History of Marriage and Common Law Marriage

The New York Times of June 26, 1989 reported that Sandra Jennings and actor William Hurt were engaged in a trial in New York's Supreme Court. It was reported that Ms. Jennings, who gave birth to a son while living with Mr. Hurt, was "fighting an uphill battle" in her efforts to prove to Judge Jacqueline Silberman that she and Hurt had entered into a "common law" marriage in South Carolina when they lived together while he was filming the movie, "The Big Chill" there in 1982 and 1983.1 Ms. Jennings testified that Mr. Hurt had told her that they had "a spiritual marriage, that we were married in the eyes of God," during the period between December 3, 1982, when Mr. Hurt obtained a divorce from the actress Mary Beth Hurt, and January 10, 1983, when he and Ms. Jennings left South Carolina to live in New York. According to the report, Ms. Jennings brought the action to establish a "common law" marriage after Mr. Hurt's attitude towards her had cooled off.2

In Jennings v Hurt, the Supreme Court had previously denied3 Ms. Jennings' application for pendente lite maintenance without prejudice to her proving her case at trial, because she had failed to demonstrate a reasonable probability of success on the merits. The court held that Ms. Jennings had failed to establish on her motion that she had contracted a valid common-law marriage in South Carolina with Mr. Hurt, but granted her the right to try to prove her case at trial. At that time, the court also denied Ms. Jennings' request for interim child support for the parties' five-year-old child, because Mr. Hurt had made tax-free, voluntary child support payments. The court also denied Ms. Jennings' request for interim counsel fees, accountant's and appraiser's fees, holding that the financial issues had to await a determination that there was a valid marriage. This trial, which was "Broadcast News" throughout the country,4 focused on Ms. Jennings' attempt to prove that there was, in fact, a common-law marriage.

While Sandra Jennings' attempt to establish a "common law" marriage received much notoriety because of her lover's popularity and reputation for his recent performances in the movies, "The Accidental Tourist" and "Broadcast News", those of us who recall the music of the 50's were equally impressed by the First Department decision in Lyman v Lyman,5 which held that the petitioner, a former singer with "The Platters", had failed to establish that she and Frank Lyman (whose 1956 recording of "Why Do Fools Fall In Love?" had made him a recording and performing star)had entered into a common-law marriage in the State of Pennsylvania in 1965.

Both of these cases raise several questions about marriage: What is marriage? How is it contracted? What is a common-law marriage? Is it different from an ordinary marriage? Must one achieve celebrity status to be a defendant in an action to establish a common-law marriage?

The term "common-law marriage" is a misnomer because it refers to a "law of marriage" which we supposedly inherited from England when we adopted its common law on July 4, 1776.6 This is because there was no common law of

marriage in England on July 4, 1776. The early Anglo-Saxon form of marriage involved a betrothal, by which the bride's father or relatives agreed to transfer the "mund," or custody for protection, of the bride to the bridegroom. In return the bridegroom agreed to make a transfer of property to them, or make a settlement of property upon the bride, and, in addition, to care for and protect her. Following the betrothal, the bride's family delivered the bride to the groom, who made the promised settlement in return. After the Norman Conquest, the power to regulate marriage was given to the Church and the ceremony took place in the presence of a priest. The wedding ring was given as a pledge that the bridegroom would perform his covenants. The additional ecclesiastical requirement of thrice publishing the banns for all church marriages was imposed and marriages had to be conducted in church and by a priest.7

When the English Reformation transformed the Roman Church and ecclesiastical establishment into an English church, the marriage ceremony and the church's requirements did not change. However, the Church was willing to recognize two kinds of informal marriage, known as "sponsalia per verba de praesenti" and "sponsalia per verba de futuro." The first took place when the parties exchanged promises that they would be man and wife from that moment on. The second required an exchange of promises to be man and wife in the future, followed by sexual intercourse. When the parties presently took each other as man and wife, a valid marriage was formed. Consummation was not required. In the case of the promise to marry in the future, a valid marriage resulted only when the parties consummated their promise by intercourse.

Until the middle of the eighteenth century these informal marriages were held valid8 by the ecclesiastics who had the jurisdiction to determine the validity of a marriage.

In 1753 Lord Hardwicke's Act9 required a parish church ceremony in the Church of England, publication of banns, and a license as a condition to the validity of a marriage. The purpose of the Act was to prevent clandestine marriages, "Fleet" marriages and other fraudulent or irregular marriages. The Act governed only marriages contracted in England, leaving Scottish and Irish marriages subject to the earlier rules allowing informal marriage,10 and did not apply to Quakers and Jews.

In the American colonies marriage was regulated by the civil authorities, and informal marriages were recognized as valid,11 at least in the absence of a statute requiring a ceremony.12 This enabled parties, such as the pioneers, to contract valid marriages when there was no clergyman or civil officer available to perform a ceremony.

English law also recognized several impediments to the formation of valid informal and formal marriages. A close relationship between the parties, either by blood or marriage, was a reason for declaring the marriage invalid.13 The range of the relationship which disqualified the parties from marrying was narrowed in the early sixteenth century, after the Reformation, to the Levitical degrees.14

Infancy was also an impediment to marriage. Children below the age of seven were incapable of marrying. After the age of seven they might marry, but the marriage was voidable until they were able to consummate the marriage, which the law presumed to be at age fourteen for boys and twelve for girls. Beyond those ages the marriages were valid, even though the parties were under the age of twenty-one and did not have their parents' consent. Later statutes imposed the requirement of parents' consent.15

The English method of entering into an informal marriage, known as "sponsalia per verba de paesenti", was adopted in New York. Its legal definition of a common-law marriage is an agreement, in words of the present tense, made by parties competent to marry, to take one another as husband and wife.16 Ordinarily, common-law marriages are unlicensed. Cohabitation, repute, holding out, and the like generally are regarded as bits of evidence which are more or less cogent in showing that such an agreement, in fact, was made, but they are not a substitute for or the equivalent of the actual agreement.17

Common-law marriages were abolished in New York on April 29, 1933,18 as the result of an amendment to Section 11 of the Domestic Relations Law,19 which enumerated the persons by whom marriages must be solemnized.20 Prior to that date, common-law marriages were generally recognized as valid if entered into in this state,21 with the exception of the period between January 1, 1902, and January 1, 1908, when such marriages were rendered invalid by statute.22

While common-law marriages were abolished in New York on April 29, 1933, common-law marriages contracted prior to that date and at a time when such marriages were valid in New York, are as valid as ceremonial marriages,23 and the long standing rule of conflicts of law is that recognition will be given by New York to a common-law marriage that is valid at the place where it was contracted.24 Currently, 13 states and the District of Columbia permit common-law marriages to be entered into within their borders, although such states differ as to requirements of proof.25

One of the more curious things about New York family law is the extreme position our courts have taken in extending recognition to out-of-state common-law marriages of New Yorkers.26 Minimum contacts with a common-law marriage state are sufficient to activate the foreign law, which then may be construed by

our courts to be something different from what it really is. Some New York decisions have liberally interpreted the requisites for a valid common-law marriage in another jurisdiction, and have held that a common-law marriage was created during a brief visit to a common-law marriage state, whereas a close scrutiny of that state's law might show that a court of that state would not have found a common-law marriage had been contracted there, because the contacts with the jurisdiction were minimal.

In other American jurisdictions it generally is held that before a common-law marriage in another state will be recognized, the local citizens must establish maximum contacts with such state27 or must have been domiciled there.28 New York decisions, however, do not require any significant nexus with the common-law marriage state.

This attitude continues. Several recent decisions are illustrative. The parties in Cross v Cross29 had cohabited in New York without benefit of clergy, between 1965 and 1983. Until 1979, the man was married to another woman and he lacked the capacity to marry the plaintiff. Although they traveled to other jurisdictions, the parties never resided in any other state. During the years 1979 through 1982 the parties took a weekend trip to Pennsylvania and a trip involving a two night stay-over to Washington D.C. The trial court declared that a common-law marriage existed between the plaintiff and the defendant, apparently crediting all of the plaintiff's evidence while totally rejecting the defendant's. It found that the defendant had introduced plaintiff to the members of her own family as "my wife Regina" during the weekend in Washington D.C. and during the trip to Pennsylvania he referred to her as his wife.

The trial court concluded that although Washington D.C. followed a more rigid approach, the "confluence of the Pennsylvania trip, the Washington D.C. trip and the acts of the parties with respect to the Bar Mitzah which took place at about the same time, led to the inexorable conclusion that the parties were married in Pennsylvania and Washington D.C."

The Appellate Division, First Department, reversed the order of the trial court holding that under Washington, D.C. law, where a relationship between a man and a woman is illicit and meretricious in its inception, it is presumed to so continue during the cohabitation of the parties, and that presumption will be rebutted only if the consent of both the parties capable of entering into a valid contract, is established by clear and convincing evidence. The Appellate Division found that the plaintiff, Regina Cross, had failed to overcome the strong presumption that the relationship remained illicit and meretricious, nor did she demonstrate "by clear and convincing evidence, as required by Pennsylvania law, that the parties agreed to enter into a valid marriage."

In Lyman v Lyman30, the Appellate Division, First Department, reversed an order of the Surrogate's Court and found that the petitioner had failed to establish by clear and convincing evidence that she and the deceased rock n' roll singer, Frank Lyman, had contracted a valid common-law marriage in the State of Pennsylvania prior to his marriage to the respondent-appellant. It found that the petitioner did not meet the heavy burden of proving that she and Lyman entered into a valid common-law marriage in Pennsylvania following her divorce in December, 1965. In the Lyman case, the petitioner's evidence was that in November, 1963 she gave birth to Lyman's child. The infant died soon thereafter. On December 10, 1963 petitioner filed for divorce from her then husband. Before his time to answer had expired, petitioner and Lyman took part in a purported civil marriage in Alexandria, Virginia, on January 23, 1964. On the application for the Virginia license petitioner indicated that she was single, although the marriage, in fact, was bigamous as petitioner's divorce from her prior husband did not become final until December, 1965. Petitioner conceeded the invalidity of the Virginia marriage but claimed that she and Lyman thereafter lived in Pennsylvania as husband and wife giving rise to a valid common-law marriage recognized in the State of Pennsylvania. In Lyman, the Appellate Division found that there was substantial evidence to the contrary which negated the Surrogate's finding that the petitioner and Lyman lived together as husband and wife in Philadelphia either before or after December, 1965, when her first marriage terminated in divorce.

Cross and Lyman, merit comparison with the Third Department decision in Dozak v Dozak31 where the Appellate Division affirmed an order of the Supreme Court which found that a common-law marriage did exist between the parties under Pennsylvania law. The court noted that plaintiff testified at trial that shortly after her divorce was finalized, she and the defendant, while residing together in Pennsylvania, had a discussion about marriage and exchanged marriage vows. Specifically, plaintiff testified "well we just decided that we would from that day on, as far as we were concerned in our hearts, we were man and wife, and we would consider ourselves a family and continue thus." Plaintiff also presented the testimony of a witness who testified that during the relevant time period, he and plaintiff's sister were present at the parties' residence in Pennsylvania when plaintiff announced that she and defendant had exchanged marriage vows with each other. According to the witness, plaintiff made the announcement and responded by saying "help me make it through the night." Defendant denied ever exchanging marriage vows with plaintiff and testified that he did not recall the incident referred to.

The Appellate Division, Third Department, found the plaintiff's testimony to be truthful, and believed it constituted clear and convincing proof that what began as an illicit relationship had been converted into a valid marriage by the parties agreement to be man and wife and to consider themselves a "family" and

continued to be thus. Based upon this testimony, the court found that plaintiff met her burden of proof under Pennsylvania law.

In each one of these recent decisions, the court interpreted the law of Pennsylvania as it applied to common-law marriages and as it believed the law of that jurisdiction to be. While local citizens must establish maximum contact or be domiciled there to establish a common-law marriage, none of these decisions discusses the length of the contact with the state, or the domicile of the parties as a significant factor. In Dozak v Dozak, the New York court found that the burden of proof had been met by plaintiff, notwithstanding that the parties thereafter moved to New York. Notably, the burden of proof under Pennsylvania law is "clear and convincing evidence".

The final chapter is far from written in Jennings v Hurt. We note that in its determination on the application for pendente lite support32, the Supreme Court stated that under South Carolina law there too must be an agreement for a man and woman to take each other as husband and wife, and that a relationship which is illicit in its inception does not automatically become a common-law marriage once the impediment to marriage is removed. However, Sandra Jennings' burden of proof may be easier, because, as the court pointed out, under South Carolina law "the person claiming the common-law marriage must prove it by a preponderance of the evidence."

ENDNOTES

(1) See "Lawyer Opposing Hurt Fighting Uphill Battle" by Marvine Howe, N.Y. Times, June 26, 1989, P. B4, col. 1.

(2) Id.

(3) NYLJ, 7-7-88, p.25, col 3. Sup Ct, N.Y. Co. (Silberman, J.)

(4) See also, People Magazine, July 10, 1989.

(5) Lyman v Lyman, AD2d_, NYS2d_, NYLJ, 6-8-89, p. 23, col 1, (1st Dept. 1989).

(6) See Judiciary Law, Section 140-b.

(7) 1, Clark, Law of Domestic Relations, 69-70 (1988); II Pollock and Maitland, History of English Law, 370 (1898).

(8) Id. at 368; Canon law on the Continent was changed by the Council of Trent (1543-1563) to require that marriage occur in the presence of a priest, but this had no effect in England.

(9) Lord Hardwicke's Act, 1753, 26 Geo. II, c. 33. Fleet marriages were performed without formalities, by disreputable parsons imprisoned in the Fleet Prison. They had become a public scandal and the desire to eliminate them influenced the passage of Lord Hardwicke's Act. It was repealed in 1857.

(10) See Dalrymple v. Dalrymple, 2 Hagg. Con. 54, Eng. Rep. 665 (1811).

(11) 1 Bishop, Marriage, Divorce and Separation, 177 (1891); II Howard, History of Matrimonial Institutions, ch XII (1904), and III Id., ch. XVIII. Maryland was an exception. See Denison v. Denison, 35 Md. 361 (1872). But see Koegel, Common Law Marriage, ch. V. (1922), and Lorenzen, Marriage by Proxy and the Conflict of Laws, 32 Harv. L. Rev. 473, 482 (1919).

(12) See the discussion in Hoage v. Murch Bros. Const. Co., 60

App.D.C. 218, 50 F.2d 983 (1931) and in Goebel, Development of Legal Institutions, 519, 525 (1946). Massachusetts had such a statute, Laws and Liberties of Massachusetts, Reprinted from 1648 Edition in the Henry E. Huntington Library (Cambridge 1929) pp. 37, 38, requiring banns and a ceremony.

(13) II Pollock & Maitland, History of English Law 386 (1898).

(14) 32 Hen. VIII, c. 38 (1541). See 1 Blackstone, Commentaries 434; Bacon's Abridgement 291 (7th ed. 1832).

(15) 5 Bacon's Abridgement 289 (7th ed. 1832).

(16) Cheney v. Arnold, (1857) 15 NY 345; Clayton v. Wardell, (1850) 4 NY 230; Re O'Neil's Estate (1946) 187 Misc 832, 64 NYS2d 714, affd 272 App Div 919, 71 NYS2d 720; Taegen v Taegen (1946, Sup) 61 NYS2d 869, affd 272 App Div 871, 72, NYS2d 402; Re Apostol's Estate (1945, Sur) 53 NYS2d 661.

(17) See Foster and Freed "Law and the Family, New York's Recognition of Common-Law Marriages,"39 NYLJ, August 24, 1984, p 1, col 1, page 22, cols 1-6.

(18) Re Rizzo's Estate, (1956, Sur) 154 NYS2d 691, affd (2d Dept) 2 App Div 2d 993, 158 NYS2d 90, reh and app den (2d Dept) 3 App Div 2d 764, 161 NYS2d 579; Re Bloch's Estate (1948, Sur) 79 NYS2d 6; Adams v Adams, (1946) 188 Misc 381, 67 NYS2d 752; Anonymous v Anonymous (1940, Dom Rel Ct) 19 NYS2d 415; Taylor v Taylor (1937) 164 Misc 401, 298 NYS 912.

(19) Laws 1933, Ch 606, eff April 29, 1933.

(20) Anonymous v Anonymous, (1940, Dom Rel Ct) 19 NYS2d 229; Andrews v Andrews (1937)) 166 Misc 297, 1 NYS2d 760.

See People v Heine, (1960, 2d Dept) 12 App Div 2d 36, 208 NYS2d 188, affd 9 NY2d 925, 217 NYS2d 93, 176 NE2d 102, where the court said that "the only effect of the 1933 amendment to section 11 was to abolish common-law marriages."

(21) Re Haffner's Estate, (1930) 254 NY 238, 172 NE 483; Ziegler v P. Cassidy's Sons, (1917) 229 NY 98, 115 NE 471; Taylor v Taylor (1903) 173 NY 266, 65 NE 1098; Gall v Gall (1889) 114 NY 109, 21 NE 106; Hynes v McDermott (1883) 91 NY 451; Badger v Badger (1882) 88 NY 546; O'Gara v Eisenlohr, (1868) 38 NY 296; Hayes v People, (1862) 25 NY 390; Clayton v Wardell (1850) 4 NY 230; Jenkins v Bisbee, 1 Edw Ch 377; Fenton v Reed, 4 Johns 52.

(22) Re Seymour (1920) 113 Misc 421, 185 NYS 373; Re Mancini (1919) 108 Misc 102, 178 NYS 57.

Laws of 1901, Ch 339, expressly provided that no marriage claimed to have been contracted on or after the 1st day of January, 1902, within New York state otherwise than as provided in the article, should be valid for any purposes whatsoever, and it was held that such provision invalidated common-law marriages. Pettit v Pettit (1905) 105 App Div 312, 93 NYS 1001. That provision, however, was repealed by the Laws of 1907, Ch 742, and it was held that common-law marriages contracted after such repeal were valid. Ziegler v P. Cassidy's Sons (1917) 220 NY 98, 115 NE 471; Re Hinman (1911) 147 App Div 452, 131 NYS 861, affd 206 NY 653, 99 NE 1109; Re Smith's Estate (1911) 74 Misc 11, 133 NYS 730.

(23) People v Massaro (1942) 288 NY 211, 42 NE2d 491.

(24) The leading case is Shea v Shea (1945) 294 NY 909, 63 NE2d 113.

(25) See 1, Clark, Law of Domestic Relations, p 103 (1988); The jurisdictions are:

Alabama: Ala.Code 1983, 30-1-9, tit. 34; Krug v Krug. 292 Ala. 498, 296 So.2d 715 (1974).

Colorado: Moffat Coal Co. v. Industrial Commission, 108 Colo. 388, 118 P.2d 769 (1941); Deter v. Deter, 484 P.2d 805 (Colo. App. 1971).

District of Columbia: Matthews v. Britton, 303 F.2d 408 (D.C Cr. 1962)

Georgia: Official Ga.Code Ann. 53-101 (1982); Aksew v. Dupree, 30 Ga. 173 (1860).

Idaho: Idaho Code 32-201 (1983); Hamby v. J.R. Simplot Co., 94 Idaho 794, 498 P.2d 1267 (1972).

Iowa: Iowa Code Ann. 595.11 (West Supp. 1984); In Re Long's Estate, 251 Iowa 1042, 102 N.W.2d 76 (1960).

Kansas: Kan. Stat. Ann. 23-101 (1981); State v. Johnson, 216 Kan. 445. 532 P.2d 1325 (1975).

Montana: Mont. Code Ann. 40-1-403 (1983).

Ohio: Ohio Rev. Code 3101.08 (1980); Umbenhower v. Labus. 85 Ohio St. 238, 97 N.E. 832 (1912).

Oklahoma: Okl. Stat. tit. 43, 1,4 (1979); Quinton v Webb, 207 Okl. 133, 248 P.2d 586 (1952).

Pennsylvania: Pa. Stat. tit. 48, 1-23 (1965); In Re McGrath's Estate, 319 Pa. 309, 179 A. 599 (1935).

Rhode Island: Souza v. O Hara, 121 R.I. 88, 395 A.2d 1060 (1978).

South Carolina: Ex parte Romans, 78 S.C. 210, 58 S.E. 614 (1907). But cf. S.C. Code 1977, 20-21 providing that it is unlawful to contract matrimony without a license.

Texas: V.T.C.A., Fam. Code 1.91 (1975); Ex Parte Threet, 160 Tex. 482, 333 S.W.2d 361 (1960).

(26) Shea v Shea (1945) 294 NY 909, 63 NE2d 113.

See Klienman v. Klienman, NYLJ, Sep 21, 1973, p 18, cols 1-2 (Nassau Co 1973), where the parties were divorced, but resumed cohabitation and made a visit to Ohio, a common-law marriage state. See also, Reda v. Reda (1973, 2d Dept) 41 App Div 2d 848, 342 NYS2d 634, vacated 34 NY2d 716, 356 NYS2d 862, 313 NE2d 341 (brief visit to Florida); and Ventura v. Ventura (1967) 53 Misc 2d 881, 280 NYS2d 5 which held that no particular period of cohabitation in Georgia was required by its laws to effect a common-law marriage. A July 4 weekend trip by the New Yorkers to Georgia, one night at a motel and two days with friends, was held to be a sufficient nexus.

In Farber v U.S. Trucking Corp., (1970) 26 NY2d 44, 308 NYS2d 358, 256 NE2d 521, there was a three-weeks stay in Florida (which later abolished common-law marriages in 1968); in Ventura v. Ventura, (1967) 53 Misc 2d 881, 280 NYS2d 5, the

couple spent three days in Georgia; and in McCullon v. McCullon, (1978) 96 Misc 2d 962, 410 NYS2d 226, there were occasional visits to relatives in Pennsylvania.

Re Estate of Benjamin, (1974) 34 NY2d 27, 355 NYS2d 356, 311 NE2d 495, held that common-law marriages, although abolished in New York on April 29, 1933, are valid if contracted in New York by competent parties prior to that date and remain valid. A subsequent denial of the marriage or a change of mind by one the parties, said the court does not invalidate the marriage. The court also held that the party asserting the common-law marriage has the burden of proof; although the agreement need not be proved in any particular way, it may be proved by direct or circumstantial evidence by documentary evidence, by cohabitation and reputation as husband and wife, acknowledgment, declaration, or conduct and the like. Although cohabitation and holding out to the world as husband and wife raises a presumption of common-law marriage, the presumption is rebuttable and may yield to the stronger presumption attaching to a subsequent ceremonial marriage.

See also, McCullon v. McCullon, (1978) 96 Misc 2d 962, 410 NYS2d 226, which held that annual visits to relatives in Pennsylvania effected a common-law marriage there which New York would recognize. Pennsylvania has exceedingly strict requirements for effecting a common-law marriage there and insists upon proof of an exchange of marriage vows in the present tense.

Mott v. Duncan Petroleum Trans, (1980) 51 NY2d 289, 434, NYS2d 155, 414 NE2d 657, held that although a common-law marriage cannot be contracted in New York, New York will recognize as valid here, a common-law marriage which is valid where contracted.

The law to be applied by New York in determining the validity of an out-of-state alleged common-law marriage, is the law of the State where the marriage occurred.

In that case, the eligibility of claimant to death benefits as the widow of John Mott, depended upon whether the parties were married under the law of Georgia. The Court of Appeals, reviewing the proofs necessary to establish a common-law marriage, held that while the burden of proving the existence of such a marriage is on the one asserting its validity, all that need be shown is that the parties possessed the ability to contract, that a contract of marriage was made and that the marriage was consummated according to law. [Ga. Code Ann 53-101] Under Georgia law proof of the existence of a contract of marriage must include proof of a "present intent to marry" in the State of Georgia.

(27) See Clark, Law of Domestic Relations, 57 (1968). Kennedy v Damron (1954, Ky) 268 SW2d 22, is the leading case requiring substantial contacts. See also,

Metropolitan Life Insurance Co. v Chase, (1961, CA3 NJ) 294 F2d 500 (applying New Jersey law); Winn v Wiggins, (1957) 47 NJ Super 215, 135 A2d 673; and Peirce v Peirce (1942) 379 Ill 185, 39 NE2d 990.

(28) The leading case is Re Veta's Estate (1946) 110 Utah 187, 170 I2d 183. See also, Re Binger's Estates (1954) 158 Neb 444, 63 NW 2d 784.

(29) Cross v Cross, AD2d , NYS2d , NYLJ, 4-28-89, p. 21,col. 3 (1st Dept. 1989).

(30) Lyman v Lyman, AD2d , NYS2d , NYLJ, 6-8-89, p. 23, col. 1 (1st Dept. 1989).

(31) Dozak v Dozak, AD2d , 528 NYS2d 712 (3d Dept. 1989).

(32) Jennings v Hurt, NYLJ, 7-7-89, p. 25, col. 3, Sup. Ct., N.Y.Co. (Silberman, J.).