CHAPTER II
THE MARRIAGE RELATIONSHIP

Read Texas Family Code Chapters 1 and 2

A. Introduction

In Chapter I of this text, it was established that marriage is one of the basic fundamental rights of humankind and, pursuant to numerous United States Supreme Court opinions, one of the most protected rights under the United States Constitution. In this, Chapter II of the text, the focus is on the marriage relationship and Chapters 1 and 2 of the Texas Family Code.

In Chapter 1 of the Texas Family Code, we find general provisions regarding the marriage relationship, encompassing definitions, presumptions, and statements of public policy to name a few. Chapter 2 of the Texas Family Code is entitled, The Marriage Relationship and encompasses statutes governing the marriage relationship. In Texas, both formal (licensed/ceremonial) and informal (common law) marriages are addressed, the Texas Family Code setting forth the requisites for each type of marriage.

B. The Generalities Established in the Texas Family Code

While referred to as general provisions, TEXAS FAMILY CODE §§1.001-1.109 provide some of the most important definitions, presumptions, and public policy statements that one will find in the Texas Family Code. These provisions have affected the ultimate outcome of numerous cases and therefore one should be familiar with them. Accordingly, the most important of those provisions are worthy of attention.

1. TEXAS FAMILY CODE §1.003. It is made clear that dissolution of a marriage is not a reference limited to divorce, but also includes annulment and suits to declare a marriage void. Though not listed in TEXAS FAMILY CODE §1.003, one must not forget, especially for marital property issues, that death of a spouse also dissolves a marriage.
2. TEXAS FAMILY CODE §1.101. Texas public policy regarding the sanctity of marriage is also established in these generalities. In TEXAS FAMILY CODE §1.101, with the goal of promoting public health and welfare, and to provide necessary records regarding marriage relationships, it is established that the public policy of Texas is to preserve and uphold each marriage against the claims of invalidity, unless a stronger reason exists for holding the marriage void or voidable. Thereafter, in TEXAS FAMILY CODE §1.103, there is reference to Chapter 6 of the Title 1 where it becomes clear that this Texas public policy does have its limits. Specifically, under §6.204, an exception, albeit a currently unconstitutional exception, is still part of the Texas Family Code. Specifically, same sex marriages are still deemed void under section TEXAS FAMILY CODE §6.204. While the statute is currently ineffective in barring same sex marriages, there is the possibility that TEXAS FAMILY CODE §6.204 provides the makings of a zombie statute. That is, should *Obergefell* ever be overturned, this section may be resurrected along with other unrepealed but unconstitutional statutes.
3. TEXAS FAMILY CODE §1.102. When multiple marriages exist for a partner or partners to the marriage, it is established under §1.102 that the most recent marriage is rebuttably presumed

to be valid as against each marriage that precedes it until a prior marriage is proved to be valid, i.e., undissolved.

4. TEXAS FAMILY CODE §1.103. The Code provides that Texas law applies to people who were married elsewhere and in accordance with the laws of this state and are domiciled in this state.
5. TEXAS FAMILY CODE §1.104. Likewise, a person, regardless of age, who has been married in accordance with the laws of Texas, has the capacity and power of an adult, including the capacity to contract. However, as we progress through the course, we will see that in Texas, those under the age of 18, can only be married in Texas if their disabilities of minority are removed by court order. Even parents cannot consent to the marriage of a child under the age of 18. For example, *Broussard v Arnel*, 596 S.W.3d 911 (Tex. App. – Houston [1st District] 2019, no pet.) a mother, in defending against a father's claim to custody of their son, traveled to Missouri with her child, and "married him off." This marriage was an attempt, by mother, to get the father's custody case dismissed. However, the appellate court found that prior to the marriage of the child there was no court order removing his disabilities; therefore, the child was not married in accordance with the laws of Texas. Accordingly, the child was not emancipated and the father's suit for custody, pending in Texas, would continue.
6. TEXAS FAMILY CODE § 1.106 & §1.107. Texas has withdrawn authorization for suits of criminal conversation and alienation of affection. Please be ready for class discussion regarding exactly what these two causes of action encompass, as well as the legislative rationale for disallowing these causes of action.

C. The Marriage License & the Ceremony

A ceremonial marriage, also known as a formal marriage, is the most common type of marriage. The Texas Family Code establishes the basic requisites for entering into a ceremonial marriage in Texas. A review of the relevant statutes is, for your convenience, set forth below. This over view should not substitute for a careful reading of the statutes.

1. TEXAS FAMILY CODE §2.001. When it comes to ceremonial, formal marriages, a license must be obtained through the state of Texas. TEXAS FAMILY CODE §2.001 clearly establishes that if a man and woman desire to enter into a ceremonial marriage, they must obtain a license. The legislature makes clear in TEXAS FAMILY CODE §2.001(b) that, in Texas, marriage licenses cannot be issued to a same-sex couple. Of course, this statutory mandate, runs afoul of the United States Supreme Court opinion of *Obergefell* wherein a state's attempt to disallow or fail to recognize same sex marriages was deemed unconstitutional. While the statute is currently ineffective in barring same sex marriages, there is the possibility that TEXAS FAMILY CODE §2.001 provides the makings of a zombie statute. That is, should *Obergefell* ever be overturned, TEXAS FAMILY CODE §2.001 will be resurrected.
2. TEXAS FAMILY CODE §2.002. In order to obtain the required license, couples desiring to marry must apply to the county clerk for such and must present proof of age, identity, and answer a variety of questions. The couple must also take an oath and sign the application.
3. TEXAS FAMILY CODE §2.003. If a minor seeks to be married, the only means by which a minor may obtain a marriage license is by obtaining an order from a court of this state, or

another state, which removes their disabilities of minority for general purposes. A parent cannot give their minor child permission to marry in Texas.

4. TEXAS FAMILY CODE §2.004. The marriage license application must conform to numerous state requisites. Some of these requisites are: applicants' full names; wife's maiden name; Social Security number; date of birth and place of birth; proof of identity and age; an answer as to whether an applicant has been divorced within the last 30 days; an answer as to whether either applicant is presently married; whether the applicant is currently delinquent in the payment of court ordered child support; answers as to whether the applicants are within one of the six prohibited degrees of consanguinity.

   Because marriage is prohibited if the applicants are within certain degrees of consanguinity, marriage licenses will be denied such "related" applicants. A marriage between applicants within prohibited degrees of consanguinity are void, with one exception. Specifically, TEXAS FAMILY CODE §2.004 (6) (F) provides that one cannot obtain a marriage license if the other applicant is the son or daughter of a parent's brother or sister of the whole or half blood or by adoption. That is, a marriage license will not be issued to first cousins. However, first cousins are not deemed to have entered into a void marriage per TEXAS FAMILY CODE §6.202. What is the rationale for disallowing the issuance of marriage licenses to first cousins but not declaring said marriage is void?

5. TEXAS FAMILY CODE §2.005. While TEXAS FAMILY CODE §2.004 requires proof of identity and age, TEXAS FAMILY CODE §2.005 provides a laundry list of documents that might be utilized in establishing one's identity and age for the purpose of obtaining a marriage license.

   The following documents are included in this laundry list: a state issued driver's license; passports; residence cards; military identifications; an original or certified copy of a birth certificate; secondary or beyond school records; a motor vehicle certificate of title; a voter's registration certificate; a pilot's license; a license to carry a handgun; and, an original or certified copy of a court order relating to the applicant's name change or sex change. While inclusion of a sex change order appears progressive, the case of *In re McReynolds*, 502 S.W.3d 884 (Tex. App. – Dallas 2016, no pet.) makes clear that TEXAS FAMILY CODE §2.005 (b)(8) does not authorize Texas courts to render sex change orders. The court explains in the *McReynolds* case, that other states or countries may have procedures for sex change orders, and that such orders are proper means of establishing an applicant's age or identity.

6. TEXAS FAMILY CODE §2.006. Texas also provides a means by which an act absent applicant can obtain a marriage license. Such accommodation is available for only one (not two) absent applicant unless the applicants are members of the Armed Forces of the United States, stationed in another country, and in support of combat or another military operation. The absent applicant must prepare and have filed an affidavit, the requisites, of which pretty much mirror the requisites of a marriage license application. Under TEXAS FAMILY CODE §2.0071, the county clerk is responsible for maintaining all records relating to the license for an absent applicant.
7. TEXAS FAMILY CODE §§2.008 – 2.012 establish duties of the county clerk including: execution of the application by the clerk; issuance of the license; arrangements for the issuance of licensing through remote technology; making available AIDS information; and, establishing penalties, should the county clerk violate any of their duties.
8. TEXAS FAMILY CODE §I2.101. Reiterates that a county clerk may not issue a marriage license if either applicant is under 18 years of age unless each under age applicant has been granted, by this state or another state, an order removing their disabilities of minority.

9. TEXAS FAMILY CODE §§ 2.201. Under TEXAS FAMILY CODE §2.201, a marriage ceremony must be conducted before the 90th day after the license is issued, if 90 days or more, the license will be expired.
10. TEXAS FAMILY CODE §2.202 A number of persons are authorized to conduct marriage ceremonies. These authorized officiants include: licensed or ordained Christian ministers or priests; Jewish rabbis; officers of a religious organization, authorized by the organization, to conduct a marriage ceremony; as well as current, former, or retired, federal or state judges. If a person, outside of this select group, conducts, a marriage ceremony an offense has been committed. Upon receiving an unexpired marriage license, an authorized person may conduct the marriage ceremony.
11. TEXAS FAMILY CODE §2.203. The Texas family code provides no set form for the marriage ceremony nor is the officiant required to ask particular questions or obtain particular answers. Indeed, as was established in *Coulter v. Melady*, 489 S.W. 2d 166 (Tex. App. – Texarkana 1972, writ ref'd n.r.e.) a wife, who failed to audibly respond to questions posed to her during the ceremony does not raise a fact issue as to her consent to the marriage because her prior actions established her consent as a matter of law.
12. TEXAS FAMILY CODE §2.204. This section requires that a marriage ceremony may **not** take place for 72 hours following the issuance of the marriage license. There are, however, within this section, several situations in which the 72 hour waiting period does not apply including: (1) The applicant is a member of the armed services and on active duty; (2) the applicant works for the department of defense; (3) the applicant obtains, a written waiver of the waiting period from a judge; or, (4) the applicant has taken a qualifying premarital education course.
13. TEXAS FAMILY CODE §2.205. In conducting a marriage ceremony, anyone who is authorized to conduct a marriage cannot discriminate on the basis of race, religion, or national origin against an applicant who is competent to be married. However, a statutory escape from application of §2.205 is provided. Specifically, under TEXAS FAMILY CODE §2.601, a religious organization, or one employed by a religious organization, and acting within the scope of that employment, may not be required to solemnize any marriage, or provide services, accommodations, facilities, goods, or privileges, if such would violate a sincerely held religious belief. Under TEXAS FAMILY CODE §2.602, these persons are protected from civil or criminal causes of actions for refusal to conduct a marriage ceremony.
14. TEXAS FAMILY CODE §2.301. Even though, there are massive requirements and questions and steps to take to obtain a marriage license in the state of Texas, under §2.301, the validity of a marriage is not affected by any fraud, mistake, or illegality, that occurred in obtaining the marriage license.
15. TEXAS FAMILY CODE §2.302. The validity of a marriage is not affected by the lack of authority of the person, conducting the marriage ceremony if:
    (a) the person conducting the ceremony had a reasonable appearance of authority;
    (b) at least one party to the marriage participated in the ceremony in good faith, and that party treats the marriage as valid;
    (c) neither party to the marriage is a minor; and,
    (d) the marriage entered into is not a bigamous marriage.

D. Texas Marriage License Evidences Earlier Ceremonial Marriage, No Ceremony in Texas Required

SHIKE
v.
SHIKE

No. 14-97-00888-CV, 2000 WL 490696
(Tex. App.—Houston [14th Dist.] April 27, 2000, pet. denied)
(Not Designated for Publication in S.W.3d)

Panel consists of JUSTICES CANNON, DRAUGHN and LEE.

OPINION

DRAUGHN.

John Shike appeals from a divorce decree entered in favor of Saba Hameed Shike. In two points of error, he contends that the trial court erred by commenting on the weight of the evidence and instructing the jury that he and Mrs. Shike were married. We affirm the judgment of the trial court.

Background

John and Saba Shike married in 1992. A few months later, Mrs. Shike left her husband after he had beaten her son. In September 1992, Mr. Shike filed a pro se petition for divorce. He received a default judgment in May 1993; the judgment, however, was set aside after both parties filed an affidavit requesting the court to allow them to work on their marriage. Two months after the two reconciled, Mrs. Shike left again when Mr. Shike broke her finger and beat her. In November 1996, a jury found that the parties should be divorced. They awarded Mrs. Shike actual damages totaling $447,000 for various torts committed by Mr. Shike and exemplary damages totaling $1,125,000.

* * *

Directed Verdict

In his second point of error, Mr. Shike contends that the trial court committed reversible error when it instructed the jury that John Shike and Saba Hameed Shike were married. The instruction resulted from a directed verdict requested by Mrs. Shike. Mr. Shike argues that a directed verdict was improper because he introduced evidence to show that he never intended to marry Mrs. Shike. We find the trial court did not err by granting a directed verdict; the evidence conclusively proves that Saba and John Shike were, in fact, married.

Standard of Review

A movant is entitled to a directed verdict when (1) the evidence conclusively proves a fact that establishes her right to judgment as a matter of law, or (2) negates the right of the nonmovant to judgment, or (3) the adverse evidence offered is insufficient to raise a fact issue on the cause of action. See *Metzger v. Sebek*, 892 S.W.2d 20, 40 (Tex. App.—Houston [1st Dist.] 1994, writ denied). In reviewing the granting of a directed verdict, we must determine whether there is any evidence of probative force to raise fact issues on material questions. See *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994); *Metzger*, 892 S.W.2d at 41. We consider all the evidence in the light most favorable to the party against whom the verdict was directed and disregard all contrary evidence and inferences. *Szczepanik*, 883 S.W.2d at 649; *Metzger*, 892 S.W.2d at 40. If, however, the probative force of certain testimony is so weak that only a mere surmise or suspicion is raised as

to the existence of essential facts, here, the non-existence of a valid marriage, we will uphold the trial court's ruling on the directed verdict. See *I.T.T. Consumer Fin. Corp. v. Tovar*, 932 S.W.2d 147, 160 (Tex. App.—El Paso, writ denied).

Agreement to be Married

Mr. Shike argues that he never agreed to be married to Mrs. Shike. To show an agreement to be married, the evidence must show that the parties intended to have a present, immediate, and permanent marital relationship and that they agreed to be husband and wife. See *Winfield v. Renfro*, 821 S.W.2d 640, 645 (Tex. App.—Houston [1st Dist.] 1991, writ denied). Proof of an agreement to be married, however, is only necessary when establishing the existence of an informal marriage. The evidence, in this case, conclusively proves that John and Saba Shike did not enter into an informal marriage, but followed the procedures for a ceremonial marriage.

Ceremonial Marriage

Mr. Shike obtained an application for a marriage license on April 1, 1992. He asked Judge Sharolyn Wood to waive the 72 hour waiting period. The period was waived and Mr. Shike took the license to Hafiz Iqbal, his pastor. Iqbal did not perform a ceremony. He determined the two had already been married in Pakistan. Prior to her arrival in Texas, the parties were married in a Muslim ceremony known as Nikkha, but neither was aware the ceremony was actually a marriage ceremony. They both thought the Nikkha signified their engagement. Because the ceremony had been performed, Iqbal signed the marriage license. The license was executed on April 3, 1992.

Prior to trial, the court found that a ceremony was not performed on April 2, 1992. The evidence at trial also showed that a ceremony was not performed on that date. The validity of the marriage license, however, was not affected by this mistake. See TEX. FAMILY CODE § 2.301 (Vernon 1998). Both parties had previously entered into marriage in Pakistan through the performance of a Muslim marriage ceremony. They followed the proper procedures to obtain a marriage license in Texas. After the parties were informed that a Nikkha was a recognized marriage ceremony, they continued forward with the process and did not object to Hafiz Iqbal signing the license. Therefore, we find Iqbal's signing of the license without performing a ceremony did not affect the validity of the already existent marriage between John and Saba Shike; it merely confirmed it in accordance with Texas law.

Furthermore, Mr. Shike's claim that he did not intend to be married finds little support in the record: he listed Mrs. Shike as his wife on his 1992 tax return; he sent her cards asking her to work on their marriage; his pleadings asserted that he had been married to Mrs. Shike in Goat Mattchi, Sadakabad, Pakistan; he previously filed a pro se divorce petition that stated he was married on or about April 3, 1992; he requested the court to set aside the divorce so they could give their marriage another chance; he shared a bedroom with Mrs. Shike; he introduced her as his wife; the lease for his apartment had both his name and Mrs. Shike's name; he signed a mental health warrant, referring to Mrs. Shike as his wife, to have her committed.

Because the evidence conclusively proves that the Shike's were married, the trial court did not commit reversible error by instructing the jury that they were, in fact, married. We overrule Mr. Shike's second point of error.

Having addressed all Mr. Shike's points of error, we affirm the judgment of the trial court.

Notes, Comments & Questions

1. What is the legal effect on the validity of a marriage if someone commits fraud in obtaining a marriage license?

2. What is the legal effect on the validity of a marriage if someone makes a mistake in obtaining a marriage license?

E. Common Law Marriage Wanes throughout the United States

Having begun teaching family law decades ago, the prevalence of states allowing for the creation of common law marriages has decreased by about one half. Today, there are seven states that recognize the creation of common law marriage within their borders without reservation. Those states are: Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, and, of course, Texas. In addition, the District of Columbia also recognizes common law marriage created within the District. By stating that recognition is without reservation, what is meant is that the state fully embraces common law marriage established within their state as long as the legal requirements are met.

In contrast, there are a number of states that recognize common law marriage in limited circumstances, usually when such a marriage began in the state before a specified date. For example, Indiana recognizes a common law marriage, if that marriage began before January 1, 1958. The following states also have date limited recognition of common law marriages, they are: Florida, if before January 1, 1968; Ohio, if before October 10, 1991; Idaho if before January 1, 1996; Georgia, if before, January 1, 1997; Pennsylvania, if before January 1, 2005; Alabama, if before, January 1, 2017; and, South Carolina if before July 24, 2019. New Hampshire recognizes common law marriage created within the state only for purposes of inheritance.

While only a few states allow for the creation of common law marriages within their boundaries, pursuant to the full faith and credit clause, all states will recognize a common law marriage if a couple is married in a common law marriage state, meeting all the requisite's for a common law marriage from that state.

However, problems do arise when couples residing in a non common law marriage state visit a common law marriage state and then attempt to claim that a common law marriage arose during that temporary stay. You will find an excellent 2022 updated article by Karen Schultz addressing such problems in BrightSpace, from 52 AmJur 64. The article is entitled, Recognition of Common Law Marriage Entered into in Foreign State — Temporary Visits.

Legal issues also arise when a state must decide whether a common law marriage will be recognized for same sex couples when that marriage predates *Obergefell*. These issues will be discussed in class.

F. 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.

G. 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 marriage

[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 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-

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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.

[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.

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 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).

H. Common Law Marriage Requires a Clear Agreement to be Married

In a very recent case, the Corpus Christi Court of Appeals made clear that common law marriage requires a very clear agreement to be married. *In Estate of Sinatra v. Sinatra*, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, pet. denied), the court opined:

> ". . . the [wife] did not testify that [ex-husband] ever agreed to be married. In fact, when asked on direct-examination, when [ex-husband] agreed to enter into a common-law marriage with [her, wife] stated that she believed that [husband] had agreed shortly after the 2001 divorce because according to [her], nothing had changed in their relationship after the divorce. [Wife] believed that after a legal divorce, if the relationship does not change, then the marriage continues. However, an agreement to create a common marriage must be specific and mutual. See *Gary v. Gary*, 490 S.W.2d 929, 932 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.). Here, it is clear from [wife's] testimony that she believed that the couple entered a common law marriage because the couple continued their relationship and not because [ex-husband] had agreed or shown an intent to enter into a common law marriage. See *id*. (explaining that agreement must be mutual); see also *Burden v. Burden*, 420 S.W.3d 305, 308-09 (Tex. App.—Texarkana 2013, no pet.) (concluding that as a matter of law there was no evidence that the couple agreed to enter into a common law marriage even though one party testified that the couple continued cohabitating after their divorce and that her ex-spouse told her that their previous divorce "meant nothing" and that "everything would be the same").
>
> And, although when asked by the trial court if she was telling the court that she and [ex-husband], despite their divorce, "agreed to continue the marriage," [wife] generally stated, "Yes," she could not and did not specify when [ex-husband] agreed to be married and did not provide any evidence that [ex-husband] had an intent to be married to her after the 2001 divorce. **Therefore, we conclude that [wife's] answer to the trial court's question regarding whether she claimed the couple agreed to continue the marriage constitutes no evidence to support the trial court's finding that [ex-husband] intended to enter into a common-law marriage with [wife] and agreed to the marriage because it is meager circumstantial evidence.** See *Jelinek v. Casas*, 328 S.W.3d 526, 538 (Tex. 2010) (citing *City of Keller*, 168 S.W.3d at 814); *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (holding that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence where circumstantial evidence is slight, and something else must be found in record to corroborate probability of fact's existence). (emphasis added)

I. Common Law Marriage Requires Holding Out in Texas

The opinion of *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App. – Houston [1st Dist.] 1991, writ denied) is a procedural masterpiece and it is recommended that the entirety be read should you ever be in need of a clear review of legal and factual sufficiency of the evidence analysis. Justice Michol O'Connor's majority opinion is an excellent appellate procedural teaching tool.

In addition to the evidentiary review, the opinion is also instructive as regards the jury charge and how the omission of 2 words from the jury charge can destroy a trial level victory. In *Winfield*, 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 honor about April 11, 1982?"

In connection with the foregoing question, the jury was instructed as to the elements of common law marriage as follows:

1. A mutual agreement to be husband and wife.
2. And, after that this agreement, they live together in this state as husband and wife.
3. And, represented to others that they were married.

In response to the foregoing, the jury unanimously answered yes, that the parties had entered into an informal common law marriage. However, in light of the statute, the third element listed above should have been:

3. And **there** represented to other others that they were married.

The charge, fashioned by the trial court judge, deleted the word **there**.

The appellate court determined, that the deletion of the word **there**, was reasonably calculated to cause, and probably did cause the rendition of an improper verdict in light of the facts presented at trial. Specifically, while there was evidence that the couple did hold out as husband and wife in Texas, there was also evidence presented to the jury that the couple had been referred to as husband and wife while attending a basketball game in the Bahamas. Indeed, a photograph was published in a Bahamian newspaper identifying the couple as Mr. and Mrs. David Winfield.

Because the jury could have based their answer on either the holding out as husband and wife in Texas or upon the Bahamian holding out, it was determined that the deletion of the word **there** was harmful error and thus reversible error; a new trial was ordered.

The case, was ultimately settled, after review was denied by the Texas Supreme Court.

J. Circumstantial Evidence Can be Considered when Determining the Existence of a Common Law Marriage

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 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 there 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 the couple lived

together as husband and wife and there 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.

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]

K. Prior Divorce Does NOT Bar Current Common Law Marriage

Lewis v. Anderson 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

[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.

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 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

[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.

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?

4. In the foregoing case of *Lewis v. Anderson*, the couple had gone through an earlier divorce, as had the couple in *Sinatra v. Sinatra*, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, pet.

denied). However, the outcomes were different, in *Lewis* the common law marriage was upheld and in *Sinatra,* it was not. To what would you attribute this different outcome?

L. A Delayed Wedding Ceremony Does NOT Negate an Earlier Common Law Marriage

MUNOZ
v.
OVALLE
2023 WL 8251588
(Tex. App. – Dallas November 29, 2023, no pet.)

MEMORANDUM OPINION
NANCY KENNEDY JUSTICE

Norma Ovalle filed her original petition for divorce from Henry Munoz. Ovalle later amended her petition to assert claims against Henry's adult daughter Maritza Munoz related to certain real property Henry deeded to Maritza, which Ovalle claimed was community property. Maritza filed a counterpetition, in which she asserted several claims against Ovalle and sought a declaration that certain real property belonged to Maritza. The case proceeded to a bench trial, and the trial court later signed a final decree of divorce. This appeal followed.

In two issues, Henry argues in rendering the final decree of divorce the trial court erred by finding (1) he and Ovalle were informally married in August 2005 and (2) that certain real properties were community properties rather than Henry's separate properties. . . . [only the first issue will be presented here]

We affirm the trial court's final decree of divorce. Because all dispositive issues are settled in law, we issue this memorandum opinion. See TEX. R. APP. P. 47.2(a), 47.4.

FACTUAL AND PROCEDURAL BACKGROUND

Ovalle and Henry met at the end of 2003 and began dating in 2004. In early August 2005, the couple traveled to Mexico where they agreed to be married. Upon return from their trip, they began cohabitating together at a residence in Plano, Texas (Plano Property), with Ovalle's then-minor daughter D.M. and two of Henry's children. . . . In July 2008, the couple applied for a marriage license and held a marriage ceremony on July 12.

In January 2019, Henry was arrested and charged with sexually assaulting D.M., and the couple separated. On February 22, Ovalle filed an original petition for divorce from Henry. In May, Ovalle filed her first amended petition, changing the date of marriage from July 12, 2008, to August 2005. . . .

The case proceeded to trial before the court, which was held virtually through Zoom conferencing, on August 26, 2020. At that trial, the court heard testimony from Ovalle, Maritza, Ovalle's two sisters, and Ovalle's friend and co-worker, and from Maritza's attorney on the issue of

Maritza's attorney's fees.[1] At the conclusion of the trial, the court issued several oral rulings and findings, including that Henry and Ovalle were informally married in August 2005, the deed of the Ashwood Property from Henry to Maritza was void, and denying Ovalle's and Maritza's respective requests for attorney's fees. On December 15, 2020, the trial court signed the final decree of divorce, which included the earlier oral findings and rulings.

On January 14, 2021, Henry filed a motion for new trial. On January 19, Henry and Maritza filed a joint amended motion for new trial. The motion for new trial was denied by operation of law.

* * *

DISCUSSION OF HENRY'S ISSUES

Henry and Ovalle were Informally Married in 2005

In his first issue, Henry challenges the legal and factual sufficiency of the evidence to support the finding that he and Ovalle were informally married in August 2005, urging that he and Ovalle only agreed to be married at a future date, did not cohabitate as husband and wife until after the 2008 ceremony, and that they did not represent to others that they were married.

When a case is tried to the court, as here, we review the trial court's findings of fact in the same manner as a jury's answers to jury questions. *In re J.G.S.*, No. 05-18-00452-CV, 2019 WL 336543, at *2 (Tex. App.—Dallas Jan. 28, 2019, no pet.) (mem. op.) (citing *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *In re Estate of Walker*, No. 02-08-00371-CV, 2009 WL 1996301, at *2 (Tex. App.—Fort Worth July 9, 2009, no pet.) (mem. op.)). In reviewing the factual sufficiency of the evidence, we weigh all of the evidence in the record and overturn the finding only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. See *In re A.D.J.*, No. 05-17-01437-CV, 2019 WL 1467962, at *5 (Tex. App.—Dallas Apr. 3, 2019, no pet.) (mem. op.) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam)). In a legal sufficiency review, we consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. See *id*. (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). We must credit the favorable evidence if a reasonable factfinder could and disregard the contrary evidence unless a reasonable factfinder could not. See id. (citing *City of Keller*, 168 S.W.3d at 827). In a bench trial, the trial court is the factfinder and the sole judge of the witnesses' credibility and the weight to be given their testimony. See *In re N.A. F.*, No. 05-17-00470-CV, 2019 WL 516715, at *5 (Tex. App.—Dallas Feb. 11, 2019, no pet.) (mem. op.).

An informal marriage may be proven by evidence the couple agreed to be married and, after the agreement, they lived together in this state as spouses and represented to others in this state that they were married. See TEX. FAM. CODE § 2.401(a). An agreement to be informally married may be established by direct or circumstantial evidence. See id. § 2.401(a)(2); *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). Evidence of cohabitation and holding out the other party as one's spouse may constitute some evidence of an agreement to be married depending on the facts of the case. *Assoun v. Gustafson*, 493 S.W.3d 156, 160 (Tex. App.—Dallas 2016, pet. denied). Because in modern society it is difficult to infer an agreement to be married from cohabitation, evidence of "holding out" must be particularly convincing to be probative of such an agreement. *Id*. Holding out requires more than

[1] In February 2020, Henry was convicted of sexually assaulting D.M. and was sentenced to twelve years' imprisonment. He did not appear at trial in person, virtually, or telephonically.

occasional references to each other as "wife" or "husband." *Smith v. Deneve*, 285 S.W.3d 904, 910 (Tex. App.—Dallas 2009, no pet.). A couple's reputation in the community as being married is a significant factor in determining the holding out element. *Id.*

Here, Henry does not dispute that he agreed to be married to Ovalle, but he argues that they both agreed in August 2005 to be married at a future date and did not do so until the formal ceremony was performed in 2008. The record contains the following evidence regarding the parties' agreement to be informally married and whether they lived together as husband and wife or were merely engaged to be married until the formal ceremony in July 2008. Ovalle testified she considered herself to be married to Henry on August 15, 2005, and that about a week after their trip to Mexico, she and Henry moved in together at the Plano Property. She also testified that in 2005 Henry and she told her daughter D.M. and Henry's children from previous relationships, as well as other family members and members of their church, that they were married. Ovalle attested that on her birthday in September 2005, Henry purchased a ring for her that she wore on her wedding finger. In addition, Ovalle indicated that Henry then asked her if she wanted a house or a wedding ceremony, and she chose a house, which led to the purchase of the Royce City Property.

On cross-examination, Ovalle acknowledged that she responded to certain discovery requests with the statement that she and Henry "both agreed to a delayed marriage." On redirect examination, Ovalle said that what she meant by "delayed marriage" was that they did not have a ceremony right away because they did not have the funds to pay for a celebration that would include all of their guests.

Henry argues that the foregoing evidence establishes that he and Ovalle agreed in 2005 to be married in the future, specifically July 2008, when they applied for a marriage license and participated in a ceremony. We conclude, however, that, viewed in the light most favorable to the trial court's finding and indulging every reasonable inference that would support it, the record contains legally sufficient evidence to support the trial court's findings that Henry and Ovalle agreed to be married in 2005 and thereafter lived together as spouses. *See* FAM. § 2.401(a)(2); *In re A.D.J.*, 2019 WL 1467962, at *5 (citing *City of Keller*, 168 S.W.3d at 822). Further, we conclude the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. See *In re A.D.J.*, 2019 WL 1467962, at *5 (citing Cain, 709 S.W.2d at 176).

Having concluded the evidence of the first two elements of informal marriage to be legally and factually sufficient, we now address the sufficiency of the evidence to establish Henry and Ovalle holding themselves out as husband and wife in their community. Arlene Benitez testified she was Ovalle's friend and coworker, that she had met the couple in 2004 and that both Henry and Ovalle told her in 2005 that they were married to each other. Benitez testified she heard them refer to each other as husband and wife "[o]ver a hundred times" at parties and when Henry visited Ovalle at the office. Alma Robles and Elizabeth Morales testified separately that they were Ovalle's sisters. Robles testified she became aware that Henry and Ovalle were married when she helped them move in together in August 2005 after returning from their trip to Mexico. According to Robles, she attended the ceremony in 2008 as a bridesmaid and understood the ceremony was "just to . . . make it legal." Morales offered similar testimony that when Henry and Ovalle moved in together in 2005, they began referring to each other as husband and wife. Ovalle testified that in 2005 Henry and she told her daughter D.M. and Henry's children from previous relationships, as well as other family members and members of their church, that they were married. Ovalle also testified that when they moved to Royce City, they began going to a new church where they introduced themselves as husband and wife.

Maritza testified she attended the ceremony in 2008 and did not believe Henry was married to Ovalle prior to same. According to Maritza, she never heard Henry refer to Ovalle as his wife. As the

factfinder, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony and thus could have found credible those who testified that Henry and Ovalle held themselves out as spouses between August 2005 and July 2008. See *In re N.A. F.*, 2019 WL 516715, at *5.

The record also contains evidence that Ovalle filed several income tax forms as "head of household" rather than "married" or "married filing jointly" and that Ovalle indicated on the application for a marriage license in 2008 that she was not married at that time. Henry relies on the tax forms and application for marriage license that Ovalle signed to argue the insufficiency of the evidence to support a finding that they held themselves out as spouses. In support of his argument, he relies on cases from other appellate courts that concluded evidence that a putative spouse's filing federal income tax returns as "single" weighed against finding of the holding out element of informal marriage. See *Small v. McMaster*, 352 S.W.3d 280, 286 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *Winfield v. Renfro*, 821 S.W.2d 640, 650 (Tex. App.—Houston [1st Dist.] 1991).

We conclude these cases are factually distinguishable as in each case there was much more evidence to weigh against a finding of holding out than exists on the record here. See *Small*, 352 S.W.3d at 286 (putative wife admitted that putative husband wanted to "conceal the fact of his marriage," failed to represent she was married in insurance dispute, was aware of putative husband's later marriage to another woman but failed to challenge the legitimacy of that marriage); *Winfield*, 821 S.W.2d at 650 (noting that even by putative wife's testimony, marriage was "largely a secret marriage" only known to few relatives and acquaintances of putative wife). Further, even in Winfield, the court noted that had the record in that case been replete with other evidence that showed an informal marriage, the evidence of the tax return and insurance application would be less significant. See *Winfield*, 821 S.W.2d at 650; see also *Malik v. Bhargava*, No. 05-13-00384-CV, 2014 WL 1022358, at *1 (Tex. App.—Dallas Feb. 19, 2014, no pet.) (mem. op.) (noting evidence in record indicated "no dispute" putative spouses represented to others that they were married despite some evidence that putative spouses filed separate federal income tax returns indicating they were both "single").

We conclude, that, viewed in the light most favorable to the trial court's finding and indulging every reasonable inference that would support it, the record contains legally sufficient evidence to support the trial court's findings that Henry and Ovalle held themselves out to their community as spouses. See FAM. § 2.401(a)(2); *In re A.D.J.*, 2019 WL 1467962, at *5 (citing *City of Keller*, 168 S.W.3d at 822). Further, we conclude the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. See *In re A.D.J.*, 2019 WL 1467962, at *5 (citing Cain, 709 S.W.2d at 176).

We overrule Henry's first issue.

* * *

CONCLUSION

We affirm the trial court's December 15, 2020 final decree of divorce.