



STATE OF KANSAS

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Curt T. Schneider
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January 5, 1978

ATTORNEY GENERAL OPINION NO. 78- 4

Mr. Devon F. Knoll
Director
Kansas Adult Authority
Room 400 - 535 Kansas Avenue
Topeka, Kansas 66603

Re: Marriage--Common-Law Marriage--Elements

Synopsis: The legal elements of a common law marriage are present capacity of the parties, a contract to assume the marriage status at the time the contract was made, and a holding of each other out to the public as husband and wife.

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Dear Mr. Knoll:

You advise that from time to time, the Authority deals with inmates or parolees who propose living arrangements with a common-law spouse. You inquire what constitutes a valid common-law marriage in this state.

In Cain v. Cain, 160 Kan. 672, 165 P.2d 221 (1946), the court stated thus:

"The requisites for a common-law marriage are present capacity of the parties, a contract to assume the marriage status at the time the contract was made and a holding of each other out to the public as husband and wife." 160 Kan. at 676.

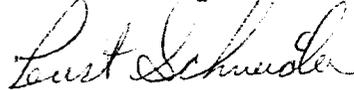
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All three elements must be proved in order to establish a valid common-law marriage. The contract or agreement to assume the marriage status need not be in written form. Like other civil contracts, the existence of the agreement may be shown from the acts and conduct of the parties, from which its existence may be presumed. The agreement, thus, may be tacit as well as express. However, there must be a present agreement, implicit or explicit. In Pitney v. Pitney, 151 Kan. 848, 101 P.2d 933 (1940), the court affirmed denial of alimony and separate maintenance on the ground that the evidence failed to establish the existence of a common law marriage. In its opinion, the court quoted with approval from 18 Ruling Case Law 392 thus:

"To constitute a valid marriage per verba de praesenti there must be an agreement to become husband and wife immediately from the time when the mutual consent is given. An express future condition is absolutely fatal to a claim of marriage, and cannot be explained away by circumstances. It shows mental reservations which are incompatible with consent. This is true whether the condition relates to the creation of the marriage status, or to the duration of the relations of the parties. As there can be no contract per verba de praesenti where the marital status is to become fixed in the future, it is not sufficient to agree to present cohabitation and a future regular marriage when more convenient, or when a wife dies, or when a ceremony can be performed."

Establishing the existence of a common-law marriage, obviously, may sometimes be a somewhat difficult evidentiary matter. However, the legal elements are as described above.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj