Chapter 2
The Marriage Relationship

Read Texas Family Code Chapters 1 and 2

A. Introduction

The first chapter of the Texas Family Code defines the phrase "suit for dissolution of a marriage," which includes a suit for: divorce; annulment; or, to declare a marriage void. But for the death of a spouse, these are the three exclusive means by which a marriage can be dissolved. As we progress through this and later chapters, it will become clear when to use which "suit for dissolution of a marriage." The first chapter of the Code also sets forth the public policy of the state in relation to the validity of a marriage. Do not ignore these seemingly simple statutes; at some point any one of them could prove very important to an argument you might want to advance in this classroom or in a courtroom.

Chapter 2 of the Texas Family Code governs: the application for and return of the marriage license; underage applicants; the marriage ceremony; the validity of marriage; the rights and duties of spouses; and, marriage without formalities—i.e., common law marriage. The 2013 legislative session yielded relatively minor changes to Chapter 2 of the Texas Family Code. The only truly substantive change dealt with proxy marriages; i.e., obtaining a license and conducting a ceremony when one applicant (or occasionally both) for the license is absent. Specifically, a marriage license for an absent applicant is now limited to one who is a member of the armed forces of the United States stationed in another country in support of combat or another military operation and is unable to attend the ceremony. Prior to the 2013 changes, proxy marriages were available to those confined in correctional facilities, but that availability has been eliminated. *See* TEX. FAM. CODE § 2006 (c), §2.007, (8).

The only other change of note, expands the right to conduct wedding ceremonies to retired judges of a municipal court and retired judges or magistrates of a federal court. *See* TEX. FAM. CODE § 2.202.

This second chapter of the text will focus on cases that interpret the statutes within Chapter 2 of the Texas Family Code. Those cases which focus upon dissolution of a marriage for failing to fulfill one of the requisites found within Chapter 2 of the Code will be presented in Chapter 3 of this text.

B. No Same Sex Marriage in Texas

LITTLETON
v.
PRANGE
9 S.W.3d 223
(Tex. App.—San Antonio 1999, pet. denied), *cert. denied*, 121 S.Ct. 174 (2000)

HARDBERGER, CHIEF JUSTICE.

This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries.

The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton.

FACTUAL BACKGROUND

A complete stipulation of the facts was made by the parties in this case.

Christie is a transsexual. She was born in San Antonio in 1952, a physically healthy male, and named after her father, Lee Cavazos. At birth, she was named Lee Cavazos, Jr. (Throughout this opinion Christie will be referred to as "She." This is for grammatical simplicity's sake, and out of respect for the litigant, who wishes to be called "Christie," and referred to as "she." It has no legal implications.)

At birth, Christie had the normal male genitalia: penis, scrotum and testicles. Problems with her sexual identity developed early though. Christie testified that she considered herself female from the time she was three or four years old, the contrary physical evidence notwithstanding. Her distressed parents took her to a physician, who prescribed male hormones. These were taken, but were ineffective. Christie sought successfully to be excused from sports and physical education because of her embarrassment over changing clothes in front of the other boys.

By the time she was 17 years old, Christie was searching for a physician who would perform sex reassignment surgery. At 23, she enrolled in a program at the University of Texas Health Science Center that would lead to a sex reassignment operation. For four years Christie underwent psychological and psychiatric treatment by a number of physicians, some of whom testified in this case.

On August 31, 1977, Christie's name was legally changed to Christie Lee Cavazos. Under doctor's orders, Christie also began receiving various treatments and female hormones. Between November of 1979 and February of 1980, Christie underwent three surgical procedures, which culminated in a complete sex reassignment. Christie's penis, scrotum and testicles were surgically removed, and a vagina and labia were constructed. Christie additionally underwent breast construction surgery.

Dr. Donald Greer, a board certified plastic surgeon, served as a member of the gender dysphoria team at UTHSC in San Antonio, Texas during the time in question. Dr. Paul Mohl, a board certified psychiatrist, also served as a member of the same gender dysphoria team. Both participated in the evaluation and treatment of Christie. The gender dysphoria team was a mutli-disciplinary team that met regularly to interview and care for transsexual patients.

The parties stipulated that Dr. Greer and Dr. Mohl would testify that their background, training, education and experience is consistent with that reflected in their curriculum vitaes, which were attached to their respective affidavits in Christie's response to the motions for summary judgment. In addition, Dr. Greer and Dr. Mohl would testify that the definition of a transsexual is someone whose physical anatomy does not correspond to their sense of being or their sense of gender, and that medical science has not been able to identify the exact cause of this condition, but it is in medical probability a combination of neuro-biological, genetic and neonatal environmental factors. Dr. Greer and Dr. Mohl would further testify that in arriving at a diagnosis of transsexualism in Christie, the program at UTHSC was guided by the guidelines established by the Johns Hopkins Group and that, based on these guidelines, Christie was diagnosed psychologically and psychiatrically as a genuine male to female transsexual. Dr. Greer and Dr. Mohl also would testify that true male to female transsexuals are, in their opinion, psychologically and psychiatrically female before and after the sex reassignment surgery, and that Christie is a true male to female transsexual.

On or about November 5, 1979, Dr. Greer served as a principal member of the surgical team that performed the sex reassignment surgery on Christie. In Dr. Greer's opinion, the anatomical and genital features of Christie, following that surgery, are such that she has the capacity to function sexually as a female. Both Dr. Greer and Dr. Mohl would testify that, in their opinions, following the successful completion of Christie's participation in UTHSC's gender dysphoria program, Christie is medically a woman.

Christie married a man by the name of Jonathon Mark Littleton in Kentucky in 1989, and she lived with him until his death in 1996. Christie filed a medical malpractice suit under the Texas Wrongful Death and Survival Statute in her capacity as Jonathon's surviving spouse. The sued doctor, appellee here, filed a motion for summary judgment. The motion challenged Christie's status as a proper wrongful death beneficiary, asserting that Christie is a man and cannot be the surviving spouse of another man.

The trial court agreed and granted the summary judgment. The summary judgment notes that the trial court considered the summary judgment evidence, the stipulation, and the argument of counsel. In addition to the stipulation, Christie's affidavit was attached to her response to the motion for summary judgment. In her affidavit, Christie states that Jonathon was fully aware of her background and the fact that she had undergone sex reassignment surgery.

THE LEGAL ISSUE

Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?

OVERVIEW OF ISSUE

This is a case of first impression in Texas. The underlying statutory law is simple enough. Texas (and Kentucky, for that matter), like most other states, does not permit marriages between persons of the same sex. *See* TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998); KY. REV. STAT. ANN. § 402.020(1)(d) (Banks-Baldwin 1999). In order to have standing to sue under the wrongful death and survival statues, Christie must be Jonathon's surviving spouse. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.004, 71.021 (Vernon 1977). The defendant's summary judgment burden was to

prove she is not the surviving spouse. Referring to the statutory law, though, does not resolve the issue. This court, as did the trial court below, must answer this question: Is Christie a man or a woman? There is no dispute that Christie and Jonathon went through a ceremonial marriage ritual. If Christie is a woman, she may bring this action. If Christie is a man, she may not.

Christie is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms. If we look at other states or even other countries to see how they treat marriages of transsexuals, we get little help. Only a handful of other states, or foreign countries, have even considered the case of the transsexual. The opposition to same-sex marriages, on the other hand, is very wide spread. Only one state has ever ruled in favor of same-sex marriage: Hawaii, in the case of *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993). All other cases soundly reject the concept of same-sex marriages. *See*, *e.g*., *Dean v. District of Columbia*, 653 A.2d 307 (D.C.1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky.1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *aff'd*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *Singer v. Hara*, 11 Wash.App. 247, 522 P.2d 1187 (1974). Congress has even passed the Defense of Marriage Act (DOMA), just in case a state decides to recognize same-sex marriages.

DOMA defines marriage for federal purposes as a "legal union between one man and one woman," and provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State ... or a right or claim arising from such relationship." Defense of Marriage Act, Pub.L. No. 104-109, § 2(a), 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C.A. § 1738C (West Supp.1997). So even if one state were to recognize same-sex marriages it would not need to be recognized in any other state, and probably would not be. Marriage is tightly defined in the United States: "a legal union between one man and one woman." *See id*. § 3(a).

Public antipathy toward same-sex marriages notwithstanding, the question remains: is a transsexual still the same sex after a sex-reassignment operation as before the operation? A transsexual, such as Christie, does not consider herself a homosexual because she does not consider herself a man. Her self-identity, from childhood, has been as a woman. Since her various operations, she does not have the outward physical characteristics of a man either. Through the intervention of surgery and drugs, Christie appears to be a woman. In her mind, she has corrected her physical features to line up with her true gender.

* * *

Nor should a transsexual be confused with a transvestite, who is simply a man who attains some sexual satisfaction from wearing women's clothes. Christie does not consider herself a man wearing women's clothes; she considers herself a woman wearing women's clothes. She has been surgically and chemically altered to be a woman. She has officially changed her name and her birth certificate to reflect her new status. But the question remains whether the law will take note of these changes and treat her as if she had been born a female. To answer this question, we consider the law of those jurisdictions who have previously decided it.

CASE LAW

The English case of *Corbett v. Corbett*, 2 All E.R. 33, 1970 WL 29661 (P.1970), appears to be the first case to consider the issue, and is routinely cited in later cases, including those cases from the United States. April Ashley, like Christie Littleton, was born a male, and like Christie, had undergone a sex-reassignment operation. *Id*. at 35-36. April later married Arthur Corbett. *Id*. at 39. Arthur subsequently asked for a nullification of the marriage based upon the fact that April was a man, and the marriage had never been consummated. *Id*. at 34. April resisted the

nullification of her marriage, asserting that the reason the marriage had not been consummated was the fault of her husband, not her. *Id*. at 34-35. She said she was ready, willing, and able to consummate the marriage. *Id*.

Arthur testified that he was "mesmerized" by April upon meeting her, and he dated her for three years before their marriage. *Id*. at 37. He said that she "looked like a woman, dressed like a woman and acted like a woman." *Id*. at 38. Arthur and April eventually married, but they were never successful in having sexual relations. *Id*. at 39. Several doctors testified in the case, as they did in the current case. *See id*. at 41.

Based upon the doctors' testimony, the court came up with four criteria for assessing the sexual identity of an individual. These are:

(1) Chromosomal factors;

(2) Gonadal factors (i.e., presence or absence of testes or ovaries);

(3) Genital factors (including internal sex organs); and

(4) Psychological factors.

Id. at 44.

* * *

The year after Corbett was decided in England, a case involving the validity of a marriage in which one of the partners was transsexual appeared in a United States court. This was the case of *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (N.Y.Sup.Ct.1971).

This New York case had a connection with Texas. The marriage ceremony of the transsexual occurred in Belton, while the plaintiff was stationed at Fort Hood. *Id*. at 499. The purpose of the suit was to declare that no marriage could legally have taken place. *Id*. The court pointed out that this was not an annulment of a marriage because a marriage contract must be between a man and a woman. *Id*. at 501. If the ceremony itself was a nullity, there would be no marriage to annul, but the court would simply declare that no marriage could legally have taken place. *Id*. The court had no difficulty in doing so, holding: "The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman." *Id*. at 500.

Factually, the New York case was less complicated than Corbett, and the instant case, because there had been no sexual change operation, and the "wife" still had normal male organs. *Id*. at 499. The plaintiff made this unpleasant discovery on his wedding night. *Id*. The husband in Anonymous was unaware that he was marrying a transsexual. *Id*. In both Corbett and the instant case, the husband was fully aware of the true state of affairs, and accepted it. In fact, in the instant case, Christie and her husband were married for seven years, and, according to the testimony, had normal sexual relations. This is a much longer period of time than any of the other reported cases.

The next reported transsexual case came from New Jersey. This is the only United States case to uphold the validity of a transsexual marriage. In *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, 205 (1976), a transsexual wife brought an action for support and maintenance growing out of her marriage. The husband interposed a defense that his wife was male, and that their marriage was void (and therefore he owed nothing). *Id*. M.T., the wife, testified she was born a male, but she always considered herself a female. *Id*. M.T. dated men all her life. *Id*. After M.T. met her husband-to-be, J.T., they decided that M.T. would have an operation so she could "be physically a woman." *Id*.

In 1971, M.T. had an operation where her male organs were removed and a vagina was constructed. *Id*. J.T. paid for the operation, and the couple were married the next year. *Id*. M.T. and J.T. lived as husband and wife and had sexual intercourse. *Id*. J.T. supported M.T. for over two years; however, in 1974, J.T. left the home, and his support of M.T. ceased. *Id*. The lawsuit for maintenance and support followed.

The doctor who had performed the sex-reassignment operation testified. *Id*. at 205-06. He described a transsexual as a person who has "a great discrepancy between the physical genital anatomy and the person's sense of self-identity as a male or as a female." *Id*. at 205. The doctor defined gender identity as "a sense, a total sense of self as being masculine or female; it pervades one's entire concept of one's place in life, of one's place in society and in point of fact the actual facts of the anatomy are really secondary." *Id*. The doctor said that after the operation his patient had no uterus or cervix, but her vagina had a "good cosmetic appearance" and was "the same as a normal female vagina after a hysterectomy." *Id*. at 206.

The trial court, in ruling for M.T. by finding the marriage valid, stated:

> It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus side show? What harm has said person done to society? The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.

Id. at 207. The appellate court affirmed, holding:

> If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent the persons' identification at least for purposes of marriage to the sex finally indicated.

Id. at 210-11.

Ohio is the last state that has considered this issue. *See In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct.1987). Ladrach was a declaratory judgment action brought to determine whether a male who became a post-operative female was permitted to marry a male. *Id*. at 829-30. The court decided she may not. *Id*. at 832.

* * * The court reasoned that the determination of a person's sex and marital status are legal issues, and, as such, the court must look to the statutes to determine whether the marriage was permissible. *Id*. The court concluded:

> This court is charged with the responsibility of interpreting the statutes of this state and judicial interpretations of these statutes. Since the case at bar is apparently one of first impression in Ohio, it is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.

Id. The court denied the marriage license application. *Id*.

* * *

DISCUSSION

Christie challenges the trial court's summary judgment on four issues: (1) Prange did not carry his summary judgment burden of proving, as a matter of law, that Christie's marriage was

between persons of the same sex; there is no summary judgment evidence that Christie was male at the time of her ceremonial marriage to Jonathon Littleton, the deceased; (2) Prange did not carry his burden of proving, as a matter of law, that Christie was male at the time of her ceremonial marriage to Jonathon Littleton, the deceased; sex at birth is not the test for determining the sex of a true post-operative transsexual for purposes of marriage; (3) Prange did not carry his summary judgment burden of proving, as a matter of law, that Christie's marriage is void; there is no summary judgment evidence that rebuts the presumption of validity of marriage; and (4) the summary judgment should be reversed because, at the very least, Christie produced summary judgment evidence raising a genuine issue of material fact that precludes summary judgment.

In an appeal from a summary judgment, we must determine whether the movant has shown that no genuine issue of material facts exists and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co*., 690 S.W.2d 546, 548-49 (Tex.1985); Ray v. O'Neal, 922 S.W.2d 314, 316 (Tex.App.—Fort Worth 1996, writ denied). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the nonmovant is taken as true, and all reasonable inferences are indulged in favor of the nonmovant. *Nixon v. Mr. Property Management Co*., 690 S.W.2d at 548-59. Furthermore, any doubt is resolved in the nonmovant's favor. *Id*.

As previously noted, this is a case of first impression in Texas. It involves important matters of public policy for the state of Texas. * * *

In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case, where the claim being asserted is statutorily-based. The statute defines who may bring the cause of action: a surviving spouse, and if the legislature intends to recognize transsexuals as surviving spouses, the statute needs to address the guidelines by which such recognition is governed. When or whether the legislature will choose to address this issue is not within the judiciary's control.

It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. Littleton has suggested we do so, perhaps using the surgical removal of the male genitalia as the test. As was pointed out by Littleton's counsel, "amputation is a pretty important step." Indeed it is. But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.

Our responsibility in this case is to determine whether, in the absence of legislatively-established guidelines, a jury can be called upon to decide the legality of such marriages. We hold they cannot. In the absence of any guidelines, it would be improper to launch a jury forth on these untested and unknown waters.

There are no significant facts that need to be decided. The parties have supplied them for us. We find the case, at this stage, presents a pure question of law and must be decided by this court.

Based on the facts of this case, and the law and studies of previous cases, we conclude:

(1) Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals.

(2) A transsexual is not a homosexual in the traditional sense of the word, in that transsexuals believe and feel they are members of the opposite sex. Nor is a transsexual a

transvestite. Transsexuals do not believe they are dressing in the opposite sex's clothes. They believe they are dressing in their own sex's clothes.

(3) Christie Littleton is a transsexual.

(4) Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a women (except for the vaginal canal). There is no womb, cervix or ovaries in the post-operative transsexual female.

(5) The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.

(6) The evidence fully supports that Christie Littleton, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate.

(7) Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.

We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is, as the court recognized in Ladrach, to interpret the statutes of the state and prior judicial decisions. This mandate is deceptively simplistic in this case: Texas statutes do not allow same-sex marriages, and prior judicial decisions are few.

Christie was created and born a male. Her original birth certificate, an official document of Texas, clearly so states. During the pendency of this suit, Christie amended the original birth certificate to change the sex and name. Under section 191.028 of the Texas Health and Safety Code she was entitled to seek such an amendment if the record was "incomplete or proved by satisfactory evidence to be inaccurate." TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992). The trial court that granted the petition to amend the birth certificate necessarily construed the term "inaccurate" to relate to the present, and having been presented with the uncontroverted affidavit of an expert stating that Christie is a female, the trial court deemed this satisfactory to prove an inaccuracy. However, the trial court's role in considering the petition was a ministerial one. It involved no fact-finding or consideration of the deeper public policy concerns presented. No one claims the information contained in Christie's original birth certificate was based on fraud or error.

We believe the legislature intended the term "inaccurate" in section 191.028 to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth. At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court.

There are some things we cannot will into being. They just are.

CONCLUSION

We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse.

We affirm the summary judgment granted by the trial court.

ANGELINI, JUSTICE, concurring opinion.

LOPEZ, JUSTICE, dissenting opinion.

ANGELINI, JUSTICE, concurring.

I concur in the judgment. . . .

* * *

I note, however, that "real difficulties . . . will occur if these three criteria [chromosomal, gonadal and genital tests] are not congruent." *Corbett v. Corbett*, 2 All E.R. 33, 48 (P.1970). We must recognize the fact that, even when biological factors are considered, there are those individuals whose sex may be ambiguous. *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999). Having recognized this fact, I express no opinion as to how the law would view such individuals with regard to marriage. We are, however, not presented with such a case at this time. *See Corbett*, 2 All E.R. at 48-49.

The stipulated evidence in the case that is before us establishes that Christie Lee Littleton was born Lee Edward Cavazos, Jr., a male. Her doctors described her as a true transsexual, which is "someone whose physical anatomy does not correspond to their sense of being or their sense of gender. . . ." Thus, in the case of Christie Lee Littleton, it appears that all biological and physical factors were congruent and were consistent with those of a typical male at birth. The only pre-operative distinction between Christie Lee Littleton and a typical male was her psychological sense of being a female. Under these facts, I agree that Texas law will not recognize her marriage to a male.

LOPEZ, JUSTICE, dissenting.

Although the standard for reviewing a trial court's order for summary judgment is well-settled in this state, that standard is not addressed in the majority's opinion. To prevail on a motion for summary judgment, the movant must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co*., 690 S.W.2d 546, 548-49 (Tex. 1985). In the instant case, this standard required Dr. Prange to prove that Christie Littleton was not the surviving spouse of Jonathon Littleton. To disprove this element of the plaintiff's cause of action, Dr. Prange produced only Christie's original birth certificate. This evidence, the majority concludes, is enough to prove as a matter of law that Christie Littleton is a male and that, as a result, Christie is not Jonathon's surviving spouse.

While a birth certificate would ordinarily establish a person's gender conclusively, Christie presented significant controverting evidence that indicated she was female. This evidence was so substantial that it raised a genuine issue of material fact about whether she was Jonathon's surviving spouse. . . .

* * *

On its surface, the question of whether a person is male or female seems simple enough. Complicated with the issues of surgical alteration, sexual identity, and same-sex marriage, the answer is not so simple. To answer the question, the majority assumes that gender is accurately determined at birth . . . . the traditional method of determining gender does not always result in an accurate record of gender.

Texas law recognizes that inaccuracies occur in determining, or at least recording, gender. By permitting the amendment of an original birth certificate upon satisfactory evidence, Texas law allows these inaccuracies to be corrected. TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992). Indeed, Christie's gender was lawfully corrected by an amended birth certificate months before the trial court ruled on Dr. Prange's motion for summary judgment. Notably, the amended birth certificate reflects the original filing date of April 10, 1952, the original date of birth, and an issuance date of August, 14, 1998. Retention of the original filing date indicates that the amended birth certificate has been substituted for the original birth certificate in the same way an amended pleading is substituted for an original pleading in a civil lawsuit.

Under the rules of civil procedure, a document that has been replaced by an amended document is considered a nullity. Rule 65 provides that the substituted instrument takes the place of the original. TEX. R. CIV. P. 65. Although neither a state statute nor case law address the specific effect of an amended birth certificate, many cases address the effect of an amended pleading. *See Randle v. NCNB Texas Nat'l Bank*, 812 S.W.2d 381, 384 (Tex.App.—Dallas 1991, no writ) (striking of second amended pleading restored first amended pleading); *Wu v. Walnut Equip. Leasing Co.*, 909 S.W.2d 273, 278 (Tex.App.—Houston [14th Dist.] 1995) (unless substituted instrument is set aside, the instrument for which it is substituted is no longer considered part of the pleading), *rev'd on other grounds*, 920 S.W.2d 285 (Tex.1996). Under this authority, an amended instrument changes the original and is substituted for the original. Although a birth certificate is not a legal pleading, the document is an official state document. Amendment of the state document is certainly analogous to an amended legal pleading. In this case, Christie's amended birth certificate replaced her original birth certificate. In effect, the amended birth certificate nullified the original birth certificate. As a result, summary judgment was issued based on a nullified document. How then can the majority conclude that Christie is a male? If Christie's evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not satisfactory enough to raise a genuine question of material fact on a motion for summary judgment?

. . . In this case, the court is required to determine as a matter of law whether Christie is Jonathon's surviving spouse, not to speculate on the legalities of public policies not yet addressed by our legislature. Under a focused review of this case, a birth certificate reflecting the birth of a male child named Lee Cavazos does not prove that Christie Littleton is not the surviving spouse of Jonathan Littleton. Having failed to prove that Christie was not Jonathon's surviving spouse, Dr. Prange was not entitled to summary judgment. Because Christie's summary judgment evidence raises a genuine question of material fact about whether she is the surviving spouse of Jonathon Littleton, I respectfully dissent.

Notes, Comments & Questions

1. Justice Angelini, in her concurring opinion, notes that "real difficulties . . . will occur if these three criteria [chromosomal, gonadal and genital tests] are not congruent." What does she mean and how would you respond to such evidence in light of the *Littleton* opinion?

2. What is the *Corbett* criteria for addressing sexual identity; does it differ from the criteria used by Justice Angelini?

3. How does DOMA define marriage?

4. Do you agree with the dissent of JUSTICE LOPEZ that the summary judgment was issued based on a nullified document

5. In *Littleton*, the alleged spouse's right to collect in a wrongful death action was compromised by virtue of gender. What other rights might be so compromised by this holding?

6. Some very interesting cases on the subject of same-sex marriage have followed *Littleton v. Prange*.

a. In the case of *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011) (Pet. for Review filed March 21, 2011 and Pet. For Writ of Mandamus filed March 25, 2011) a same-sex couple who had married in Massachusetts sought a divorce in Travis County. After the divorce was granted, the Attorney General of the State of Texas, representing the State, filed an appeal as an intervenor. The State of Texas had not intervened at the trial court level. The Austin Court of Appeals held that: (1) State's attempt at intervention in proceeding was untimely; (2) State was not bound by judgment and thus was not virtually represented; (3) State further did not have privity of interest and thus was not virtually represented; (4) there was no identity of interest between State and any named party to divorce judgment, as would allow State to be virtually represented; and (5) even if State were a deemed party by virtual representation, equitable considerations weighed against allowing State to appeal. In searching the petition history for this case, it appears that the petition is still pending before the Texas Supreme Court, as is a Petition for writ of mandamus. It will be interesting to see what happens with this case in the future.

b. But compare the case of *In re Marriage of J.B. & H.B.* 326 S.W.3D 654 (Tex. App.—Dallas 2010, no pet.), wherein the Dallas Court of Appeals answered the question, " Does a Texas district court have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred in Massachusetts?" This question presented itself because the trial court held that it had jurisdiction and that article I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code, which limits marriage to opposite-sex couples, violated the Equal Protection Clause of the Fourteenth Amendment. In its consideration of the question, the Dallas Court held that Texas district courts do not have subject-matter jurisdiction to hear a same-sex divorce case and that Texas's laws compelling this result do not violate the Equal Protection Clause of the Fourteenth Amendment. Based thereon, the appellate court reversed the trial court's order and remanded with instructions to dismiss the case for lack of subject-matter jurisdiction. Further, the appellate court conditionally granted the State's petition for writ of mandamus to correct the trial court's erroneous striking of the State's petition in intervention.

What appears to be the primary difference between this and *State v. Naylor*?

c. In *Mireles v. Mireles*, No. 01-08-00499-CV (Tex. App.—Houston [1st Dist.] 2009, pet. denied), Jack alleged that she and Mireles "were divorced by [the trial court] on April 25, 2005." Jack sought to have the divorce decree relating to her marriage with Mireles set aside and vacated because Mireles, Jack's former husband, "was born a female named Phyllis Ann Mireles." Here, both parties agreed that Jack's marriage to Mireles was void as a matter of law under the Constitution and laws of Texas because both Jack and Mireles are female. *See* TEX. CONST. art. I, § 32 ("Marriage in this state shall consist only of the union of one man and one woman."); TEX. FAM.CODE ANN. § 6.204(b) (Vernon 2006) ("A marriage between persons of the same sex . . . is contrary to the public policy of this state and is void in this state."); *see also, Littleton v. Prange,* 9 S.W.3d 223, 231 (Tex. App.—San Antonio 1999, pet. denied). Based on the foregoing, the First Court of Appeals

determined that a Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person. Accordingly, the First Court held that the trial court did not err in granting Jack's collateral attack on the divorce decree relating to the parties' void same-sex marriage.

7. Should recent United States Supreme Court Opinions have any effect upon the cases mentioned in the previous note?

C. Premarital Education Courses and the Texas Marriage License

There has long been a movement of persons who believe that marriage is just far too simple to enter into; likewise, there is a movement (considered parallel by some) that divorce is too easily obtained. In order to address some of these concerns and to educate future spouses about the gravity of the marriage decision, there was legislation passed in 2007, the session before last, which addressed certain marriage licensing concerns. For example, under TEX. FAM. CODE 2.013, each person applying for a marriage license is encouraged to take an eight hour premarital education course during the year preceding the date of application for a marriage license. This section specifies the subjects that must be included in the instruction, as well as who might be qualified to teach such a course. The standards that must be met by such a course are also specified. Upon completion of the 8 hour course a certificate is issued to the attendee.

To encourage future spouses to take this course, the 2007 Legislature put their money where their mouth is. Specifically, the Local Government Code was also amended as part of this initiative. The fee for a Texas marriage license was raised from $30.00 to $60.00. TEX. LOCAL GOVT. CODE § 118.018. However, if the marriage license applicant has completed the premarital education course within the past year and presents a certificate to the clerk, then a license will be issued without collecting the $60.00 fee. In addition, applicants who have completed the course are excepted from the 72 hour waiting period required between issuance of the license and the ceremony. TEX. FAM. CODE § 2.204. However, the 2009 session did yield a waiver of the waiting period for divorce in certain circumstances of domestic violence. See TEX. FAM. CODE 6.702.

As originally envisioned, the failure to take such a course was to be linked to an extended waiting period for divorce. This extended waiting period did not pass in either the 2007 or the 2009 legislative session.

D. The Evolution of the Evidentiary Common Law Marriage Statute In Texas

In Texas, common law marriage may be established in two ways: first by filed declaration, the parameters of which are established by statute and which is filed with the county clerk; and second, by meeting a three-prong evidentiary test. The statutes which govern the evidentiary means of establishing a common law marriage have undergone significant changes since 1970. The cases that will be presented within this portion of this chapter are still viable under the current statute. Nevertheless, knowledge of the evolution of this statute will aid in understanding the

cases that follow. The following three statutes have governed the evidentiary common law marriage since 1970.

(Effective 1970 through August 31, 1989.)

§ 1.91. Proof of Informal Marriage.

(a) In any judicial, administrative or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) A declaration of their marriage has been executed under section 1.92 of this code; or

(2) they agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) In any proceeding in which a marriage is to be proved under Subsection (a)(2) of this section, the agreement of the parties may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married.

(Effective September 1, 1989 through April 16, 1997.)

§ 1.91. Proof of Informal Marriage. [Amendment of subsection (b).]

(a) In any judicial, administrative or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) A declaration of their marriage has been executed under section 1.92 of this code; or

(2) they agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) A proceeding in which a marriage is to be proved under this section must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later.

(Effective April 17, 1997 through August 31, 1997.)

§ 2.401. Proof of Informal Marriage. [Non-substantive recodification and amendment of subsection (b).]

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(Effective September 1, 1997 through August 31, 2005.)

§ 2.401. Proof of Informal Marriage. [Amended by adding subsection (c).]

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(c) A person under 18 years of age may not:

(1) be a party to an informal marriage; or

(2) execute a declaration of informal marriage under Section 2.402.

(Effective September 1, 2005 through present.)

§ 2.401. Proof of Informal Marriage. [Amended by adding subsection (d).]

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(c) A person under 18 years of age may not:

(1) be a party to an informal marriage; or

(2) execute a declaration of informal marriage under Section 2.402.

(d) A person may not be a party to an informal marriage or execute a declaration of an informal marriage if the person is presently married to a person who is not the other party to the informal marriage or declaration of an informal marriage, as applicable.

Remember, if one is seeking to declare a common law marriage, under TEX. FAM. CODE § 2.403 proof of identity and age must be established per TEX. FAM. CODE § 2.005. In addition, the recording of a common law marriage has been expanded to encompass not only declarations, but certificates of common law marriage, as well. TEX. FAM. CODE § 2.404.

E. Denial of Marriage By Parties Does Not Bar Common Law Marriage

ESTATE of CLAVERIA
v.
CLAVERIA
615 S.W.2d 164
(Tex. 1981)

POPE, JUSTICE.

The question presented is whether there is some evidence, more than a scintilla, of a common-law marriage. This case arose as a probate matter in which Patricio Claveria contested the will of Otha Faye McQuaid Claveria. The probate court dismissed the contest after sustaining a plea to abate which stated that Patricio was not an interested person as defined by the Probate Code.[1] The trial court concluded that Patricio had no interest in the estate property because his ceremonial marriage to Otha Faye was void by reason of a prior undissolved common-law marriage. The court of civil appeals reversed the judgment, holding that there was no evidence of the prior common- law marriage. 597 S.W.2d 434. We hold that there was evidence of the marriage and remand the cause to the court of civil appeals to determine the factual insufficiency points.

Otha Faye died testate on March 4, 1978, leaving all of her property to her two children by a former marriage. Patricio and Otha Faye were ceremonially married in November, 1974, and he claims a community and homestead interest in the property acquired since that time. His only claim in the trial court and on appeal is that he is an interested party by reason of his marriage to Otha Faye. He has not asserted that he has an interest as a putative spouse nor because of any other right of ownership in the property. The inference should not be drawn from this opinion, that a marriage is always essential to proof of an interest in an estate. The points that were presented in the court of civil appeals relate only to the validity of the marriage between Patricio and Otha Faye.

After Patricio's and Otha Faye's ceremonial marriage, they lived together as husband and wife until Otha Faye died on March 4, 1978. We must begin, therefore, with the presumption that their marriage was valid. TEX. FAM. CODE ANN. § 2.01.[2] The presumption that the most recent

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[1] § 3. Definitions and Use of Terms

When used in this Code, unless otherwise apparent from the context:

(r) "Interested persons" or "persons interested" means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of a minor or incompetent ward.

[2] § 2.01. State Policy

In order to promote the public health and welfare and to provide the necessary records, this code prescribes detailed and specific rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide legitimacy and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless strong reasons exist for holding it void or voidable. Therefore, every marriage entered into in this state is considered valid unless it is expressly made void by this chapter or unless it is expressly made voidable by this chapter and is annulled as provided by this chapter. When two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that precedes it until one who asserts the validity of a prior marriage proves its validity.

marriage is a valid one continues until one proves the impediment of a prior marriage and its continuing validity. *Texas Employers' Ins. Ass'n v. Elder*, 155 Tex. 27, 282 S.W.2d 371 (1955); *Nixon v. Wichita Land & Cattle Co*., 84 Tex. 408, 19 S.W. 560 (1892); *Carroll v. Carroll*, 20 Tex. 731 (1858); *Lockhart v. White*, 18 Tex. 102 (1856); *Yates v. Houston*, 3 Tex. 433 (1848). *See also* Allen, *Presumption of the Validity of a Second Marriage*, 20 BAYLOR L. REV. 206 (1968); Annot., *Presumption as to Validity of Second Marriage*, 14 A.L.R.2d 7 (1950); 52 AM. JUR.2D *Marriage* §§ 140-167 (1970).

After some evidence of a prior and continuing marriage has been introduced, the weight of such evidence must be determined by the finder of fact. *Davis v. Davis*, 521 S.W.2d 603 (Tex.1975); *Woods v. Hardware Mut. Casualty Co*., 141 S.W.2d 972 (Tex. Civ. App.—Austin 1940, writ ref'd). *See* O. SPEER, TEXAS FAMILY LAW §§ 1:46, 5:90 (5th ed. 1975); 38 TEX. JUR.2D *Marriage* §§ 44-46 (1962); Note, *Evidence-Sufficiency of Evidence to Rebut Presumption of Validity of Second Marriage*, 1 BAYLOR L. REV. 203 (1948); Note, *Workman's Compensation Presumption of Validity of Second Marriage to Allow Beneficiary to Recover*, 6 BAYLOR L. REV. 242 (1954); Allen, *supra*, at 215-17; Note, *Marriage Evidence*, 33 TEXAS L. REV. 1097 (1955).

A valid common-law marriage consists of three elements: (1) an agreement presently to be husband and wife; (2) living together as husband and wife; and (3) holding each other out to the public as such. *Collora v. Navarro*, 574 S.W.2d 65 (Tex. 1978); *Humphreys v. Humphreys*, 364 S.W.2d 177 (Tex. 1963). This law has been codified in the Family Code. [3]

Marriage, whether ceremonial or common-law, is proved by the same character of evidence necessary to establish any other fact. *Stafford v. Stafford*, 41 Tex. 111 (1874); O. SPEER, TEXAS FAMILY LAW § 5:89 (5th ed. 1975). Thus, proof of common-law marriage may be shown by the conduct of the parties, or by such circumstances as their addressing each other as husband and wife, acknowledging their children as legitimate, joining in conveyances as spouses, and occupying the same dwelling place. *Bonds v. Foster*, 36 Tex. 68 (1871); O. SPEER, *supra* § 5:89; 38 TEX.JUR.2D *Marriage* § 42 (1962).

In reviewing the record on the "no evidence" point, this court must consider only the evidence and reasonable inferences from the evidence, which, viewed in their most favorable light, supports the trial court's judgment, and must disregard all the evidence and inferences to the contrary. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex.1977); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1952); Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361 (1960).

When two persons not living together occasionally refer to each other as a spouse, these isolated references have been held, in some instances as a matter of law, not to have established a common-law marriage. *See Ex parte Threet*, 160 Tex. 482, 333 S.W.2d 361 (1960); *Drummond v. Benson*, 133 S.W.2d 154 (Tex. Civ. App.—San Antonio 1939, writ ref'd). Further, the act of

[3] § 1.91. Proof of Certain Informal Marriages

(a) In any judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been executed under Section 1.92 of this code; or

(2) they agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) In any proceeding in which a marriage is to be proved under Subsection (a) (2) of this section, the agreement of the parties to marry may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married.

one of the parties to an alleged common-law marriage in celebrating a ceremonial marriage with another person without having first obtained a divorce, tends to discredit the first relationship and to show that it was not valid. *Higgins v. Higgins*, 246 S.W.2d 271 (Tex. Civ. App.—Austin 1952, no writ); *Nye v. State*, 77 Tex. Cr. R. 389, 179 S.W. 100 (1915). Still, the circumstances of each case must be determined based upon its own facts. *Collora v. Navarro*, *supra* at 70; O. SPEER, *supra* at § 2:3; Annot., *Judicial Declaration of Validity or Existence of Common-Law Marriage*, 92 A.L.R.2d 1102 (1963).

The record discloses several items of direct evidence which establish the fact of a prior undissolved common-law marriage between Patricio Claveria and Carolina Mendoza Claveria. Both Patricio and Carolina testified at the trial; and while they both denied they had ever been married, they both also produced evidence of their common-law marriage. Some of their denials appear from the record to express the belief that the questions concerned a ceremonial marriage. In any event, there was evidence about the elements of a common-law marriage.

Patricio and Carolina both testified that they had lived together in 1967 in San Antonio for some two and a half months. A deposition that Patricio gave in a worker's compensation case in 1972, two years before his ceremonial marriage to Otha Faye, is also in the record. In that earlier court proceeding, he testified that he was married, and that his wife's name was Carolina. He testified that his wife was not employed, that she was a housewife. When asked if she had been a housewife for several years, he answered "About 16 years married." The evidence was not retracted nor otherwise explained.

Patricio and Carolina lived together in a house and lot in San Antonio that they purchased through the Veterans Administration. The grantees in the deed were Patricio Claveria and wife, Carolina Claveria. They executed a deed of trust to secure the payment of the purchase price in the amount of five thousand three hundred and fifty dollars, and they did so as husband and wife. The acknowledgment to the deed of trust was taken as husband and wife and there was a recital, in the quaint custom of the times, that Carolina was examined "privily and apart from her husband" when the document was explained to her. Carolina admitted that she had signed the document and had done so as a wife. This is direct evidence of the common-law marriage. *Red Eagle v. Cannon*, 201 Okl. 511, 208 P.2d 557 (1949).

Carolina testified that she had lived all her life in San Antonio. Patricio testified that he had lived only in San Antonio and Dallas. Certificates from the district clerks of Bexar and Dallas Counties show that there has been no divorce or annulment decree from either of those counties which involved Patricio or Carolina. *Caruso v. Lucius*, 448 S.W.2d 711 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.); *Woods v. Hardware Mut. Casualty Co*., *supra*; Tex. Rev. Civ. Stat. Ann. art. 3731a § 5.

We have in this case direct evidence by Patricio that he and Carolina were husband and wife and that they lived together as such. We have the recorded deed in which both Patricio and Carolina represented to the Veterans Administration that they were married. We have the notarial acknowledgment by both of them that they were husband and wife. We have Patricio's and Carolina's solemn acknowledgment which was filed in the public records. There is, therefore, some evidence that the two lived together and held themselves out to the public as husband and wife. From the nature of that proof, their agreement to be married may also be inferred. TEX. FAM. CODE ANN. § 1.91(b).

The law recognizes a common-law marriage, but a common-law divorce is unknown to Texas law. The marriage arises out of the state of facts; but once the common-law status exists, it, like any other marriage, may be terminated only by death or a court decree. Once the marriage exists,

the spouses' subsequent denials of the marriage, if disbelieved, do not undo the marriage. *De Beque v. Ligon*, 292 S.W. 157 (Tex. Comm'n App.1927, holding approved).

Patricio also urges that the common-law marriage between him and Carolina was impossible, because Carolina was already married in 1967 when the common-law marriage arose, having ceremonially married Luis Ochoa in 1945, some twenty-two years earlier. Carolina so testified, but the trial court, in this instance, determined that there was no existing impediment at the time of Carolina's and Patricio's common-law marriage. An alleged spouse's testimony is not conclusive. *Oldham v. McIver*, 49 Tex. 556 (1878); O. SPEER, *supra* at § 1:35. The trial court could also rely upon the unrebutted presumption of the validity of the 1967 common-law marriage of Patricio and Carolina, TEX. FAM. CODE ANN. § 2.01. *Texas Employers' Ins. Ass'n v. Elder*, *supra*. Carolina testified in this case that she and Luis Ochoa lived together two months, separated, and that she had not seen him since 1945. The long absence of Luis Ochoa for twenty-two years before the 1967 common-law marriage, without any proof that he was still alive at that time, gave rise to the presumption of his death. Tex. Rev. Civ. Stat. Ann. art. 5541; *Zurich Gen. Accident & Liability Ins. Co. v. Hill*, 251 S.W.2d 948 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.); *see also* O. SPEER, *supra* at § 1:45; 1 R. RAY TEXAS LAW OF EVIDENCE § 83 (Texas Practice 3d ed. 1980).

The court of civil appeals was in error in its holding that there was no evidence of an undissolved common-law marriage between Patricio and Carolina and in rendering judgment that no such marriage arose. We reverse the judgment of the court of civil appeals and remand the cause to that court to pass upon the factual insufficiency and the great weight of the evidence points that were presented to that court but not decided.

Notes, Comments & Questions

1. Texas is in the minority in recognizing common law marriage. What was the original purpose in recognizing common law marriage?

2. Why does Texas still recognize common law marriage?

3. The common law marriage statute has changed since *Claveria*. Would the change effect the holding?

4. What is the difference between a void marriage and a marriage that is voidable?

5. Would other states recognize a Texas common-law marriage? Do they have to? Why even allow common-law marriage? What kinds of problems does this create? How do you get out of a common-law marriage?

6. For another "take" on a pre-existing marriage as an impediment, see *Nguyen v. Nguyen*, 355 S.W.3d 82, (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

F. Common Law Marriage Requires Holding Out in Texas

Although common law marriage claims are unusual, they do exist. The case of *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App.—Houston [1st Dist] 1991, writ denied) provides insight into the type of evidence that might be presented in support of a common law marriage claim. Although the jury in *Winfield* did find a common law marriage, the case was reversed due to a defective jury charge. Specifically, the jury was questioned if the parties had represented to others that they were married—not that they there [in Texas] had represented to others that they were married. In light of the evidence that the couple had held out in other locales, the charge as given was deemed harmful and required reversal. As you read this case, consider the evidence presented, remembering that the evidence did convince a jury.

WINFIELD
v.
RENFRO
821 S.W.2d 640
(Tex. App.—Houston [1st Dist.] 1991, writ denied)

O'CONNOR, JUSTICE.

David Winfield appeals from a judgment which established a common-law marriage with Sandra Renfro and granted them a divorce. We reverse and remand.

1. THE CHARGE

In point of error one, Winfield contends Renfro did not secure a finding on each essential element of her claim of common-law marriage. Specifically, Winfield claims that the question and the instruction submitted to the jury did not instruct them that both parties must represent to others in Texas, that they were married. *Williams v. Home Indem. Co*., 722 S.W.2d 786, 788 (Tex. App.—Houston [14th Dist.] 1987, no writ) (living together and holding out in another state does not satisfy the requirement of section 1.91). Section 1.91 of the Texas Family Code provides that a common-law marriage may be established by evidence that: (1) the parties agreed to be married, (2) and after the agreement they lived together in this state as husband and wife, and (3) there represented to others that they were married. TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975).

The jury was asked:

> Do you find from a preponderance of the evidence that Petitioner and Respondent entered into an informal or common law marriage on or about April 11, 1982?
>
> In connection with the foregoing question you are instructed that the elements of an informal or common law marriage are:
>
> 1. A mutual agreement to be husband and wife.
> 2. And, after this agreement they lived together in this state as husband and wife.
> 3. And, represented to others that they were married.
>
> The agreement of the parties to marry may be inferred or implied if it is proved that they lived together as husband and wife and represented to others that they were married.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by witnesses who saw the act done or heard the words spoken or by documentary evidence. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved. A representation to others that the parties were married may be established by the conduct of the parties or spoken words or a combination of both.

Answer "Yes" or "No"

Answer: _____

Comparing the elements submitted in the charge to the elements in § 1.91 of the Texas Family Code reveals the following:

ELEMENTS UNDER §1.91 &	ISSUE SUBMITTED
1. They agreed to be married.	A mutual agreement to be husband and wife. [issue]
2. And after the agreement they lived together in this state as husband and wife.	And after the agreement they lived together in this state as husband and wife. [issue]
3. And there represented to others that they were married.	And represented to others that they were married. [issue]

Except for the omission of the word "there," the instructions tracked the statutory language in § 1.91 of the Texas Family Code. Except for the substitution of the phrase lived together in "this state" for lived together "in Texas" and the omission of the word "there," the jury question and the instructions stated the elements necessary to establish a common-law marriage based on the suggested charge in 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 201.04a (1989).[1]

Error in the jury charge is reversible only if it caused, or was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986); *Trevino v. Brookhill Capital Resources, Inc*., 782 S.W.2d 279, 283 (Tex. App.—Houston [1st Dist.] 1989, writ denied); TEX. R. APP. P. 81(b)(1).

Winfield objected to the omission of the word "there" from the charge. The word "there" or the phrase "in Texas" was important because only two items of evidence suggested Winfield may have acquiesced to being identified as married to Renfro, one of which occurred in the Bahamas in November of 1983. In the time period around April 11, 1982, most of the time Winfield and Renfro spent together was outside the state of Texas. We hold it was error to submit the jury question without the word "there" in the charge.

Renfro defends the omission of the word "there" from the charge as a broad form submission, which the supreme court requires whenever feasible. *Texas Dep't of Human Services v. E.B*., 802 S.W.2d 647, 649 (Tex.1990); TEX. R. CIV. P. 277. Rule 277 requires the trial court to "submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict." *E.B*., 802 S.W.2d at 649. We do not agree that the broad form submission excuses the omission of the word "there" or the phrase "in Texas" from the charge on an informal marriage. The evidence in this case on the issue of representations to others in Texas that they were married, was close and contested. We conclude the erroneous instruction constituted error that was

[1] The instruction in the PATTERN JURY CHARGES reads: A man and a woman are married if they agreed to be married and after the agreement they lived together in Texas as husband and wife and there represented to others that they were married.

reasonably calculated to cause and probably did cause the rendition of an improper verdict. *Island Recreational Dev. Corp.*, 710 S.W.2d at 555; *Trevino*, 782 S.W.2d at 283; TEX. R. APP. P. 81(b)(1).

We sustain point of error one.

2. THE SUFFICIENCY OF THE EVIDENCE

In point of error two, Winfield contends the evidence is legally and factually insufficient to support a finding of a common-law marriage. Winfield challenges the sufficiency of the evidence to support each separate element of the cause of action. In reviewing a legal sufficiency of the evidence challenge, this Court must view the evidence in the light most favorable to the jury's verdict, considering only the evidence and inferences that support the finding and disregarding all other evidence and inferences. *Davis v. San Antonio*, 752 S.W.2d 518, 522 (Tex. 1988).

In reviewing a factual sufficiency point, this Court must evaluate all the evidence, and reverse the judgment only if the jury's finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Rego Co. v. Brannon*, 682 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). This Court may not substitute its opinion for that of the jury merely because we would have reached a different result. *Pool v. Ford Motor Co*., 715 S.W.2d 629, 634 (Tex.1986); *Glockzin v. Rhea*, 760 S.W.2d 665, 666 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

We now look to the record to judge the sufficiency of the evidence to support the three elements of a common-law marriage: (1) agreement to be married; (2) after the agreement, living together in Texas as husband and wife; and (3) representing to others in Texas that they are married. TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975); *see Ex parte Threet*, 160 Tex. 482, 333 S.W.2d 361, 364 (Tex. 1960); *In re Estate of Giessel*, 734 S.W.2d 27, 30 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). A common-law marriage does not exist until the concurrence of all three elements. *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. App.—San Antonio 1987, no writ) (the three common-law marriage elements did not co-exist until parties purchased property, which established the element of holding out); *Gary v. Gary*, 490 S.W.2d 929, 934 (Tex. App.—Tyler 1973, writ ref'd n.r.e.).

a. Agreement to be married

Winfield contends Renfro did not prove they agreed to be married. To establish this element, the evidence must show the parties intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be husband and wife. *Rodriguez v. Avalos*, 567 S.W.2d 85, 86 (Tex. App.—El Paso 1978, no writ).

(1) Legal sufficiency

Winfield contends there is no evidence they agreed to be married.

Renfro asks us to consider the following evidence to support of the element that they agreed to be married: Renfro testified that after she became pregnant, Winfield and she agreed to be married informally in Dallas on April 11, 1982. She said she agreed to forego a ceremonial marriage because of Winfield's concerns about the effect of fathering a child before marriage would have upon his image with the media, his endorsement contracts, and the New York Yankees. Her testimony is direct evidence of the agreement to be married. *Collora v. Navarro*, 574 S.W.2d 65, 70 (Tex. 1978) (direct testimony of the party of an agreement to be married was enough to raise the issue of agreement); *see also Giessel*, 734 S.W.2d at 32 (testimony of one party that they had agreed to be married "in God's eyes" was direct evidence of agreement to be

married). Renfro's testimony is more than a scintilla of evidence that the two agreed to be married. *Collora*, 574 S.W.2d at 70; *see Bolash*, 733 S.W.2d at 699. Thus, on Renfro's testimony and the inferences we draw from it, we hold evidence is sufficient to overrule a legal sufficiency challenge to the evidence to support the element of the agreement to be married. *Collora*, 574 S.W.2d at 70.

(2) Factual sufficiency

Next, Winfield argues the evidence is factually insufficient to support the element that they agreed to be married. Under the factual sufficiency challenge we must consider all the evidence. *Cain*, 709 S.W.2d at 176.

Winfield asks us to consider the following evidence to challenge the element that they agreed to be married: Winfield testified he never had a present intention to be married to Renfro; he did not stay overnight at the hotel, but stayed with the team at another hotel; they did not have champagne; and he knew nothing about a "honeymoon" suit. Winfield's brother, an insurance agent, sold health insurance to Renfro in December of 1982 and Renfro's application for the policy, which she signed, stated that she was not married. Renfro filed her income tax statements as head of the household, not as a married woman. Renfro signed the birth certificate with the name of Renfro, not Winfield. Craig Comier, a friend of Renfro's, testified that Renfro told him in September 1982, after Shanel was born, that they planned to get married, but it had been postponed. Renfro made specific references to a future date for them to marry. Renfro identified her as Shanel Renfro, not Winfield.

Renfro asks us to consider the following evidence to support the element that they agreed to be married: Winfield purchased the condominium in the summer of 1982, and Renfro moved into the condominium in early August 1982. Renfro said that Winfield was "together" with her many times at the condominium in Houston. Winfield sent an oversized bed to the Houston home; Renfro testified that Winfield kept personal belongings at the home. Alma Renfro, Renfro's mother, testified that she went by the Houston condominium frequently in the fall of 1982 and that David was there most of the time although he sometimes traveled for business reasons. Pat Caruso, Winfield's secretary, testified that she learned that Winfield was buying a condominium in Houston for his family; she further testified that from October 1982 to the end of 1984, Winfield spent about 100 days in Houston during the off season.

To explain, Winfield offers the following evidence: He bought the condominium as an investment, not as an indication of agreement to marry; he sent the bed to Houston because it was an extra bed; and neither Renfro nor Winfield wore a wedding ring.

Evidence of an agreement to be married may be inferred from cohabitation and representations. *Collora*, 574 S.W.2d at 70; *Giessel*, 734 S.W.2d at 32. Considering all of this evidence, we hold the evidence is sufficient to overrule a factual sufficiency challenge to the evidence to support the element of intent to be married. We overrule the point of error as it relates to the element of the agreement to be married.

b. Lived together

Winfield contends Renfro did not prove they lived together as husband and wife in Texas on April 11, 1982, the date in the jury question. Although the three elements that make up a common-law marriage may occur at different times, until all three exist, there is no common-law marriage. *Bolash*, 733 S.W.2d at 699. To satisfy this element, the parties must live together in Texas. TEX. FAM. CODE ANN. § 1.91(a)(2). Living together in another state does not satisfy this element of common-law marriage. *Williams*, 722 S.W.2d at 788.

In this case, we are limited by the date in the jury question, which asked the jury to decide if the parties entered a common law marriage on or about April 11, 1982.[2] The phrase "on or about" means generally in time around the date specified. *Fortner v. Merrill, Lynch, Pierce, Fenner & Smith, Inc*., 687 S.W.2d 8, 11 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). This Court has upheld a variance of the date in the pleadings and proof of 19 days. *Snow v. Auto Loan Co*., 259 S.W.2d 340, 342 (Tex. App.—Galveston 1953, no writ). Other courts have upheld variances in dates between pleadings and proof up to three months. *See Fortner*, 687 S.W.2d at 11 (variance of 40 days); *Aetna Casualty & Surety Co. v. Tucker*, 418 S.W.2d 382, 383 (Tex. App.—Beaumont 1967, writ ref'd n.r.e.) (variance of 23 days); *Ingram v. Gentry*, 205 S.W.2d 673, 675-76 (Tex. App.—Waco 1947, no writ) (variance of three months); *Kleber v. Pacific Avenue Garage*, 70 S.W.2d 812, 814 (Tex. App.—Dallas 1934, writ dism'd) (variance of three months); *Texas & N.O.R. Co. v. Weems*, 184 S.W. 1103, 1104 (Tex. App.—Texarkana 1916), *aff'd*, 222 S.W. 972 (Tex. Civ. App.1920) (variance of 30 days).

The test in determining whether to uphold a variance between the pleadings and proof is whether the variance between the proof and the evidence was substantial, misleading, and prejudicial. *Brown v. American Transfer & Storage Co*., 601 S.W.2d 931, 937 (Tex. 1980); *Danny Darby Real Estate, Inc. v. Jacobs*, 760 S.W.2d 711, 718 (Tex. App.—Dallas 1988, writ denied); *Kleber*, 70 S.W.2d at 814.

Here, the date the parties entered a common-law marriage (if they did), is critical, for it not only fixes the date for the marriage, it establishes the size of the community estate. If the parties entered a common-law marriage in April 1982, it would result in a larger community estate than one establish later, say in 1987. Thus, on this charge, which will establishes both the date of the marriage and the size of the community estate, we limit Renfro to proving the elements of a common-law marriage as it might have existed up to August of 1982. Using a more generous definition than that used in the cases cited above, we examine the record to determine if in the four months after April 11, 1982, Renfro provided any evidence to support the element of living together as husband and wife.

(1) Legal sufficiency

Winfield contends there is no evidence they lived together as husband and wife in Texas on or about April 11, 1982, the date in the jury question.

Renfro asks us to consider the following evidence to support the element of living together as husband and wife: Winfield and Renfro stayed in the hotel in Dallas for three days. In April of 1982, Winfield told her to look for a home for them in Houston; he specifically requested one with good security because of his reputation. Beginning in August 1982, when Renfro moved into the condominium, Renfro testified they lived together whenever Winfield was in Houston.

Undermining somewhat her claim that they lived together in Texas on or about April 11, 1982, Renfro admitted that after April 11, 1982, Winfield did not visit Houston again until August 1982. Thus, from April 11, 1982 to August 1982, the two did not occupy the same residence in Texas. Although Renfro traveled outside of Texas to visit Winfield during that period, we cannot consider that evidence to support the element of living together in Texas.

If we stretch "on or about" to include August (four months), we can consider Renfro's testimony that they lived together in Texas, beginning in August, to support the second element.

[2] We note that in the TEXAS PATTERN JURY CHARGES, the jury is asked to supply the date. 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 201.04a (1989). Here, the date was supplied by the charge and thus it controls our review of the evidence as if it was the date determined by the jury.

The evidence outlined here is sufficient to overrule a legal sufficiency challenge to the evidence to support the element of living together as husband and wife. In *Bolash*, the court stated that "her testimony that they were together each time he came to this country is sufficient to support the element that they lived together as husband and wife to the extent possible under the circumstances." 733 S.W.2d at 699. Thus, on the testimony that beginning in August, Winfield lived with Renfro in Houston when he could, and the inferences we draw from it, we must overrule the legal sufficiency challenge to the verdict regarding the element of living together as husband and wife.

(2) Factual sufficiency

Next, Winfield argues the evidence is factually insufficient to support the element they lived together as husband and wife. Under this challenge, we examine all the evidence to determine if the evidence was factually sufficient to support the element that Winfield and Renfro lived together as husband and wife.

Winfield asks us to consider the following evidence to challenge the element that they lived together as husband and wife: Winfield testified he did not live with Renfro, that he bought the condominium to take care of his daughter, not to marry her mother; he said he did not have a key to the condominium (Renfro said he did). Winfield sent Renfro fruit, flowers, and a card in September of 1982, that said "for your new home." (Emphasis ours.) Winfield said that over a period of five years, he stayed at the condominium in Houston for only 14 days (his secretary said in two years he spent about 100 days in Houston). Winfield and Renfro testified that Winfield continued to see other women during this time, and that Renfro knew about it. Renfro admitted she knew Winfield traveled with other women, and took a woman to Africa in November 1982.

Renfro asks us to re-consider the evidence that we considered under the factual challenge to the agreement to be married: He bought a condominium for her in August 1982; the two of them were together as often as he could be in Houston; he sent his bed to Houston; he kept his personal belongings here; he acted "husbandly," that is he did errands, worked around the house, and generally behaved as if he were married.

Considering all the evidence under the factual sufficiency point of error, we hold the evidence is sufficient to support the element of living together as husband and wife on or about April 11, 1982, and is not against the great weight and preponderance of the evidence.

c. Holding out

Winfield contends that Renfro did not prove they represented to others in Texas, that they were husband and wife on or about April 11, 1982. To satisfy this element, the parties must represent in Texas that they are married. TEX. FAM. CODE ANN. § 1.91(a)(2). Representing to others in another state that they are married does not satisfy this element of common-law marriage. *Williams*, 722 S.W.2d at 788. Recall that this element must occur concurrently with the agreement to be married and the element of living together as man and wife. Until the three elements co-exist, there is no common-law marriage. *Bolash*, 733 S.W.2d at 699. Because the jury question asks only if the elements existed on or about April 11, 1982, we are limited to considering evidence around that date, that is, including August 1982.

The statutory requirement of "represented to others" is synonymous with the judicial requirement of "holding out to the public." *Giessel*, 734 S.W.2d at 30. It is well settled that "holding out" may be established by conduct and actions of the parties. *Giessel*, 734 S.W.2d at 31; *Rosales v. Rosales*, 377 S.W.2d 661, 664 (Tex. App.—Corpus Christi 1964, no writ). Spoken words are not necessary to establish representation as husband and wife. *Associated Indem. Corp. v. Billberg*, 172 S.W.2d 157, 164 (Tex. App.—Amarillo 1943, no writ).

(1) Legal sufficiency

Winfield contends there is no evidence they held themselves out to be husband and wife in Texas on or about April 11, 1982, the date in the jury question.

Renfro asks us to consider the following evidence to support of the element of holding out as husband and wife in Texas: Renfro reserved a suite at the Amfac Hotel at the Dallas airport as "Mr. and Mrs. David Winfield." Following the trip to Dallas, she testified she told her mother that she and Winfield were married. Alma Renfro testified that she knew they had a common-law marriage because Sandra had told her.

The registration form indicates Renfro made the reservation in her own name for a Mr. and Mrs. Winfield:

M/M David Winfield
Attn: S. Renfro
4511 Orange St
Houston, TX 77020

Renfro testified that Winfield paid for the room in cash and took the receipt when they checked out of the hotel.

The only other evidence Renfro offers of holding out is that the mailbox at the condominium had the name Winfield on it, and Winfield knew and did not object. This was in August or September of 1982. Renfro argues that Winfield acquiesced in being identified as married to Renfro.[3]

On the narrow issue of holding out in Texas on or about April 11, 1982, we find there is more than a scintilla to support the jury's answer. Thus, on this testimony and the inferences we draw from it, we must overrule the legal sufficiency challenge to the verdict regarding the element of representing to others in Texas that they were married.

(2) Factual sufficiency

Next, Winfield argues the evidence is factually insufficient to support the element of "holding out." Under this challenge, we must consider all evidence to determine if the evidence is factually sufficient.

Winfield asks us to consider the following evidence to challenge the element of holding out as husband and wife: Renfro represented that she was single in her tax returns, bank and pay records, and in her insurance applications. She signed her daughter's birth certificate in the name

[3] Renfro asks us to consider other evidence about events in 1983 and 1987. Because the evidence is too removed from the date in the charge, we decline. That testimony is: In 1983, while Winfield and Renfro were vacationing in the Bahamas, a local newspaper described them as Mr. and Mrs. Winfield. The witness Sarah English, Renfro's neighbor, testified that in the fall of 1983, she gave a party honoring Renfro and Winfield. She referred to the couple as David and Sandra Winfield on the invitations and introduced them that way at the party. English testified that Winfield heard the introductions, and that he did not deny or correct it. This testimony might support a holding out in late 1983, but does not support a holding out in April 1982. Even then, an isolated reference as husband and wife is no evidence of "holding out." *Threet,* 333 S.W.2d at 364; *Giessel,* 734 S.W.2d at 31. The second witness, Pat Caruso, Winfield's former secretary, testified she asked Winfield in November 1983, if he was married to Renfro. Instead of answering, Winfield just smiled. Caruso testified that she understood his smile to mean he was married to Renfro. No legal theory would permit us to uphold the verdict based on her interpretation of a smile, even if it happened in April 1982. The third witness, Marsha Dewan, school teacher to Sharad, Renfro's other child, testified that in April of 1987, Winfield introduced himself to her as Sharad's stepfather. Again, her testimony might support a holding out in 1987, but not in 1982.

Renfro and gave her daughter the name Renfro, not Winfield. Renfro testified she did not use the name Winfield because Winfield told her not to. Sometime in 1982, early in the baseball season, when Renfro was pregnant, Renfro traveled to Florida to meet Winfield. When Renfro brought up the issue of getting married to Winfield in the presence of Al Forman, Winfield's manager, she was told Winfield was not getting married. When Renfro attended Yankee games, she and Sharad did not sit in the section for the team's family; Winfield asked them to sit in right field. Although Winfield bought the condominium, he testified their agreement was that Renfro would begin paying rent in two years, after she started working. The condominium was an investment and according to his agreement with Renfro, she could live there rent-free for two years because she found the house. In 1984, they talked about her paying him rent. Winfield began dating Tonya Winfield in 1981 and continued dating her, with one interruption, until they married in 1988. Winfield and several other witnesses testified that he never introduced Renfro to anyone as Mrs. Winfield. Winfield testified that when he traveled with Renfro before and after April 11, 1982, they always logged in under their separate names, not as Mr. and Mrs. Winfield.

Tonya Winfield testified that Winfield told her he was not married to Renfro. In April 1983, when Tonya was traveling with Winfield, she picked up the telephone in their hotel room when Renfro called. She testified Renfro claimed to be Winfield's "lady," meaning girlfriend, not his wife. Renfro then asked Tonya if she was planning to marry Winfield.[4] Even Renfro's mother admitted that Winfield never introduced Renfro as his wife.

Renfro asks us to consider the following evidence to support the element of holding out in Texas: When Renfro moved into the condominium, the condominium's mailbox had the name Winfield on it. It was later taken down.[5]

In none of the documents in which Renfro was required to state her marital status, did Renfro state that she was married. When Renfro contracted with Winfield's brother for insurance, she signed a form that said she was single. This was a representation, not to a stranger, but to a member of Winfield's family, a person who would normally know if the couple was holding themselves out as a married couple. There was no evidence as to any reason to misinform the brother or the insurance company about her status, if she was holding herself out as married to Winfield. When Renfro signed her daughter's birth certificate, she used the name Renfro, not Winfield. When Renfro filed her tax return, she indicated she was a single person. The federal government might have a keen interest in Renfro's status as the wife of a well-paid sports star.

We recognize that in *Giessel*, we affirmed a common-law marriage even though the wife had filed income tax returns as a single woman. *Giessel*, 734 S.W.2d at 31. In *Giessel*, however, the couple had lived together as husband and wife for 20 years. If the record here were replete with other evidence that showed a common-law marriage, the evidence of the tax return and the insurance application would be less significant.

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[4] Renfro, as the dissent points out, contradicts the evidence about this telephone call. Renfro claims she told Tonya she was married to Winfield. The dissent says we "evidently" place no significance on Renfro's testimony about the conversation with Tonya Turner. Not so. We do place some significance on it and we acknowledge it supports Renfro's testimony that in 1983 (not 1982) she (not Winfield) held herself out as married. But, Renfro's version of the conversation is no evidence that Winfield held himself out as married in 1982. That is what this record is lacking: evidence that Winfield held himself out as married to Renfro.

[5] Renfro also asks us to consider the testimony of a witness about events in 1983 and 1987. Because their testimony is too removed from the date in the charge, we decline. One witness testified that in the fall of 1983, Renfro's neighbors had a party for her and Winfield and they introduced as Mr. and Mrs. Winfield. Winfield did not correct the introduction.

Even by Renfro's testimony, the marriage was largely a secret marriage. If secret, it was not a common-law marriage. *Threet*, 333 S.W.2d at 364. A common-law marriage is more than a contract; it is a public status. *Id*. Here, the marriage seems to have been a secret from everyone except Renfro's relatives and acquaintances. Renfro testified she only told her mother she was married, and she only used the name Winfield around her neighbors and when she traveled with Winfield. To resolve this issue, we must compare the supreme court's decision in *Threet* to our decision in *Giessel*. Both *Threet* and *Giessel* involve an element of secret marriage and an occasional introduction as husband and wife. In *Threet*, the supreme court held that a common-law marriage was not established even though the couple had been introduced as husband and wife, because the couple's cohabitation occurred in secret at their parents' houses, and only a few friends were told of the marriage. *Threet*, 333 S.W.2d at 364. In *Giessel*, this Court held that even though the couple did not tell some of their relatives that they were married, and even though the wife listed herself as single on her tax returns, the couple formed a common-law marriage because the couple cohabited for 20 years, the man represented to many other persons in the community that the woman was his wife, and the couple had the reputation in the community for being married. *Giessel*, 734 S.W.2d at 31.

Under these two cases, it is clear that a marriage that is secret from some persons can still be a common-law marriage. In *Threet*, the supreme court held a marriage that was secret from most of the people in the community—only a few friends knew about it—was not a common-law marriage. In *Giessel*, we held that a marriage that was secret from only a few members of the couple's family, was a common-law marriage because the marriage was widely known in the community. Here, only a few people knew about the marriage: Renfro's mother testified her daughter told her they were married; English said she thought they were married; Whitfield said she considered them married by their conduct. A schoolteacher said Winfield told her he was the stepfather to Renfro's other child, and that someone at the school told her that Winfield was Renfro's husband.

Threet and *Giessel* establish that occasional introductions as husband and wife do not establish the element of holding out. In *Threet*, the couple was introduced as husband and wife to a few friends, and the supreme court held the occasional introduction amounted to no evidence of holding out. *Threet*, 333 S.W.2d at 365. In *Giessel*, the couple had the reputation in the community for being married. *Giessel*, 734 S.W.2d at 31. Here, as in *Threet*, the couple was introduced as husband and wife on only two occasions; as opposed to *Giessel*, the couple did not have the reputation in the community for being married.

We note that the dissent argues the evidence was very contradictory on the issue of holding out. We believe the problem was that the evidence of holding out in Texas around April 11, 1982 was scant, not contradictory. Most of the evidence urged by the dissent to support "holding out" happened long after April 11, 1982, the date in the jury charge. The only evidence the dissent can find to support its position on holding out as married close to April 11, 1982 is that Renfro and Winfield stayed in a hotel in Dallas around that time and, on her return to Houston, she told her mother that she was married. Our response is that a three-day stay in a hotel with a person of the opposite sex is not enough to establish the element of holding out as married.

All other evidence offered by the dissent to support holding out in 1982, 1983, and even later, was holding out by Renfro only, not by Winfield. Only Renfro did anything, and she did not do much, that could be interpreted as holding them out as married in 1982 and in 1983. Winfield did not tell anyone he was married and nothing in the record contradicts him on this point, not even Renfro. During this period he was seeing other women and traveling with them openly. Renfro knew because Winfield told her he was having sexual relations with other women. Even her

unilateral testimony on holding out is not without contradictions. In April 1982, Renfro visited Winfield in New Jersey for the housewarming party there. Winfield introduced her as the hostess, not as his wife.

If the jury had been asked (1) if they were married, and if so (2) on what date, the jury might have found they were married in 1983 or sometime later. But, on this record, the evidence that they were married (that they held themselves out as married) on April 11, 1982 is against the great weight and sufficiency of the evidence. The dissent's analysis would adopt a form of relation-back: any evidence of Winfield's "holding out," no matter when it occurred, would relate back to corroborate Renfro's allegations that they held themselves out to be married in 1982.

Considering all the evidence under the factual sufficiency point of error, we hold the evidence was insufficient to support the element that Renfro and Winfield represented to others that they were married on or about April 11, 1982. We overrule point of error two as it relates to the legal sufficiency challenge, and we sustain it as it relates to the factual sufficiency challenge on the element of representing to others in Texas that they were married. Based on this holding, we reverse and remand for new trial.

* * *

The judgment of the trial court is reversed and remanded.

[Justice Mirabel's Dissent has been omitted; she was of the opinion that there was legally and factually sufficient evidence to support all three elements necessary to prove a common law marriage. Justice Mirabel also would have held that the error in the jury charge did not result in an improper judgment; accordingly, Justice Mirabel would have affirmed the jury's decision.]

[On rehearing, Winfield sought rendition rather than remand. The opinion on rehearing reaffirmed the appellate court=s decision to remand. The opinion on rehearing has also been omitted.]

Notes, Comments & Questions

1. What is the difference between "factually sufficient evidence" and "legally sufficient evidence"?

2. In light of the evidentiary requisites of common law marriage, at what point do you actually become married in a common-law marriage?

3. How long must persons live together as husband and wife to establish a common law marriage.

4. By what means might a couple "hold out" as married?

5. In *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1994), the Texas Supreme Court held that under section 1.91 of the Texas Family Code, as amended in 1989, an agreement to be married may be established by direct or circumstantial evidence. The Texas Supreme Court's holding in *Russell*, that circumstantial evidence may be used to establish a common law marriage, is still good law equally applicable to the current statute.

The court explained, as follows:

> Prior to the 1989 amendment, section 1.91 permitted courts to infer or imply the couple's marriage agreement from evidence which established cohabitation and public

representation. *See Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex. 1981); *Howard v. Howard*, 459 S.W.2d 901, 903-04 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). . . . For suits filed on or after September 1, 1989, the existence of a common law marriage in Texas requires proof of each of the three elements of an informal marriage set forth in section 1.91(a)(2) no later than one year after the relationship ended. The elements are (1) an agreement to be married, (2) after the agreement, the couple lived together in this state as husband and wife, and (3) the couple represented to others that they were married. The 1989 amendment defines the burden of proof for informal marriages and eliminates the ability of courts to simply infer an agreement to marry from evidence that they lived together as husband and wife and represented to others that they were married. One commentator described the effect of the 1989 amendment as follows:

> Rather than abolishing the doctrine of informal marriage as had been proposed on numerous occasions in the past, the legislature tightened the rules for reliance on the doctrine by repealing the provision that allowed a court to infer an agreement to be married from proof of cohabitation and holding-out. This amendment, therefore, raises the question of how the elements of agreement may hereafter be proved.

In the future one of two basic fact patterns will develop depending on whether both parties are living. If both parties to the alleged informal marriage are alive, one of them will commonly deny the agreement. When the other party to the alleged informal union offers direct evidence of an express agreement to be presently married, the trier of fact will be required to weigh the testimony in the context of other evidence of the relationship. If one of the parties is dead, the survivor will be required to meet the limitation imposed by Evidence Rule 601(b) by providing corroboration of an alleged transaction with the decedent. Under most circumstances the proponent of the marriage will have an easier case in the latter instance unless there is convincing evidence that the decedent denied the existence of the agreement. If evidence of an express agreement to marry is not offered, the fact finder will have to treat the facts of cohabitation and holding-out as circumstantial evidence of the agreement in order to find a tacit agreement to be married. This process is, however, virtually identical to the prior process of inference. But by repealing the provision authorizing the fact-finder to infer an agreement from proof of two elements of an informal marriage, the legislature has not excluded a finding of a tacit agreement to be married. In making such a finding, however, it seems that the evidence of holding-out must be more convincing than before the 1989 agreement.

In a society in which non-marital cohabitation for extended periods of time is far more common than it once was, the fact-finder will have to weigh the evidence of a tacit agreement more carefully than in the past. As the statute now stands, an occasional uncontradicted reference to a cohabitant as “my wife” or “my husband” or “mine” will not prove a tacit agreement to be married without corroboration. Such a reference by the contestant of the union will, of course, be stronger evidence of an agreement than such a statement by the proponent. The non-social context of the contestant’s reference to the proponent as his “wife” or her “husband” will also receive closer scrutiny. If the statement is made in a self-serving context, the fact-finder may be expected to disbelieve the truth of the statement. A forthright assertion of marriage with the consequence of liability (as when an alleged spouse seeks admission of the other to a hospital) may, on the other hand be far more probative of a tacit agreement to be married.

6. In *Russell v. Russell*, JUSTICE GONZALEZ dissented, and opined that:

> In 1989 the legislature *repealed* the Family Code provision which provided that *an agreement to enter into a common-law marriage could be inferred* if one of the parties proved that they lived together as husband and wife and represented to others that they were married. Today, the Court ignores this amendment and in effect holds that a fact finder can look to cohabitation and holding-out as circumstantial evidence of an agreement to be married. This approach is identical to the process of inferences that the legislature repealed. Under our constitution, the legislature is authorized to make this change and we should not disregard it. To do so violates the separation of powers doctrine. I would affirm the judgment of the court of appeals in *Lorensen v. Weaber*[1] and reverse and render in *Russell v. Russell*.[2]

7. As was stated in *Winfield*, facts may be established by direct or circumstantial evidence. *Russell* also discusses corroborative evidence and tacit agreement. Looking back at *Winfield* and the three witnesses that the court declined to consider (the hostess at the party, Winfield's former secretary, and the school teacher), the court stated it probably would not have found enough to show a holding out. Under *Russell*, would *Winfield* have been decided differently?

8. Under the common law statute as it existed between 1989 and 1997, a rather restrictive statute of limitations was in play, which provided that, "A proceeding in which a marriage is to be proved under this section must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later."

Judge Paul Brown, of the Federal District Court for the Eastern District of Texas, addressed the constitutionality of the 1989 common law marriage statute in the case of *White v. State Farm Mutual Automobile Insurance Co*., 907 F. Supp. 1012 (E. Dist. Tex. 1995). Finding the statute unconstitutional, Judge Brown reasoned thus:

> 3. *Constitutional Challenges*
>
> White maintains that section 1.91(b) violates the Equal Protection and Due Process clauses of the United States and Texas Constitutions and the Open Courts provision of the Texas Constitution. Because the Court is of the opinion that section 1.91(b) is unconstitutional as a violation of the equal protection clause, the Court chooses not to address White's other arguments.
>
> White presents two very distinct classes to the Court: ceremoniously married persons and informally or common-law married persons. White contends section 1.91(b) is

[1] 840 S.W.2d 644. Vivian Weaber and Ronald Lorensen began a relationship in 1982. They lived together in Illinois, Iowa, New Mexico, and California before moving to Texas in 1990. During their relationship, they rented property under the names of Vivian and Ronald Lorensen, and used the name Lorensen for certain utility bills. Mr. Lorensen filed as a "single" person on his tax returns, but claimed Ms. Weaber as his dependent, designating her as a "friend" on each return. There were no children born to them. The trial court held that a common-law marriage existed, but the court of appeals reversed and rendered on the basis that there was no evidence of an agreement to be married.

[2] 838 S.W.2d 909. Believing that death was imminent, James and Margaret Russell were ceremonially married in Texas in 1981. Prior to this ceremony, from 1964 to 1981, not only did Mr. Russell father five children with Mrs. Russell, but during this same period, he fathered and supported other children by other women. The underlying issue in this case is whether the parties entered into a common-law marriage before the ceremonial marriage so that Mrs. Russell can share the assets that Mr. Russell acquired before 1981. The trial court found a common-law marriage and the court of appeals agreed, but it reversed and remanded because the evidence was factually insufficient to support the finding of the date of inception of the marriage.

unconstitutional because it carves out special treatment for ceremoniously married couples.

Under Equal Protection analysis of a government's classification, a court must apply differing standards of review depending upon the right or classification involved. If a classification causes a disadvantage to a "suspect class" or threatens a "fundamental right," then the standard of strict scrutiny is applied. *Plyler v. Doe*, 457 U.S. 202, 217, 102 S.Ct. 2382, 2394-95, 72 L.Ed.2d 786 (1982). If a classification, however, does not involve a suspect class or fundamental right, then the standard of rationality is applied. *Vance v. Bradley*, 440 U.S. 93, 95-97, 99 S.Ct. 939, 942-43, 59 L.Ed.2d 171 (1979).

White does not argue that 1.91(b) disadvantages a suspect class. Moreover, the Court is unable to find the protection of a marital estate or community property rights impinges upon a "fundamental right." *See Dannelley v. Almond*, 827 S.W.2d 582, 585 (Tex. App.—Houston [14th Dist.] 1992, no writ). Accordingly, the Court must decide whether the one year prove-up period contained in section 1.91(b) is reasonably related to a legitimate governmental interest.

In 1989, certain members of the Texas Legislature made a significant effort to abolish common-law marriages in Texas. *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex.1993). The effort failed and section 1.91(b) was the resulting compromise. *Id*. Texas' interest in requiring "timely" proof of informal marriages is to facilitate divorce and probate proceedings by limiting the staleness of evidence presented at those proceedings. *See Dannelley*, 827 S.W.2d at 586. The Court has concluded that the goal of 1.91(b) was to prevent Texas courts from having to rely on stale evidence in proceedings to adjudicate property interests. Section 1.91(b)'s purpose is not solely to have formal proof of informal marriages. The Court finds that a state's efforts at limiting the use of stale evidence in court proceedings is a legitimate governmental interest.

The Court must now determine whether the one-year limitation is rationally related to the accomplishment of the state's interest. In answering this question, the Court chooses to rely on the Supreme Court's decision in *Mills*. In *Mills*, the Court examined the constitutionality of a similar one-year limitation in Texas on proving up the legitimacy of a child. *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982). The Court held that the statute was unconstitutional as a violation of equal protection. *Id*. at 102-03, 102 S.Ct. at 1556. In reaching its decision, the Court found that given the importance of the rights involved and the social, as well as legal, impediments to a legitimacy determination, the one-year time period was too short. *Id*. at 98-03, 102 S.Ct. at 1554-56.

In applying the rationale of *Mills* to *White's* case, this Court finds that section 1.91(b) is unconstitutional. First, the Court is concerned by the severity of the bar section 1.91(b) presents. By way of example, assume a couple has been common-law married for a lengthy time period and has filed no formal declaration of marriage. During their marriage, the couple has acquired a house, automobiles, investments, financial accounts, and retirement benefits. The couple has also had two children during their period of marriage. Should this couple cease cohabitating and neither file for a divorce or a declaratory judgment seeking to prove the existence of the marriage within one year, under section 1.91(b), all community property rights are extinguished. Moreover, the legitimacy of the children of the marriage is also now placed at issue, because section

1.91(b) puts the couple in a position as if they were never married. *Dannelley*, 827 S.W.2d at 585.

Assuming the same scenario as detailed above for a ceremoniously married couple and the result is the opposite. A formally married couple can separate and cease cohabitating for any number of years, even until death, and Texas law protects the ceremoniously married couple's community property interests, as well as protecting the legitimacy of any children of the marriage. Texas law does this despite the fact that proof of the origin of property and any contributions made by each spouse's separate estate may grow incredibly stale.

Moreover, like the Court in *Mills*, this Court is concerned by the impediments that exist to filing a proceeding under section 1.91(b) in the one-year time period. As discussed above, the statute begins running when cohabitation ceases. If a common-law couple ceases cohabitation, but is attempting to reconcile, the statute may run without there ever being any intent that the marriage cease.

The Court finds that section 1.91(b) is not rationally related to Texas' interest in aiding in the conduct of divorce and probate proceedings. The Court recognizes that the Legislature has the power to limit proof of common-law marriages, however, the one-year limitation is too short a time period. Moreover, the same concerns of staleness exist in sorting out the property in a formal marriage, yet the law does not require those spouses to take action or forfeit these very significant marital rights and interests. The state's interest is not rationally furthered by the one-year limitation. Therefore, section 1.91(b) is unconstitutional as a violation of the Equal Protection clause of the United States Constitution. State Farm's motion for summary judgment on the basis of section 1.91(b) should be denied.

9. In contrast, and three years later, the Texas Supreme Court held that TEX. FAM. CODE § 1.91(b) barred a wrongful death claim brought within the two year statute of limitations for such claims, but after the one year statute for establishing a marriage. In all fairness, it is observed that the constitutional issue was not raised in the contrary case of *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998). *Shepherd v. Ledford* was a consolidation of *Shepherd v. Ledford* and *TransAmerican v. Fuentes*. The Texas Supreme Court reasoned:

A. *Shepherd v. Ledford*

1. Limitations Period

Because Mrs. Ledford alleged a common-law marriage, as opposed to a formal marriage, she was required to prove the elements of an informal marriage within one year from the time the relationship ended. *See* TEX. FAM. CODE § 1.91(b). The apparent conflict arises, however, because the statute of limitations for medical negligence is two years. *See* TEX. REV. CIV. STAT. art. 4590i, § 10.01; *Bala*, 909 S.W.2d at 893.

Affirming the trial court's judgment, the court of appeals held that section 1.91(b) impermissibly reduced the time Mrs. Ledford had to file her wrongful death suit. The court reasoned that because section 1.91(b) required her to file the wrongful death lawsuit within one year of Mr. Ledford's death and the limitations for a medical malpractice wrongful death claim is two years under section 10.01, section 1.91(b) necessarily conflicted with section 10.01. We disagree.

We hold that section 1.91(b) of the Family Code does not conflict with section 10.01 of the MLIIA. When the one-year time period in section 1.91(b) expires, the party asserting

an informal marriage is barred only from proving the marriage's existence. *See Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991).

Mrs. Ledford did not have to file her medical liability claim within one year of Mr. Ledford's death. Rather, she only had to initiate a proceeding to prove the requisite elements of an informal marriage within one year of his death. *See* TEX. FAM. CODE § 1.91(a) & (b). There are legal procedures available for common-law spouses in Mrs. Ledford's situation. For example, Mrs. Ledford could have filed a Proceeding to Declare Heirship to establish the existence of her common-law marriage. *See* TEX. PROB. CODE § 48(a). Or she could have filed the wrongful death claim within one year of Mr. Ledford's death and established the existence of the common-law marriage at trial. The choice was hers, as long as she initiated a proceeding to prove her informal marriage within the one-year time limit. *See* TEX. FAM. CODE § 1.91(b); *Mossler*, 818 S.W.2d at 754.

Accordingly, we reject the court of appeals' conclusion that section 1.91(b) provided an independent limitations mechanism that directly conflicted with section 10.01. Rather, we hold that section 1.91(b) simply estops a person from claiming that he or she is informally married unless he or she starts a proceeding to establish an informal marriage within section 1.91(b)'s one year time limit. Consequently, the person would be unable to assert standing to sue under the Wrongful Death Act.

* * *

2. The Stipulation

We have held that section 1.91(b) required Mrs. Ledford to begin a proceeding to prove her common-law marriage within one year limit of Mr. Ledford's death, or forfeit the opportunity to establish her standing to bring suit under the Wrongful Death Act. However, under the specific facts of this case, her failure to comply with section 1.91(b) does not bar her wrongful death claim.

Mrs. Ledford sued on November 15, 1991. Despite the fact that she had not complied with section 1.91(b), the court entered an order, which reflected the parties agreement, stating that the parties "stipulated and agreed . . . that Lahoma Ledford and John Ledford had a valid common-law marriage, prior to and at the time of John Ledford's death."

* * *

Consequently, the stipulation relieved Mrs. Ledford of her burden to prove her common law marriage, something she would not have been able to prove otherwise, and she had standing to bring the wrongful death action. Accordingly, section 1.91(b) does not apply in this case.

* * *

B. *Transamerican v. Fuentes*

1. Limitations—Wrongful Death

A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death." TEX. CIV. PRAC. & REM. CODE § 16.003(b). As we have explained, section 1.91(b) sets the time limit in which a proceeding to prove an informal marriage must be brought. Thus, for the same reasons discussed above, section 1.91(b) does not supplant or conflict with the two-year statute in section 16.003(b).

It is undisputed that Mrs. Fuentes and Mr. Fuentes were never formally married and never filed a declaration of informal marriage. Thus, the only way Mrs. Fuentes could assert standing to bring this suit under the Wrongful Death Act is if she proved she was Mr. Fuentes's common-law surviving spouse. *See* TEX. CIV. PRAC. & REM. CODE § 71.004(a).

Mrs. Fuentes had to initiate a proceeding to prove that she was Mr. Fuentes's common-law surviving spouse within one year of his death. *See* TEX. FAM. CODE § 1.91. However, Mrs. Fuentes did not initiate a proceeding to prove her common-law marriage within section 1.91(b)'s one-year requirement; therefore, she is barred from offering any proof of that relationship.

* * *

9. The foregoing cases no doubt gave rise to the amended limitations period now found in the statute. Under the current statute, when does the statute of limitations begin to run to prove a common-law marriage?

G. Prior Divorce Does Not Bar Current Common Law Marriage

Lewis v. Anderson is a recent case that addresses the type of evidence that can be used to establish a common law marriage.

LEWIS
v.
ANDERSON
173 S.W.3d 556
(Tex. App.—Dallas 2005, pet. denied)

MOSELEY, JUSTICE.

In this case, we must determine whether the evidence supports the jury's finding that a common law or informal marriage existed between Mindy Jane Anderson and Harold Ray Lewis. In three issues, Lewis claims the evidence is legally and factually insufficient to support that finding and that the trial court improperly commented on the weight of the evidence in its instructions to the jury. We affirm the trial court's judgment.

BACKGROUND

In 1998, Anderson left Lewis and filed for divorce. After Lewis denied the existence of a marriage, the trial court conducted a separate trial on the existence of an informal marriage. A jury found that Anderson and Lewis were informally married and the trial court entered a judgment declaring the existence of an informal marriage. This judgment was later severed from the divorce action. After the trial court denied his motion for judgment notwithstanding the verdict and for new trial, Lewis perfected this appeal.

The record indicates that Anderson, a nurse, and Lewis, a medical doctor, were married in a formal ceremony in December 1974. They bought a house in 1976. Lewis testified that in 1976

or 1977, it became clear to him that a divorce was necessary. One of his reasons was that Anderson was reluctant to sign documents about financial matters. Anderson resisted the divorce, saying she was committed to the marriage. Lewis determined that divorce was absolutely necessary because he would not allow his "financial situation to be jeopardized by her emotional state." Lewis prepared the divorce papers himself without a lawyer and Anderson signed the waiver of service and divorce decree. Lewis presented the documents to the court and the divorce decree was signed on May 26, 1977.

Following the signing of the divorce decree, Anderson conveyed her interest in the residence to Lewis in August 1977. However, except for a few weeks in 1978 when Lewis (according to Anderson) locked her out of the house, Anderson and Lewis lived together for the next twenty years, until 1998. During this time, they joined a church as "Hal and Mindy Lewis" and adopted two children. Documents in both adoption proceedings referred to Anderson and Lewis as husband and wife, "Dr. and Mrs. Lewis," or "Harold and Mindy Lewis."

The couple attended Lewis family functions together and celebrated wedding anniversaries. Lewis wore a wedding ring until the couple separated in 1998. The record contains one tax return filed by the couple in 1997 as married filing jointly. Lewis could not remember whether earlier tax returns were filed jointly or singly, but said the 1997 return was a mistake and he had notified the IRS of the mistake.

Anderson testified she did not remember the 1977 divorce decree until sometime after this suit was filed in 1998. However, she wrote to Lewis sometime in 1978 about the termination of their marriage the previous year. She did not dispute the divorce or her signature on the waiver and divorce decree. The jury found the parties were informally married as of September 21, 1982, the date they filed the petition to adopt their first child.

DISCUSSION

Lewis's first and second issues challenge the legal and factual sufficiency of the evidence to support the finding of an informal marriage. Specifically, he challenges the sufficiency of the evidence of an agreement to be married.

1. Legal Sufficiency of the Evidence

To evaluate the legal sufficiency of the evidence to support a finding, we must "determine whether the proffered evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994); *see also St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519 (Tex. 2002) (plurality op.). We view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. June, 2005).

A common law, or informal, marriage may be proved by evidence that: (1) the parties agreed to be married and after the agreement; (2) they lived together in Texas as husband and wife; and (3) there represented to others that they were married. TEX. FAM. CODE ANN. § 2.401(a)(2) (Vernon 1998). The proponent of a common law marriage may prove an agreement to be married by circumstantial as well as direct evidence. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). The legislature has not excluded the finding of a tacit agreement to be married, but circumstantial evidence must be "more convincing" than before the 1989 amendments to the statute. Id. at 932. Direct evidence of an agreement to be married is not required. *Id*. at 933. Evidence of cohabitation and representations that the couple is married may constitute circumstantial evidence of an agreement to be married, but "the circumstances of each case must be determined based upon its own facts." *Id*.

Lewis makes three arguments in support of his first issue: (a) the evidence conclusively negates an agreement to be married; (b) there is no evidence of the holding out of a new marriage; and (c) there is no evidence of the date of the marriage found by the jury.

(a) Evidence of Agreement to be Married

The record contains evidence that after the 1977 divorce, Lewis and Anderson lived together as husband and wife in Texas and represented to others that they were presently married. In 1978, Anderson wrote Lewis a note expressing regret over their situation and acknowledging "the termination of our marriage and the resulting property settlement." She also stated, "I continue to be committed to a marriage with you and our future." After a few weeks of separation in 1978, the couple resumed living together and continued to live together for the next twenty years. They joined a church together in 1979 as "Hal and Mindy Lewis" and Anderson heard Lewis tell the pastor that they were married. The pastor testified the couple represented themselves as "Hal and Mindy Lewis" and he knew both of them by the name Lewis.

In 1982, the couple hired an attorney to adopt their first child in a private adoption. Correspondence from the adoption attorney referred to them as "Dr. and Mrs. Lewis." Anderson testified that Lewis told the attorney they were married. Lewis admitted he reviewed the lawyer's correspondence and never told the lawyer they were not married or were divorced. The petitions for termination of the parental rights of the birth mother and for adoption of the child signed by their attorney identified Anderson and Lewis as husband and wife. Correspondence arranging the social study for the adoption was addressed to "Dr. & Mrs. Harold Ray Lewis." Anderson heard Lewis tell the social worker they were married. She also heard Lewis testify in court at the adoption hearing that they were married. The decree of adoption signed by the judge on February 11, 1983 recites that "On this day Petitioners, Harold Ray Lewis and wife, Malinda Jane Lewis, appeared in person and by attorney and announced ready for trial." Lewis testified that he did not tell his attorney, the social worker, or the adoption court that he and Anderson were not married and were divorced because he did not feel it was important or relevant.

In 1985, the couple adopted another child through Hope Cottage. They signed a custody agreement with Hope Cottage as "Harold Ray Lewis and Malinda J. Anderson Lewis, husband and wife respectively." The document obligated them to reimburse Hope Cottage for expenses of the child and mother in the amount of $5000.[3] Anderson heard Lewis tell Hope Cottage and testify in court that they were married. The adoption decree identified the parties as "Harold and Mindy Lewis." Anderson also heard Lewis tell their children that they were married, but never heard him tell the children they were divorced. Anderson testified that she and Lewis represented themselves as married to the children's schools.

Lewis argues there is no evidence of an agreement to be married after the divorce and that the evidence conclusively shows the opposite—that the couple did not agree to be married. Lewis points to some of Anderson's testimony that after the divorce, she and Lewis did not have discussions that they were "common law married" and that the only date she asserted they were married was the date of their 1974 ceremonial marriage. He also relies on Anderson's testimony that she felt her agreement to be married to Lewis began in 1974 and never ended. Lewis testified that there was no agreement to be married after the divorce.

[3] "A forthright assertion of marriage with the consequence of liability (as when an alleged spouse seeks admission of the other to a hospital) may, on the other hand be far more probative of a tacit agreement to be married." *Russell,* 865 S.W.2d at 932 (quoting Joseph W. McKnight, *Family Law: Husband and Wife,* 44 SW. L.J. 1, 2-3 (1990)).

Anderson also testified, however, that during the period after the divorce, she felt they were husband and wife. She said, "we had an agreement that we were married every year. We celebrated our anniversary every year." During cross-examination, she testified:

> Q I'm sorry. You had discussions between 1977 and 1998 that you were informally married?
>
> A We agreed that we were.
>
> Q Is that what you just testified to?
>
> A We had—we agreed that we were married. We didn't have a discussion as to whether it was formal or informal.
>
> Q I apologize, I'm a little lost. Just a moment ago you testified, we had discussions that we were informally and formally married. Is that accurate?
>
> A That's not accurate.
>
> Q Okay. Thank you.
>
> A We had discussions—
>
> Q Did you—
>
> A —that we were married.

While Anderson agreed that she and Lewis had not discussed being "common law married," she testified that they did agree they were married and had an agreement they were married every year. After the 1977 divorce, she did not believe there was any reason to talk about a common law marriage with or remarrying Lewis, "[b]ecause he told me we were married."

The issue here of course is not whether Anderson agreed to be married--she testified that she agreed to be married to Lewis from 1974 until she filed this action. The issue is whether there is some evidence that after the divorce, Lewis also agreed to be married to Anderson. Anderson's testimony that in the years after the divorce, she and Lewis agreed they were married and that Lewis told her they were married is at least some evidence that Lewis did agree to be married to Anderson after the divorce. That Anderson did not remember the divorce later, does not negate an agreement to be married after the divorce. *See Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 737 (Tex. App.—Texarkana 1996, no writ) ("She may have been mistaken about the effectiveness of the divorce decree, but so long as she and Ricky met the requirements of a common law marriage sometime after the divorce and before he died, they were capable of entering into a new marriage after the acknowledged divorce."). It is undisputed that Lewis knew about the divorce; yet there is evidence that afterwards he told Anderson and others they were married. Anderson wanted to be married to Lewis and there is evidence that Lewis agreed with her after the divorce.

In addition to Anderson's direct testimony of an agreement to be married, the evidence of cohabitation and representations to others is circumstantial evidence of an agreement to be married. *See Russell*, 865 S.W.2d at 933 (stating agreement to be married may be shown by direct or circumstantial evidence or both). The jury could reasonably infer that Lewis and Anderson agreed to be married after their divorce.

Lewis relies primarily on *Gary v. Gary*, 490 S.W.2d 929 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.), a case decided some twenty years before *Russell*. However, each case must be decided on its own facts, *Russell*, 865 S.W.2d at 933, and we conclude *Gary* is distinguishable. *Gary* was a dispute over worker's compensation benefits between the parents of the deceased worker, Charles, and two woman who both claimed to be the common law wife of Charles. *Gary*, 490 S.W.2d at 931. After one of the women was dismissed on summary judgment, the jury heard

evidence and found the other woman, Wanda, was Charles's common law wife at the time of his death. *Id*. The evidence indicated that Wanda married Charles, her third husband, in 1960 and divorced him a year later. They remarried the next year, but Wanda obtained a second divorce later that year. After the second divorce, they lived together for a while in various cities for almost six years. However, the couple did not live together for at least a year before Charles's death and Wanda did not begin referring to herself as Wanda Cegale Gary until after his death. *Id*.

In *Gary*, Wanda did not argue she had an express agreement to be married to Charles, but asserted the evidence supported the finding of an implied agreement to be married. *Id*. 490 S.W.2d at 932. There was evidence that Charles occasionally introduced Wanda as his wife, but "[s]ince [Wanda] had twice been his wife by ceremonial marriage, and since neither [Charles] nor [Wanda] were sure their second divorce in 1962 was valid, the occasional use of the term 'wife' is of no probative value." *Id*. at 933. Further, there was evidence that neither party was sure that the second divorce was valid because they had not established residency in that county. They decided to resume living together thinking it was not necessary to go through another marriage ceremony. *Id*. The court of civil appeals stated that even if they agreed to go back together, because of the uncertainty over the validity of the second divorce, any agreement did not include an agreement to "become again husband and wife." *Id*. at 934. Thus, the appellate court concluded there was no evidence to support the jury's finding of a common law marriage. *Id*.

The facts here are different. Anderson does not rely solely on an implied agreement and there is at least some evidence of an express agreement to be married after the divorce. Therefore, it is not necessary to find evidence of an implied agreement. Moreover, neither Anderson nor Lewis dispute that the 1977 divorce terminated their 1974 ceremonial divorce. Anderson's 1978 note to Lewis acknowledged the "termination of our marriage." Anderson testified that she did not remember the divorce decree, but she did not dispute her signature on the documents. There is evidence that for the twenty years they lived together after the divorce, they both represented to others that they were presently married.

The evidence of an express agreement, the lack of doubt about the validity of the divorce, the long cohabitation and adoption of children, the representations of a present marriage for an extended time, and Lewis's willingness to sign or accept without question legal documents referring to an existing marriage with Anderson distinguish this case from *Gary*. We also distinguish *Gary* because the evidence of holding out in this case is more convincing than in *Gary*. *See Russell*, 865 S.W.2d at 932 ("evidence of holding-out must be more convincing than before the 1989 [amendment]") (quoting Joseph W. McKnight, *Family Law: Husband and Wife*, 44 SW. L.J. 1, 2-3 (1990)).

(b) Holding out of a New Marriage

Lewis argues that the fact that he and Anderson did not tell anyone they were divorced, negates a holding out of a subsequent informal marriage. He argues the evidence they represented they were married following the divorce, was a holding out of the earlier ceremonial marriage (that was dissolved by the 1977 divorce). We disagree. While the parties did not discuss the divorce,[4] Lewis also argues the equal inference rule prevents an inference of a holding out of a new agreement to be married following the divorce. He asserts the evidence of holding out

[4] The divorce decree was a matter of public record and its validity was never disputed. As a matter of law, the 1974 ceremonial marriage was terminated. Thus, when the parties later represented that they were presently married, the representation was of a new, current marriage rather than the old, previously terminated ceremonial marriage.

supports two inferences: (1) the parties represented they remained married under the 1974 ceremonial marriage; and (2) the parties represented they were married under a new post-divorce informal marriage. The equal inference rule applies in weak circumstantial evidence cases where the jurors would have to guess whether a vital fact exists. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). We conclude the equal inference rule does not apply because there was direct evidence of the holding out of a current marriage during the twenty years the couple lived together after their divorce. This is not a weak circumstantial evidence case; the jury was not required to guess whether Lewis and Anderson "represented to others that they were married." TEX. FAM. CODE ANN. § 2.401(a)(2).

Even so, the equal inference rule does not apply here because one of the competing inferences is not reasonable. Lewis argues it would be reasonable to infer from the evidence that the parties represented they remained married under the 1974 ceremonial marriage after the divorce. We disagree. There is evidence that after the divorce, both Lewis and Anderson represented to others that they were presently married. Some of this evidence was disputed; however, a reasonable jury could disbelieve the disputed evidence and resolve the disputes in favor of the finding of an agreement and holding out. Although there was evidence that the parties submitted the 1974 marriage certificate to the social worker in one or both of the adoptions, the undisputed facts remain that the ceremonial marriage was terminated by the 1977 divorce and that they represented they were presently married at the time of the adoptions.

Because the earlier ceremonial marriage had been terminated by the divorce, it is not reasonable to infer that the later representations of a present marriage were representations of the terminated marriage instead of a new agreement to be married. Certainly Lewis was aware of the divorce and the termination of the ceremonial marriage. The evidence that he later represented to others that he was presently married to Anderson leads to only one logical inference--the representation was of a new post-divorce marriage. Any inference that the parties could unilaterally nullify the divorce decree by holding out that they remained married under the 1974 ceremonial marriage would not reasonable.

(c) Date of the Marriage

Lewis argues there is no evidence to support the jury's finding that they were informally married on September 21, 1982, the date the first adoption petition was filed. This date is significant because the petition was a representation by the couple through their attorney that they were husband and wife. The couple had been living together since 1978. Anderson testified that she and Lewis had an agreement they were married every year. There is evidence that Lewis told the attorney who prepared the petition that he and Anderson were married. Evidence that the parties continued to represent that they were married when they later adopted a second child tends to corroborate that they were married by the time of the first adoption. Thus, there is evidence that by the time the first adoption petition was filed, all of the elements of an informal marriage existed. *See Winfield v. Renfro*, 821 S.W.2d 640, 646 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (elements may occur at different times, but until all three exist there is no common law marriage).

(d) Conclusion

Viewing the evidence in the light most favorable to the jury's finding, we conclude the evidence is such that reasonable minds could differ in their conclusions about whether Lewis and Anderson had an informal marriage. Crediting all favorable evidence that reasonable jurors could believe and disregarding all contrary evidence except that which they could not ignore, we

conclude the evidence is legally sufficient to support the jury's verdict. We resolve Lewis's first issue against him.

2. Factual Sufficiency of the Evidence

Lewis also argues the evidence is factually insufficient. To evaluate the factual sufficiency of the evidence to support a finding, we consider all the evidence and will set aside the verdict only if the evidence supporting the jury finding is so weak that the finding is clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Dyson v. Olin Corp*., 692 S.W.2d 456, 457 (Tex. 1985). This Court, however, is not a fact finder; we may not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact, even if a different answer could be reached upon review of the evidence. *See Clancy v. Zale Corp*., 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

Lewis argues there is no direct evidence of an agreement to be married nor of a holding out of a post-divorce informal marriage. We have already concluded there is legally sufficient evidence of an agreement to be married after the divorce and that the representations that the couple was married in the years following the divorce was a representation of a current marriage post-dating the termination of the ceremonial marriage. We do not repeat that discussion.

In support of the factual insufficiency issue, Lewis points to his testimony that he and Anderson never agreed to be married following their divorce and never discussed whether they were married or were going to be married. He also testified that in 1994, he made arrangements to remarry Anderson, but she refused, saying she would not consent to being married to him. He denied ever representing to anyone (their pastor, lawyer, the social workers, or the adoption courts) that he was married to Anderson after the divorce. He testified that Anderson told the representatives of Hope Cottage that she and Lewis were divorced. He said the 1997 joint tax return was a mistake and he had contacted the IRS about the mistake.

There is also evidence that Lewis and Anderson kept separate banking arrangements and that Anderson continued to use her maiden name. For example, in 1980, Anderson purchased a house individually as "Mindy Anderson, a single woman." However, when Anderson sold the house in 1985, the deed referred to her as "Mindy Anderson Lewis," but was signed on her behalf by her agent.

The record indicates much of the testimony was conflicting. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Golden Eagle Archery, Inc., v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). While not always clear and consistent, Anderson did testify to an agreement and holding out. It was up to the jury "to resolve conflicts and inconsistencies in the testimony of any one witness as well as in the testimony of different witnesses." *Ford v. Panhandle & Santa Fe Ry. Co*., 151 Tex. 538, 542, 252 S.W.2d 561, 563 (1952). After reviewing all the evidence, we cannot say the evidence is so weak that the jury finding of an informal marriage on September 21, 1982 is clearly wrong and unjust. Thus the evidence is factually sufficient to support the verdict. We resolve Lewis's second issue against him.

* * *

We affirm the trial court's judgment.

Notes, Comments & Questions

1. *Lewis v. Anderson* establishes that common law marriage is alive and well in Texas, even under the more stringent statutes.

2. Can you think of any other evidence that one might seek in proving a common law marriage?

3. Do not forget that a common law marriage can also be proved by statutory declaration. What are the requisites for such?