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Domestic Relations—Husband-Wife—Common Law Marriage

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the infant will be adequately represented or the court will appoint a special guardian (who would be granted for an infant) to protect such infant's interests. Finally, the statute relates that the judge or surrogate may make such disposition for the foster child as he may deem proper; there would definitely be little or no need for this if the intent was to make the section applicable to adult adoptees. Furthermore, elsewhere in the statute there have been definite distinctions made in the treatment of adult adoptees, in contrast to infant adoptees, as to the manner of conduct and proceedings for them.[16]

The court in summing up the probable intent of the legislature in providing for the abrogation of adoptions thus said, ". . . the necessity for terminating an adoption is so unlikely, that the threat of so drastic a court remedy should not overhang the adopted child's whole adult life."[17]

B. Husband—Wife

Marriage, Common Law

Common law marriage was abolished in New York State as of 29 April 1933 by Domestic Relations Law § 11 which states that a valid marriage must be solemnized.[21] But § 11 does not spell out a retroactive effect, and since it is in derogation of the common law, it has been held not to be retroactive and so common law marriages entered into prior to 29 April 1933 are valid.[22] To establish a common law marriage the prime factor is an intent of the parties to enter into the marriage contract[23] with an ability on the part of both parties to enter the relationship[24] and an open assumption of marital duties and obligations or a promise and cohabitation.[25]

The Court of Appeals twice deliberated upon the sufficiency of evidence from which a common law marriage could be inferred.

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16. DOM. REL. LAW Art. VII, §§ 109, 110, 111, 112, 113, 116, 117.

17. See note 14 *supra*.

21. As amended L. 1933, c. 606: *Ferraro v. Ferraro*, 77 N. Y. S. 2d 246 (Dom. Rel. Ct. 1948).

22. *In re Makel's Estate*, 153 Misc. 228, 274 N. Y. Supp. 625 (Surr. Ct. 1934).

23. *Akeson v. Salvage Process Corp.*, 305 N. Y. 438, 441, 113 N. E. 2d 788, 789; *Zy v. Zy*, 13 N. Y. S. 2d 415 (Dom. Rel. Ct. 1939); see GROSSMAN, THE NEW YORK LAW OF DOMESTIC RELATIONS § 92 (1st ed. 1947).

24. A common disability is a prior valid marriage. *Castellani v. Castellani*, 176 Misc. 763, 28 N. Y. S. 2d 879 (Dom. Rel. Ct. 1941); *Karameros v. Luther*, 166 Misc. 376, 2 N. Y. S. 2d 508 (Sup. Ct. 1938), *aff'd*, 254 App. Div. 845, 5 N. Y. S. 2d 319 (1st Dep't 1938).

25. In re *Monty's Estate*, 32 N. Y. S. 2d 705 (Surr. Ct. 1941), *aff'd*, 289 N. Y. 685, 45 N. E. 2d 334 (1942). *Anonymous v. Anonymous*, 19 N. Y. S. 2d 229 (Dom. Rel. Ct. 1940). *Zy v. Zy*, *supra* note 23; *Heidig v. Heidig*, 6 N. Y. S. 2d 405 (Sup. Ct. 1938); *Castellani v. Castellani*, *supra* note 24; *Karamos v. Luther*, *supra* note 24; see GROSSMAN, *op. cit. supra* note 23 §§ 90-99.

In *Akeson v. Salvage Process Corp.*[26] the plaintiff claimed widow's benefits under workmen's compensation on the basis of a common law marriage. Plaintiff had lived with the alleged common law husband from 1918 until his death in 1944. Plaintiff's legal husband died 17 April 1933. Since common law marriage was abolished as of 29 April 1933, there was a period of twelve days in which plaintiff could establish a common law marriage. The court in concluding that there was no "substantial evidence upon which the vital social relationship of marriage can be predicated"[27] stated that a meretricious relationship for fifteen years during her legal husband's lifetime is presumptively continued as such beyond that period.[28] Nor was there a showing of intent, e. g., plaintiff continued using her legal husband's name.[29]

In *Blek v. Blek*[30] the husband sought to annul his marriage on the ground that his wife was the undivorced wife of one Engelman. The wife contended that her marriage to Engelman was a nullity because at that time Engelman was a party to a valid common law marriage to one Georgia. The trial court held for the wife on testimony of Engelman and three other witnesses who testified having known them as husband and wife. The Court of Appeals held (4-3) that there was evidence to sustain the trial court's finding and the Appellate Division's affirmation precluded the Court of Appeals from weighing the evidence.[31] The dissent[32] asserted that as a matter of law there was no evidence to sustain a common law marriage of Engelman and Georgia. Evidence to establish a common law marriage must be "clear, consistent, and convincing."[33] A mere reputation as husband and wife[34] by some witness as opposed to a "common reputation"[35] is not sufficient, especially in the light of the only documentary evidence, Engelman's application for a marriage license,[36] being to the contrary.[37]

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26. 305 N. Y. 438, 113 N. E. 2d 788 (1953).
27. *Id.* at 441, 113 N. E. 2d at 788.
28. See *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106 (1889).
29. But use of the maiden name does not perforce show lack of intent. e. g. theatre actress, In re *Erlanger's Estate*, 145 Misc. 1, 259 N. Y. Supp. 610 (Sup. Ct. 1932).
30. 306 N. Y. 27, 114 N. E. 2d 192 (1953).
31. C. P. A. § 605, Review of questions of fact in the Court of Appeals; *Angelos v. Mesevich*, 289 N. Y. 498, 46 N. E. 2d 903 (1953).
32. Per Fuld, J., Desmond and Van Voorhis, JJ., concurring.
33. *Boyd v. Boyd*, 252 N. Y. 422, 428, 169 N. E. 632, 634 (1930).
34. See *Clayton v. Wardell*, 4 N. Y. 230 (1850).
35. See *Matter of Wells*, 276 App. Div. 822, 93 N. Y. S. 2d 354 (4th Dep't 1948), *aff'd*, 301 N. Y. 796, 96 N. E. 2d 95 (1950).
36. In applying for a marriage license the applicant must sign an affidavit as to his or her legal competency to marry. See DOM. REL. LAW § 15.
37. *Clayton v. Wardwell*, *supra* note 34; 7 WIGMORE, EVIDENCE § 2083 (3d ed. 1940).