possible would be all the more apparent."

The evidence in this case must be tested and weighed in view of the considerations set forth in this opinion. Not having been so treated, we reverse the judgment so that the evidence may be considered and evaluated in manner consistent with the doctrines and policies expressed in this opinion.

MOORE and DOYLE, JJ., concur.



Dorothy GRANT, Plaintiff in Error,
v.

Juanita GWYN, Defendant in Error.
No. 19394.

Supreme Court of Colorado.

In Department.

Sept. 25, 1961.

Rehearing Denied Oct. 23, 1961.

Action for damages for assault wherein defendant filed a counterclaim. The District Court of the City and County of Denver, Clifford J. Gobble, J., entered judgment for plaintiff and defendant brought error. The Supreme Court, Moore, J., held that under a rule of procedure, a body execution could not issue against defendant who was convicted in a criminal prosecution for the same wrong, where matter of such conviction was called to court's attention prior to issuance of the execution.

Judgment insofar as it authorized execution against body reversed, in all other respects affirmed.