

1 COMMONWEALTH OF PENNSYLVANIA
2 HOUSE OF REPRESENTATIVES
3 JUDICIARY COMMITTEE
4 SUBCOMMITTEE ON COURTS

5 * * *

6 IN RE: HOUSE BILL 43

7 * * *

8 Verbatim record of hearing held at the
9 University of Pittsburgh, William
10 Pitt Union, Room 637, 3959 Fifth
11 Avenue, Pittsburgh, Pennsylvania,
12 on Wednesday,
13 July 12, 2000
14 9:00 a.m.

15 * * *

16 MEMBERS OF THE COMMITTEE

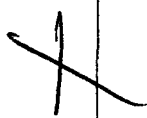
17 HON. THOMAS P. GANNON, CHAIRMAN

18 * * *

19 ALSO PRESENT:

20 Hon. David J. Mayernik
21 Brian Preski, Esquire, Chief Counsel
22 Richard Scott, Esquire, Minority Chief Counsel
23 Jane Mendlow, Research Analyst

24 Reported by:
25 Nancy J. Grega, RPR



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1 MR. PRESKI: I am Brian Preski, Chief
2 Counsel for the House Judiciary Committee. With me
3 right now are Richard Scott of the Democratic Caucas
4 and Jane Mendlow, M-E-N-D-L-O-W, of Representative
5 Blaum's Office. Right now we are awaiting the arrival
6 of Chairman Gannon and other members of the Committee.
7 However, we did want to open up this meeting. One of
8 our testifiers, Robert Raphael, R-A-P-H-A-E-L, Esquire,
9 of Raphael, Ramsden, R-A-M-S-D-E-N, and Behers,
10 B-E-H-E-R-S, is present and would like to make a few
11 comments just for the record. We are prepared to take
12 those comments right now.

13 MR. RAPHAEL: My name is Robert Raphael.
14 I'm a lawyer here in Allegheny County. I'm Past
15 President of the Pennsylvania Bar Association, Family
16 Law Section, the Allegheny County Bar, Family Law
17 Section. I'm a committee member of the Joint State
18 Government Commission on Domestic Relations Law.
19 I am Past President of the Allegheny County Bar
20 Association and Past President of the Pennsylvania Bar
21 Institute, the educational arm of the Pennsylvania Bar
22 Association. I have been doing this kind of work for
23 a long time.

24 MR. PRESKI: Mr. Raphael, I know that you
25 have to leave and go to Boston. What I would ask you,

1 just if you could in a few brief minutes, give us
2 your position on the issue that is before the Committee
3 this morning, that would be common law marriages,
4 Representative Mayernik's proposal to abolish those
5 common law marriages.

6 MR. RAPHAEL: I advocate the abolishment
7 of the common law marriage. I think most of the
8 people who think they are common law married are not
9 common law married. They don't know what a common law
10 marriage is. They think it is you file a joint tax
11 return, you are married, or if they have lived
12 together for a certain period of time, they are
13 married, or if they have children, they are married.
14 It brings about a great deal of confusion. In claims
15 of Social Security, they have to prove that they are
16 married; in terms of Workmen's Compensation, I think
17 even in the recent U S . Airline accident here, a
18 number of people came in and claimed survivor benefits
19 claiming they were the spouses and they are stuck with
20 trying to prove. I think that people should know
21 whether they are married or not married. There are
22 people that may want to live together without the
23 marriage and even if they are living together for a
24 period of time, one party claims they are married and
25 the other one says, we never did get married. I think

1 that's wrong. I think a consideration should be given
2 to, that there should be a place where people can go
3 in in every Register of Wills Office throughout the
4 State, there would be a book where they could identify
5 themselves and have to prove who they are and they
6 would put down the date that they are there and sign
7 their names and that alone would be an acknowledgement
8 of marriage and at least they would know what the
9 obligations and commitments are. They shouldn't have
10 to wait until they have lived together for ten years
11 and separate and then fight over whether it was a
12 marriage relationship or just a live-together situation.

13 MR. PRESKI: Mr. Raphael, one question if
14 I could. You talked about the US Air crash from here
15 in Pittsburgh. Is it fair for me to say that in
16 those cases where people claim common law marriages at
17 times, they do that when there is some specific benefit
18 they are trying to get either from the courts or from
19 the government or some other type of program and then
20 conversely, do people often not claim the common law
21 marriage when it would be some type of detriment to
22 them?

23 MR. RAPHAEL: No question about it. You
24 know, a classic example would be when I was in law
25 school, my tort professor gave a situation where a

1 car drives into an intersection and the professor
2 said, you tell the client, did you look to the left;
3 did you look to the right and did you look back to
4 the left and if you didn't do that, you are contribu-
5 tory negligent. Now, did you look to the left and
6 did you look to the right and the answer is yes and
7 this is true when people come to a lawyer about common
8 law marriages. You say to them, in order to be
9 married, you know, you had to make a declaration in
10 presenti and the client will say to you, what's that
11 and you explain what that is and the next thing you
12 know is, of course, I did that. It's just wrong
13 evidence question of who commits the better perjury.

14 MR. SCOTT: Quick question. You mentioned,
15 and you did it quite succinctly, of all of the dis-
16 advantages and the fact of the holding forth and
17 making a declaration. Are there any miniscule benefits
18 for common? I'm just trying to say, does it benefit
19 anyone, i.e., the Commonwealth, the married couple?
20 I mean, I agree with you but I know there are some
21 people going to say, you know --

22 MR. RAPHAEL: Well, you know, people move
23 in with each other. I don't know what they expect
24 when they do that and one party will say one thing
25 and another party another. I don't know of any real

1 benefit. I think if people wanted to have a relation-
2 ship, there ought to be a declaration in writing
3 somewhere so everybody knows it: The government knows
4 it, the individuals know it and everybody is
5 protected.

6 MR. SCOTT: Thank you, sir.

7 MR. PRESKI: Mr. Raphael, my understanding
8 is that you have to catch a plane and get to Boston.
9 Thank you very much. One request though. If you do
10 adopt any resolutions at the Bar Association's
11 meeting, that they be sent to us.

12 MR. RAPHAEL: I will be sure that is
13 taken care of.

14 MR. PRESKI: To go back on the record, the
15 next -- very briefly, we hear from Professor Mary
16 Kearney and Professor Lockard from the Widener
17 University School of Law.

18 PROFESSOR KEARNEY: Thank you for the
19 opportunity to appear. We are both professors at
20 the Harrisburg campus of the Widener University School
21 of Law. Both of us teach family law and, in addition,
22 Professor Lockard directs a civil law clinic which
23 serves indigent populations.

24 Our research and experience leaves us to
25 conclude that Pennsylvania would be better served by

1 retaining the common law marriage and so we are in
2 opposition to House Bill 43. We have many reasons
3 for this conclusion which we have presented in our
4 written testimony which, I believe, we have available
5 to you. So, today our oral focus will be on our
6 primary reason for our opposition to House Bill 43 and
7 that's the adverse impact of abolishing the doctrine
8 would have on some of our most vulnerable
9 Pennsylvanians, namely poor women and children and
10 particularly also the elderly. From our research,
11 about 90 percent of the common law marriages brought
12 in Pennsylvania are brought by women. Often, they
13 are brought in the situation which you have alluded
14 to, survivor claims, Worker's Compensation claims,
15 a man is killed on the job and his partner of many
16 years is seeking benefits as a survivor, government
17 benefits, veterans benefits, pensions, Social Security
18 benefits. Those the typical situations where a
19 common law marriage claim arises and our experience
20 from looking at 20 years of Pennsylvania court cases --

21 (An off-the-record discussion was held.)

22 CHAIRMAN GANNON: You may start again.

23 PROFESSOR KEARNEY: We are both pro-
24 fessors at Widener University School of Law and we
25 are actually speaking in opposition to House Bill 43

1 and so we are in favor of retaining common law
2 marriages in Pennsylvania for the main reason, and as
3 I was saying, it has an adverse impact, particularly
4 on the indigent population in Pennsylvania.

5 I think one case that Professor Lockard
6 and students at the clinic handled recently provides
7 a good example of the benefits of retaining the
8 common law marriage doctrine. Ms. Smith was a client
9 of the Harrisburg Civil Law Clinic. She was 76 years
10 old and she had lived with Mr. Jones for about 20
11 years. Mr. Jones had been adjudicated incompetent and
12 placed in a nursing home. His court-appointed guardian
13 began eviction proceedings against Ms. Smith because
14 her name was not on the deed to the home which they
15 had shared for 20 years. The students from the
16 Civil Law Clinic obtained affidavits from neighbors,
17 from friends, from relatives indicating that the
18 couple indeed had held themselves out as a married
19 couple, had stated a present intent to be married and
20 that, in fact, a common law marriage did exist. As a
21 result of those affidavits that were gathered, the
22 guardian withdrew his petition to evict Ms. Smith from
23 the home, allowing her to remain in the house and,
24 in addition, the clinic students filed with the Social
25 Security Administration for spousal benefits for

1 Ms. Smith. Her monthly income went up from approxi-
2 mately \$450 a month to \$900 a month and so she was
3 able to maintain her home and she was able to receive
4 an adequate level of income from her old age. Had
5 the common law marriage doctrine not been available
6 to Ms. Smith, she would have remained at the same
7 level of income and probably most likely been evicted
8 from her home. Ms. Smith was somebody who came from
9 a generation of Pennsylvanians who knew about the
10 common law marriage doctrine because she had grown up
11 in Pennsylvania and had been around as long as she
12 had and she was someone who believed that she truly was
13 married under the common law marriage doctrine, and
14 so she would be the kind of person who would, I think,
15 be done a grave disservice by the abolition of the
16 doctrine.

17 We think that this case is typical in a
18 number of respects of the kinds of cases where it
19 arises in Pennsylvania. It's typical, first of all,
20 because the parties were involved in a long term
21 relationship. This relationship went on for about 20
22 years and usually when someone is claiming common law
23 marriage when it gets to the court level in
24 Pennsylvania, we're not talking about a six-month,
25 one-year, two-year situation. We're talking about a

1 longstanding relationship. So, we think it's
2 typical in that respect.

3 We think it's typical because Ms. Smith
4 met the low income requirements to qualify as a
5 civil law clinic client and I think we think that's
6 typical because many of the people claiming common
7 law marriage in Pennsylvania are of a lower socio-
8 economic status.

9 It's a typical case because the property,
10 the home, was titled in Mr. Jones' name. Oftentimes
11 in these cases, the property is still titled in the
12 man's name and so the way the woman has access to the
13 property is through her status as a common law wife.

14 I think it's also typical because, as I
15 said earlier, about 90 percent of the common law
16 marriage claims brought in Pennsylvania are brought
17 by women oftentimes because the woman outlives the man
18 or is in better health than the man. So, she is
19 the person seeking the benefits. As Mr. Preski pointed
20 out earlier, yes, in many of these cases it is where
21 someone is filing for sort of benefits, oftentimes
22 survivor benefits.

23 In addition to these reasons -- we think
24 this is the kind of a case that mitigates in favor
25 of the retention of the common law marriage doctrine.

1 In addition, if I could just address what
2 is probably the strongest argument against the
3 common law marriage doctrine in favor, in other words,
4 of House Bill 43, which are concerns about judicial
5 and administrative efficiency. Our research suggests
6 that this issue of common law marriages reaches the
7 appellate level only about once, Pennsylvania
8 Appellate Court level, only about once or twice a
9 year. So, we do not believe that the appellate
10 courts are overburdened by this issue. At the trial
11 court level, although it's more difficult, and we
12 don't have data on how many cases reach the trial
13 court level each year. At the trial court level
14 though our understanding and experience suggests that
15 the fact finders, the trial court judges, are well
16 equipped to sift through the meritorious from the non-
17 meritorious claims in the way that they have to sift
18 through claims with any oral contract. This is an
19 oral contract and oftentimes they are in a position of
20 having to decide whether or not there was an oral
21 contract made. That's what they are doing in these
22 cases. And so for those reasons we don't believe that
23 the courts are overburdened by this doctrine.

24 In addition, Pennsylvania courts have
25 set up a bifurcated approach dealing with common law

1 marriages that we think works very well. The two
2 situations are -- the first situation which I have
3 been describing where one of the spouses or one of
4 the partners has died and the other surviving partner
5 is seeking some sort of benefits. In that situation
6 Pennsylvania courts have adopted a **rebuttable** presumption
7 in favor of a common law marriage because of the
8 difficulty, frankly, when there is only one surviving
9 partner of proving that there wasn't a common law
10 marriage. However, the surviving partner still has to
11 show that there was co-habitation and that the couple
12 had a reputation of being married in the community.
13 So, there is a rebuttable presumption in favor of
14 common law marriage. However, that rebuttable
15 presumption does not exist in the kind of cases which
16 could and probably would generate fraud and that's a
17 situation where both partners are alive. They have
18 been together and they have separated. One of them
19 is arguing that there is a common law marriage because
20 she usually is seeking assets. The other partner is
21 saying that there never was a common law marriage; we
22 were just living together. In that situation there is
23 no rebuttable presumption in favor of common law
24 marriage. The person who is seeking common law
25 marriage status has to prove by clear and convincing

1 evidence. So, has a higher evidentiary burden of
2 proving by clear and convincing evidence that there
3 was cohabitation and that there was the present intent
4 to be married. In many of those cases of our
5 research the Court finds that there wasn't a common
6 law marriage. So, because of this bifurcated approach
7 that Pennsylvania has taken to common law marriages,
8 because of the relative paucity of common law marriage
9 claims that have reached the court, we believe that
10 the judiciary has adequate resources and adequate
11 information to make determinations of whether common
12 law marriages exist. Do you want to add anything
13 about your experience?

14 PROFESSOR LOCKARD: I just want to add a
15 couple of words. I have been the Director of the
16 Civil Law Clinic at Widener University of Law for
17 nine years. During that nine-year period, I would
18 estimate that we see one, perhaps two claims of
19 common law marriage per year. I don't believe there
20 is an epidemic of common law marriage claims in
21 Pennsylvania. Almost invariably the claim does arise
22 in the context of a party, usually a woman, seeking
23 public benefits and needing to prove the existence of
24 a marriage to obtain an entitlement to those benefits.
25 Most of the claims come to us believing that they are

1 married. This is not an idea that we put into their
2 heads. For instance, Ms. Smith, who Professor Kearney
3 talked about, came to us and said, we were married.
4 It was not a situation where she sat down and told
5 us she was being evicted and we said, well, perhaps
6 we could establish a common law marriage, we can keep
7 you in the home. She believed that she was married.

8 Now, I know Mr. Raphael testified that
9 oftentimes individuals are not aware of the require-
10 ments for common law marriage in Pennsylvania and I
11 think that is entirely accurate, but they do believe
12 that they are married and they have established a
13 relationship that, I believe, is as deserving of
14 protection as a formal ceremonial marriage. They
15 are often long term. They are stable relationships.
16 The individuals believe that they have entered into a
17 marriage and I think that they deserve the protection
18 of law.

19 CHAIRMAN GANNON: Let me ask you a
20 question. If we eliminated common law marriage in
21 Pennsylvania as this bill proposes, how would that
22 void be filled? What do you project from a legal
23 standpoint would happen? In other words, what I am
24 looking at is those relationships where perhaps you
25 have two people living together -- let me give you

1 two scenarios. One where they present themselves as
2 being married but they are not; on the other hand,
3 it's common knowledge that they are not married but
4 they continue to live together and support each other
5 and cohabitate. How do you see that void being
6 filled if this is eliminated?

7 PROFESSOR LOCKARD: A number of juris-
8 dictions have established a putative spouse doctrine.
9 Pennsylvania has not to the best of my -- I can find no
10 reported cases accepting the putative spouse doctrine.

11 CHAIRMAN GANNON: Could that be because we
12 recognize common law marriage?

13 PROFESSOR LOCKARD: I think in large part,
14 yes.

15 CHAIRMAN GANNON: Go ahead, I'm sorry.

16 PROFESSOR LOCKARD: And I think that the
17 reason so many jurisdictions have accepted the
18 putative spouse doctrine is because of the perceived
19 inequity in situations where people believe they are
20 married and, in fact, are not and that ameliorates
21 the effects of the lack of a marriage. The problem
22 with a putative spouse doctrine is that it entails
23 at least as much judicial effort as does a common
24 law marriage because, again, there is going to be
25 testimony from a party, yes, I believe I was married.

1 We thought we were married. In most of the juris-
2 dictions that accepted the putative spouse doctrine,
3 there has to be a good faith belief in the validity
4 of the marriage. So, not only are we going to go
5 into the circumstances of the relationship, but we are
6 also going to have to go into the good faith of the
7 party who is asserting the putative spouse doctrine.
8 That would be one way to fill the void if we eliminated
9 common law marriages. I don't know that it's a
10 superior way. I don't know that it has any benefits
11 over common law marriage.

12 CHAIRMAN GANNON: I can't think of any
13 cases that I'm aware of where you have a situation
14 different than what you are talking about, the wife
15 seeking benefits or the spouse, female spouse, seeking
16 benefits after the death of the husband in the common
17 law where a couple have lived together for a long
18 period of time and the dependent spouse says so and so
19 now has assets, pensions, savings, investments and I
20 think I should get a share of that because, not
21 necessarily because we were allegedly married,
22 although that might be an argument, but because I was
23 at a disadvantage for all of these years staying home
24 and doing the cooking and cleaning and washing and
25 raising the kids. Would you see a change in attitude

1 if we eliminate the common law -- I mean, I can see
2 where the courts come in and say, well, if you can
3 establish common law marriage, we'll listen to you,
4 but if you can't establish common law marriage, you
5 were at risk the whole time you were in that relation-
6 ship.

7 PROFESSOR KEARNEY: And I think that in
8 part responds to both this question and your previous
9 question, which is I don't see a substitute or a
10 replacement for common law marriage. I think what
11 Pennsylvania will say to people like Ms. Smith is
12 tough. You should have known better. You should have
13 gotten married. You should have gone to the courthouse
14 20, 25 years ago.

15 CHAIRMAN GANNON: I sense that there would
16 be a little more sympathy on this situation where you
17 have Ms. Smith who believed she was married as
18 opposed to, you know, maybe the high profile case
19 where, you know, hey, we weren't married, just
20 living together. Everybody knew it but I deserve a
21 whack at these assets because I suffered at home for
22 ten years and that was ten years out of my life. We
23 don't see that in Pennsylvania. I'm just wondering if
24 we did away with common law if all of a sudden the
25 courts would have to look at something like that

1 without the argument to say, well, if you had a
2 common law marriage, we could help you out because we
3 recognize that, but you don't, so we can't do
4 anything for you whereas that is no longer available.

5 PROFESSOR LOCKARD: I think that is a valid
6 concern because I think certain jurisdictions, there
7 certainly has been high profile cases of that nature
8 in California.

9 CHAIRMAN GANNON: Which doesn't recognize
10 common law marriage.

11 PROFESSOR LOCKARD: Right. I think it's
12 a valid concern.

13 CHAIRMAN GANNON: I was thinking of
14 palimony.

15 PROFESSOR KEARNEY: And that's all of a
16 sudden the Marvin versus Marvin.

17 CHAIRMAN GANNON: I'm just wondering if we
18 eliminated common law marriage, if we would see
19 Marvin versus Marvin type cases a lot because --

20 PROFESSOR KEARNEY: There would be
21 alternative access.

22 CHAIRMAN GANNON: Well, I think the courts
23 would be without a door to say, well, if you can go
24 through that door, we can help you but if you can't,
25 too bad; whereas now that door is shut and now they

1 say well, okay. Maybe we have to look at that because
2 we can't offer you any other option.

3 PROFESSOR KEARNEY: And I think there is
4 a possibility of that door opening and opening a
5 Pandora's box.

6 MR. PRESKI: My question is this. The
7 first one is, do you think if there was an abolition
8 of common law marriage, that the courts sometime
9 would come in like the Chairman had said on a hard
10 facts case and come up and say, okay, now we have
11 putative spouse but it's judicially creative rather
12 than legislatively created? I mean, you have dealt
13 with these kind of people. I mean, are the cases of
14 such, you know, hard facts, you know, little old lady,
15 all these years that some court somewhere is going to
16 say, I'm finding a way to let her collect?

17 PROFESSOR LOCKARD: I think there is a real
18 possibility that that would happen.

19 PROFESSOR KEARNEY: But they are going to
20 have to work harder to find a theory.

21 MR. PRESKI: What about Mr. Raphael's
22 suggestion that there be some type of, I don't know
23 how else to say it except some type of common law
24 registry maintained? I mean, from an evidentiary
25 standpoint, that would certainly help the clinic out

1 but do you have any comments on that?

2 PROFESSOR LOCKARD: I think that something
3 of that nature would be very beneficial. I haven't
4 had the time to consider what the format should be.

5 PROFESSOR KEARNEY: I think the problem is
6 that somebody who is going to go so far as going to
7 register in the County Courthouse or a clerk's office
8 or something like that is probably also the type of
9 person who is also just going to get the Judge or
10 somebody to marry them and have the formal ceremonial
11 marriage. I think that what happens in the common
12 law marriage situation is you have people who don't
13 deal with the administrative system or the legal
14 system as much and so frankly there isn't going to be
15 that level of sophistication or knowledge. Not that
16 they wouldn't necessarily do it but they might not
17 know about it. I mean one of the things that we
18 really came up with in our research, one of the things
19 that runs through, one of the threads that runs
20 through a lot of these cases is the kind of people
21 who are seeking common law marriage claims are
22 typically not educated. So, in addition, it's not
23 just a poverty issue. It's not necessarily a gender
24 issue or a race issue. I think it's an educational
25 issue and so to know about it, I think it's a good idea,

1 but it's such a step closer to a civil marriage
2 ceremony that the kind of person who is going to be
3 seeking these benefits is probably not going to be
4 in the position.

5 MR. PRESKI: So, my thought is that where
6 you talked about the rebuttable presumption where
7 the one spouse is deceased, maybe the law treats
8 that registry the same way except you don't need to
9 have both. Both don't need to sign in. One signs
10 in and you give them the rebuttable presumption that
11 it does exist, thinking outloud. Based upon the
12 research that you did, and I don't know whether it's
13 this deep or not but is common law marriage something
14 that is a vestige of old times? Is it growing more or
15 has it just been kind of steady throughout?

16 PROFESSOR KEARNEY: It is definitely a
17 vestige of olden times. I mean, it was imported
18 from England. It was really created in a time when
19 people did not have access to ceremonial marriages
20 the way they do today. However, what's interesting
21 about it is it's abolition, ten states have it,
22 including Pennsylvania, ten jurisdictions have it
23 including Pennsylvania and the District of Columbia.
24 So, it would be 11 including the District of Columbia.
25 Most of the states that abolished it, abolished it

1 between the Civil War and the early 1920's and only
2 a handful of states have gotten rid of it since 1940,
3 a couple of them in 1940, two or three in 1940's
4 and then two or three in the 1990's, but the majority,
5 about 30 states that got rid of it, got rid of it in
6 the late 1800's, early 1900's. What was particularly
7 interesting to me were some of the reasons those
8 states got rid of it at the turn of the century. A
9 lot of times, for example, it was a way -- they
10 abolished common law marriage because they were con-
11 cerned about interracial marriages, particularly in
12 a lot of the southern states. They didn't want a
13 situation where an African-American woman and a
14 Caucasian male were to claim common law marriage after,
15 for example, the man had died even though it had
16 probably been a common law marriage relationship.
17 The states were very concerned about recognizing
18 interracial marriages. So, the kind of history
19 abolishing it to me was very striking. It was
20 something I didn't realize until I had done all of
21 my research and the reasons, the motives for it were
22 very different. Some states got rid of it just
23 because they did see it as a vestige of a time
24 long gone; that people now can go to the courthouse
25 if they want to get married but other states,

1 particularly the southern states, seemingly, from what
2 came up within the research, got rid of it for racial
3 reasons. And the states that have got rid of it
4 recently, so, those are the majority of the states,
5 about 30 states around the turn of the century. The
6 ten states that have gotten rid of it since 1940 have
7 done it because I think they have considered it anti-
8 quated and outmoded from what interesting is three
9 states, Michigan, Idaho and one other that I can't
10 recall, that got rid of it in the 1990's, all of them
11 seemed to have expressed some regret at having done so
12 after the fact; that maybe it did protect a particular
13 class of citizens. For example, there is an interest-
14 ing article in the Michigan Bar Journal after common
15 law marriage was abolished by a lawyers' group who had
16 supported its abolition and then came back afterwards
17 and said, maybe it's not such a bad thing; maybe now
18 because, for some of the reasons you both have
19 suggested, the judiciary is having to look harder to
20 protect a certain group of people who were protected
21 under common law marriage status and because it
22 wasn't something that came up too often. Maybe it's
23 something we should have kept.

24 PROFESSOR LOCKARD: Michigan is a juris-
25 diction that does recognize putative spouse doctrine.

1 MR. PRESKI: And that came after?

2 PROFESSOR LOCKARD: I believe, yes.

3 MR. PRESKI: That's it.

4 MS. MENDLOW: I'd be interested in knowing
5 if you see any pattern where certain either insurance
6 companies or certain parties are not interested in
7 continuing the recognition of common law marriages
8 because it's more of a hassle and, therefore, as
9 opposed to the issue of protection of the "rights" of
10 the women who may have been in a long term relationship.
11 This may be a situation where there are companies or,
12 you know, that would prefer not to have to give out
13 certain benefits and if you are in a common law
14 marriage and they haven't been married, it makes
15 things clear and simple. Can you give me some in-
16 sight on that?

17 PROFESSOR KEARNEY: I think that is a
18 valid point. I cannot think of a specific example.
19 I could not cite to you a particular example. It makes
20 sense because the main opposition to common law
21 marriage has been both judicial, that it creates
22 judicial inefficiencies because the courts have to
23 figure out someone is married, and also administrative
24 inefficiency which is what I think you are referring
25 to. It is easier, there is no question, it is easier

1 if someone can present a marriage certificate to give
2 them spousal benefits, at the insurance level or
3 any level, any sort of governmental benefits. It's
4 just easier because you either have the piece of
5 paper or you don't. However, our position is that
6 it's fair and it's more just and it may take a little
7 more time to dig a little bit deeper and figure out
8 if, in fact, a marriage existed.

9 MS. MENDLOW: One other question real
10 quickly and that would be prior to the hearing, Mr.
11 Raphael was mentioning that there was a recent Supreme
12 Court case where the individuals again were not
13 married but there were actually children in this
14 relationship and yet the Supreme Court ruled that
15 they would not recognize it as a common law marriage.
16 I was wondering if you were familiar with that case?

17 PROFESSOR KEARNEY: I think the issue in
18 general about the adverse effect -- I'm not directly
19 familiar with that particular case. However, I think
20 oftentimes these cases do affect not just the women
21 who are seeking common law marriage status but the
22 children. There may still be in our society, maybe
23 not, some stigma associated with the legitimacy, but
24 if there is, clearly that would fall upon the children
25 where it really, I think, affects the children is in

1 the rights to intestate succession. So, I think that
2 if there isn't a common law marriage, then they can
3 lose some of their rights in terms of intestacy.

4 PROFESSOR LOCKARD: I would agree.

5 MS. MENDLOW: I guess what I was concerned
6 about is the amount of judicial discretion that is
7 given in determining whether or not there was this
8 "common law marriage" and I think Mr. Raphael was
9 expressing, and I hope I am not mischaracterizing what
10 he was trying to explain to me, but he seemed quite
11 taken back by that decision because in that case it
12 appeared there was this understanding; there was a
13 long term relationship producing several children and
14 yet somehow there was a ruling that it not benefit
15 the children or the woman. I was interested and
16 perhaps we can get back to Mr. Raphael on that to
17 learn more about that case.

18 PROFESSOR LOCKARD: I think one of the
19 problems with common law marriage is that the require-
20 ments for the establishment of a common law marriage
21 are not well understood either by the public or by
22 the Bar for that matter and that's unfortunate and
23 that's how you can have an instance such as the one
24 you described where there are children and there has
25 been a long term relationship but yet the court can

1 still determine there is not a common law marriage.
2 But I think that is a matter that is best addressed
3 through education rather than abolishment of common
4 law marriage.

5 MR. SCOTT: I would assume that England
6 still has it?

7 PROFESSOR KEARNEY: I would assume they do.
8 Traditions, last a long time there.

9 MR. SCOTT: I was getting ready to say that
10 you'd really hit up against a wall if England doesn't
11 have it.

12 What Chairman Gannon brought up as far as
13 what aspect of retention was to give the courts the
14 ability to choose a Door No. 1 rather than a Door No. 2,
15 but it would appear that the brethren of the Bar listen
16 to Attorney Raphael who has been past president. He
17 gave his background and I see that one of our next
18 speakers, who happens to be a lawyer, is not in favor
19 of it. As a matter of fact, I think we are all
20 lawyers except Jane sitting up here now. So, I'm
21 trying to weigh out academia, what you are saying,
22 you two from Widener versus people that, I don't want
23 to say people in the real world. When a piece of
24 legislation goes through, we have what we call a
25 fiscal note, whether or not the Commonwealth will spend

1 money or save money. So, what do you think, with the
2 abolition, what would happen with the Commonwealth?
3 Would it save money or spend more money? You have to
4 look at it from that viewpoint because the numbers will
5 through the fiscal note.

6 PROFESSOR KEARNEY: What a response before
7 Professor Lockard who has been practicing for 20, 25
8 years now in the area of poverty law. So, he
9 probably has seen about as many common law marriages
10 as any practicing attorney but in response to your
11 question, I would say they both save and lose. I
12 think maybe in the long run, I mean the short run,
13 they save money because if there isn't a recognition
14 of a common law marriage, the state may not have to
15 pay particular benefits or the federal government may
16 not have to pay particular benefits to an individual.
17 So, they would save money in that regard. I think
18 that they might lose money in a case like Ms. Smith
19 in the long run because I think somebody like that
20 will be on the public welfare rolls. So, the state
21 will be paying in a different form for not having
22 recognized the common law marriage. So, it depends
23 at what point you want to spend.

24 PROFESSOR LOCKARD: Yes, I concur. I
25 think that rather than -- at least in the short term,

1 the savings won't be a loss. It will be a shift.
2 Rather than collecting this Social Security disability
3 benefit, she will be collecting other forms of public
4 assistance.

5 MR. SCOTT: Right. I'm not talking about
6 the insurance company who has to pay up the benefit
7 except for the Commonwealth and I think that will be
8 a controlling factor when the legislation comes up.
9 I'm trying to look at it realistically. Thank you,
10 Mr. Chairman.

11 CHAIRMAN GANNON: Just a follow-up here
12 because, you know, we have been talking and Scotty
13 made his comment about, does England still have it and
14 you go back and you have that body of common law
15 that the court has to look at for precedence when they
16 have a case before it involving the issue of whether
17 or not common law marriage existed and they are going
18 to be bound by some of that precedence and we haven't
19 abrogated this section of common law, to my knowledge.
20 They could argue and go back to English common law
21 for precedence, which they would have to **overturn**
22 if they wanted to come to a different result whereas
23 by abolishing the common law, that would be at the
24 starting point. So, the court could begin to set up
25 a new common law from that point forward without

1 concern about abolishing precedence. You just deal
2 with that particular deck of cards as presented to you
3 and make sure the hand comes out exactly the way you
4 want and you go from there, whereas you are bound by
5 the -- the reason I bring that up is because you made
6 that comment that it's not very well understood, which
7 means that somebody has to go back and find out what
8 elements have to exist before you can make a case that
9 a common law marriage did, in fact, exist because --
10 and then look at precedence and see whether or not those
11 factors are there. Whereas, without that confinement,
12 you can start from scratch and say okay and use the
13 term putative marriage, for instance, instead of
14 common law. I was thinking like two people buying
15 a piece of property as tenants in common but they were
16 living together and everybody thought they were
17 married. When the common law issue comes up, did
18 that become tenants by the entirety? At any rate, I
19 thought that was -- that struck me on some of the
20 other comments that were made, that maybe the courts
21 were to go in another direction, either maybe more
22 stringent or perhaps less stringent and you might see
23 a lot more cases, not so much on entitlements but
24 on the Marvin versus Marvin side of the equation
25 because people would see much better opportunity.

1 PROFESSOR KEARNEY: The legislature can
2 decide if that is a desirable thing or not.

3 CHAIRMAN GANNON: Perhaps instead of being
4 recognized as a marriage in the community -- well, a
5 lot of people thought they were married. Some people
6 knew they weren't and some people thought that they
7 were. Well, that meets the criteria. You might have
8 a much more looser standard. Anything?

9 (No response.)

10 CHAIRMAN GANNON: Thank you very much. I'm
11 glad to see that Widener University School of Law is
12 represented here.

13 (The following was submitted for inclusion
14 in the record:)

15 HOUSE JUDICIARY COMMITTEE
16 COMMON-law MARRIAGE TESTIMONY
17 HOUSE BILL 43

18 Professor Mary Kate Kearney
19 Professor J. Palmer Lockard
20 Widener University School of Law
21 3800 Vartan Way
22 P.O. Box 89382
23 Harrisburg, PA 1706-9382

24 INTRODUCTION

25 We wish to express our opposition to
House Bill 43 which proposes the abolition of
common-law marriage in Pennsylvania. For the

1 reasons presented below, we believe that
2 common-law marriage serves many important
3 purposes. Chief among these is the protection
4 of traditionally disadvantaged groups. Our
5 presentation sets forth the origin and
6 rationale for common-law marriage, the Pennsylvania
7 courts' treatment of the subject, and a
8 discussion of the policies for and against
9 common-law marriage. Although we are mindful
10 of objections to the doctrine, we conclude that
11 the citizens of Pennsylvania are well-served
12 by the continued recognition of common-law
13 marriage.

14 ORIGINS OF AND RATIONALE FOR COMMON-LAW MARRIAGE

15 The concept of common-law marriage was
16 transported to the American colonies from
17 England.¹ Today, ten states and the District of
18 Columbia recognize common-law marriage.²
19 Most of the states that abolished the doctrine
20 did so by 1970 although a few eliminated it
21 in the 1990's.³ Nevertheless, many of those
22 states which have abandoned the doctrine
23 will honor common-law marriages that have
24 taken place in jurisdictions that still
25 recognize it.

1 The reasons for common-law marriage are
2 varied. Sometimes they occur when one party
3 has greater bargaining power and does not
4 want a formal marriage to occur. More

5

6 ¹Cynthia Grant Bowman, "A Feminist Proposal
7 to Bring Back Common Law Marriage," 75 Or. L.
8 Rev. 709, 719 (1996).

9 ²Those states are Alabama, Colorado, Iowa,
10 Kansas, Montana, Oklahoma, Pennsylvania,
11 Rhode Island, South Carolina, Texas and the
12 District of Columbia.

13 ³Bowman, supra note 1, at 716 N.24.

14 often, they arise over time when both parties
15 assume that they are legally married. As one
16 commentator explained the phenomenon:

17 In most instances...people drifted into
18 common law marriage either because one of
19 the parties persuaded the other that they
20 really be married in this fashion, or
21 because the customs of their social class
22 sanctioned this kind of union. In such
23 cases they had no contact with the law
24 until one of them died or a divorce action
25 was brought.⁴

26 The issue often arises after the death of one
27 of the parties when the other is seeking
28 spousal benefits or a share of the estate.
29 In other instances, both parties are alive
30 and disagree about the distribution of assets
31 after the relationship has dissolved.

1 PENNSYLVANIA COURTS' INTERPRETATION OF COMMON-LAW
2 MARRIAGE

3 Common-law marriage in Pennsylvania has
4 two requirements: capacity and a present
5 agreement to be married.⁵ First, the parties
6 must have the mental capacity to enter into
7 an agreement. In addition, they must have
8 an agreement in the present, as opposed to the
9 future, to be married, although that agreement
10 "does not require any specific form of words."⁶

11 The Pennsylvania Supreme Court most recently
12 addressed the subject of common-law marriage
13 in Staudenmayer v. Staudenmayer.⁷ The court
14 adopted a bifurcated approach to common-law
15 marriages. One standard is used when one
16 party has died, and the other party argues

18 ⁴ Homer Clark, The Law of Domestic Relations
19 in the United States, 59-60(1988).

20 ⁵ In re Garges, 378 A.2d 307 (Pa. 1977). See
21 also Joseph B. Kelly, Pennsylvania Marriage,
22 Divorce, Custody, Property and Support & 2-7
23 (3d ed. 2000)

24 ⁶ Id. at 309.

25 ⁷ 714 A.2d 1016 (Pa 1998).

1 that a common-law marriage existed. A
2 second standard exists when both parties are
3 still alive and dispute the existence of a
4 common-law marriage.

5 In Staudenmayer, both parties were alive
6 and disagreed about whether they had a common-
7 law marriage. The common-law marriage issue
8 arose during the equitable distribution phase
9 of divorce proceedings between the Staudenmayers.
10 The couple, who decided to divorce in 1992,
11 had been married in a 1984 civil ceremony and
12 had lived together between 1976 and 1984.⁸
13 In 1982 or 1983, Theodore Staudenmayer was
14 injured in a work-related accident and began
15 receiving structured settlement payments for
16 his injuries. When the couple divorced,
17 Linda Staudenmayer argued that those payments
18 constituted marital property and should have
19 been included in the equitable distribution
20 calculations because the settlement occurred
21 during their common-law marriage. Theodore
22 responded that Linda was not entitled to a
23 share of the settlement proceeds because the
24 award occurred before the civil ceremony while
25 they were merely living together.⁹

1 The court enunciated the requirements
2 for common-law marriages in Pennsylvania. The
3 court focused on the requirement of an exchange
4 of words in the present tense made for the
5 purpose of establishing the husband/wife
6 relationship.¹⁰ Although no specific words
7 are required for the exchange, the parties
8 must establish proof of an agreement to enter
9 into a present relationship.

11 ⁸Id. at 1018.

12 ⁹Id.

13 ¹⁰Id. at 1020 (citing Commonwealth vs. Gorby,
14 588 A.2d 902, 907 (1991); Estate of Manfredi,
15 159 A.2d 697, 700 (1960)).

16 The court further explained the difference
17 between the two types of common-law marriage
18 claims. When one party is seeking spousal
19 benefits or a share of the estate after the
20 other party has died, the surviving party may
21 have a hard time proving the exchange of words
22 in the present tense. The courts therefore
23 have adopted a rebuttable presumption in favor
24 of a common-law marriage absent testimony about
25 a present exchange of vows. The surviving

1 party meets her burden of proof if she
2 establishes continuous cohabitation and a
3 general reputation of marriage.¹¹

4 In the second instance, which was presented
5 in the Staudenmayer case, both parties were
6 alive and could testify about their intent to
7 enter into a common-law marriage. In that case,
8 the rationale does not exist for relying on
9 the rebuttable presumption in favor of common-
10 law marriage based on cohabitation and reputation
11 of marriage. Therefore, the Supreme Court
12 required the party arguing in favor of a
13 common-law marriage to show by clear and
14 convincing evidence that words were exchanged
15 in the present tense for the purpose of estab-
16 lishing the existence of a common-law marriage.¹²

17 In Staudenmayer, the court determined that
18 Linda Staudenmayer failed to meet her burden
19 of establishing by clear and convincing evidence
20 the existence of a common-law marriage.¹³
21 Linda failed to produce proof of an agreement
22 to enter into the legal relationship of
23 marriage because she did not produce evidence
24 of "an exchange of words in the present tense
25 spoken with the purpose of establishing the

1 relationship of husband and wife."¹⁴ The

2
3 ¹¹Id. at 1020-21.

4 ¹²Id. at 1021.

5 ¹³Id. at 1022.

6 ¹⁴Id. at 1021.

7
8 Supreme Court agreed with the trial court's
9 conclusions that Linda Staudenmayer's lack of
10 recollection about times when she referred to
11 Theodore Staudenmayer as her husband during
12 the supposed common-law marriage, her inability
13 to explain the necessity of a civil ceremony if
14 they were already married, and the timing
15 between raising the issue and learning that the
16 structured settlement might not be considered
17 marital property further undermined her
18 common-law marriage claim.¹⁵ For these reasons,
19 the Pennsylvania Supreme Court held that Linda
20 Staudenmayer did not meet her "heavy burden"
21 of proving a common-law marriage and that she
22 did not enjoy a presumption that such a
23 marriage existed based on cohabitation and
24 reputation of marriage in the community.¹⁶

25 In dicta, the majority opinion traced

1 the Pennsylvania courts' objections to
2 common-law marriages, noting that they repre-
3 sented a "fruitful source of perjury and
4 fraud."¹⁷ The Court further stated such
5 claims were "tolerated, but not encouraged"
6 and "disfavored."¹⁸ In keeping with that
7 same line of thinking, Justice Nigro, in a
8 concurring opinion, proposed that Pennsylvania
9 join other states in abolishing common-law
10 marriages.¹⁹

11 In subsequent cases, lower Pennsylvania
12 courts have followed the Staudenmayer court's
13 rationale in analyzing the issue of common-law
14 marriage. When a man died in a work-related

15 ¹⁵Id. at 1022

16 ¹⁶Id. at 1021.

17 ¹⁷Id. at 1019 (quoting in re Estate of Wagner,
18 159 A.2d 495, 497 (1960)).

19 ¹⁸Id. at 1020

20 ¹⁹Id. at 1022 (Nigro J., concurring).

21 accident, his companion of five years sought
22 workers' compensation benefits on the grounds
23 that they were a common-law husband and wife.²⁰
24 The Pennsylvania Commonwealth Court affirmed the
25

1 Workers' Compensation Board's determination
2 that a common-law marriage existed because
3 the couple had had a private marriage ceremony
4 and had lived together uninterruptedly for
5 five years.²¹

6 In contrast, a federal district court
7 rejected a prisoner's argument that he should
8 be granted visits with a woman who he claimed
9 was his common-law wife.²² The court
10 determined that the prisoner did not meet the
11 "heavy burden" of proving that the couple
12 had an agreement to enter into the legal
13 relationship of marriage at the present time
14 or that the couple had the general reputation
15 of being married.²³

16 In both cases, the courts seemed com-
17 fortably reviewing or sifting through the
18 facts to determine whether the elements of
19 common-law marriage had been met. In the
20 workers' compensation case, the court deter-
21 mined that the surviving partner was indeed
22 a widow and should be granted survivor benefits.
23 In the prison situation, the court concluded
24 that the claim of common-law marriage was
25 without merit. Taken together, the cases

1 suggest that common-law marriages serve an
2 important function: they allow one court
3 to remedy an injustice that would be created
4 by the denial of worker compensation
5

6
7 ²⁰Brandywine Paperboard Mills v. Workers'
8 Compensation Appeal Board, --A.2d--(2000).

9 ²¹Id. at -.

10 ²²Africa v. Vaughan, 998 Pa. Supp. 552 (E.D.
11 Pa. 1998).

12 ²³Id. at 556.

13 benefits, and they avoid an injustice that
14 would be created by the recognition of a sham
15 marriage.
16

17 ARGUMENTS AGAINST COMMON-LAW MARRIAGES AND RESPONSES

18 Several arguments against common-law
19 marriages exist. The first is that the
20 original purpose of common-law marriages as
21 providing an alternative to ceremonial marriages
22 no longer exists. People now have the access
23 to churches or courthouses that they may not
24 have had a couple of hundred years ago so
25 they do not need common-law marriages.

1 Although that original basis may no longer
2 exist, common-law marriages still serve a
3 valuable purpose for the reasons discussed below.

4 A second objection to common-law marriages
5 is rooted in fear of fraudulent marriage claims.
6 The concern is that one party will claim that a
7 marriage existed, when it did not, simply to
8 get control of the other person's property
9 or estate. One commentator explains that
10 this concern about fraud manifested itself in
11 the stereotypes of "gold-digging women" who
12 sought a share of the decedent's estate by
13 claiming that they were widows rather than mis-
14 tresses. Although this may occasionally happen,
15 the incidence of this in the reported cases
16 appears to be far less than meritorious claims
17 by women seeking benefits or property after
18 the death of the other party.²⁴ In addition,
19 the evidentiary process is well-suited to distin-
20 guish between valid and fraudulent claims.²⁵

21
22 ²⁴Bowman, supra note 1, at 733.

23 ²⁵Clark, supra note 4, at 58. See also,
24 Note, Kathryn S. Vaughn, "The Recent Changes
25 in the Texas informal Marriage Statute:
Limitation or abolition of Common-law
Marriage?", 28 Hous. L. Rev. 1131, 1137 (1991).

1 Pennsylvania courts require evidence that the
2 couple in question had the reputation of being
3 husband and wife, they can identify legitimate
4 claims.²⁶

5 A third argument against common-law
6 marriage is that it debases the institution of
7 marriage.²⁷ To the contrary, common-law marriage
8 arguably elevates the institution of marriage
9 because it values substance over form. In
10 common-law marriage, the foundation of the
11 marriage depends on the actual relationship
12 between the couple rather than on a piece of
13 paper.

14 An additional argument is that common-law
15 marriage undermines the state's desire to
16 keep marriage records and to enforce health-
17 related marital requirements, such as tests
18 for sexually transmitted diseases.²⁸ One
19 response to this argument is that the state's
20 goal of preventing the spread of sexually
21 transmitted diseases is not met by premarital
22 screening since much sexual activity takes
23 place outside of marriage.

24 A related argument is that common-law
25 imposes burdens on agencies administering
benefits related to marriage and on the

1 court system. The argument is that the
2 absence of a marriage license or piece of
3 paper for common-law marriages makes agencies'
4 and courts' jobs more difficult.

5 Several responses can be made to that
6 argument. First, the issue of whether a
7 common-law marriage exists is not a deter-
8 mination that the judiciary has to make very
9

10
11 ²⁶Clark, supra note 4, at 58.

12 ²⁷Id.

13 ²⁸Bowman, supra note 1, at 752.

14 often.²⁹ For example, Pennsylvania has only
15 five reported appellate decisions on the
16 subject in the past six years. Moreover,
17 courts do comparable analysis when determining
18 the existence of other kinds of oral contracts
19 so they are well-equipped to make these
20 determinations in the context of common-law
21 marriages.

22 Finally, fairness to the party who
23 believes that she is in a common-law marriage
24 may override concerns about judicial efficiency.
25 The elimination of common-law marriages will

1 most adversely affect traditionally disadvan-
2 taged groups: the poor, women, children and
3 minorities. A case that was recently handled
4 by Widener's Civil Law Clinic illustrates
5 how common-law marriages can benefit these
6 disadvantaged groups.

7 Ms. Smith (not her real name) was
8 referred to the Civil Law Clinic by the
9 Dauphin County Area Agency on Aging. The
10 Agency referred Ms. Smith to the Clinic because
11 she was being evicted from the home that she
12 had shared with Mr. Jones (not his real name)
13 for over 15 years. Mr. Jones had recently been
14 placed in a nursing home and adjudicated
15 incompetent. His court-appointed guardian had
16 then begun eviction proceedings against Ms.
17 Smith, whose name was not on the deed to the
18 shared home.

19 Students from the Civil Law Clinic were
20 able to obtain affidavits from neighbors
21 and relatives that established the existence
22 of a common-law marriage between Ms. Smith
23 and Mr. Jones. Mr. Jones' guardian withdrew
24 the eviction proceedings, thereby enabling
25 Ms. Smith to remain in her home. In addition,

1 the students presented proof of the common-law
2

3
4 ²⁹The reported appellate decisions suggest
5 that Pennsylvania courts have examined the
6 issue once or twice a year over the past
7 twenty years. The issue usually arises in
8 one of three situations: workers' compensation
9 survivors' claims; divorce and property
10 distribution; and elections against wills.
11 In approximately three-quarters of those cases,
12 courts did not find that a common-law marriage
13 existed.

14 marriage to the Social Security Administration.
15 The Administration found that there had been a
16 common-law marriage and awarded Ms. Smith spousal
17 benefits. Her monthly income thereafter
18 increased from \$469.00 to \$944.00. Because of
19 the common-law marriage doctrine, Ms. Smith was
20 able to maintain her housing and receive an
21 acceptable level of income for her old age.

22 Ms. Smith's story is not atypical,
23 particularly among elderly Pennsylvanians. Ms.
24 Smith, who was seventy-six years old, was aware
25 of the common-law marriage doctrine, and
believed that she and Mr. Jones had been married
when they began cohabiting. Her belief in the
validity of common-law marriages is typical
of individuals who grew up at a time when

1 common-law marriages were widely recognized
2 throughout the United States. The danger of
3 a sudden change in Pennsylvania's recognition
4 of common-law marriage is that it will have
5 a disparate effect on our least educated citizens.

6 Some commentators have stated that the
7 majority of couples in common-law marriages
8 have had less education and have attained a
9 lower socio-economic level than the majority
10 of the population.³⁰ When that is the case,
11 they may not be aware that a common-law marriage
12 does not have the same validity as a ceremonial
13 one. Therefore, they may expect to get the
14 kind of benefits that a spouse would get from
15 a ceremonial marriage and may rely on having
16 them.

17 A second group adversely affected by the
18 elimination of common-law marriage are women.
19 In most of the appellate cases involving
20 common-law marriage claims, the claimant is a
21 woman. Often, she is seeking widow's benefits,
22 such as insurance benefits; sometimes, she is
23 seeking the right to support or alimony. The
24 frequency with which women bring these claims
25 may speak to a larger issue about women's economic

1
2 ³⁰Vaughn, supra note 25, at 1141 (citing
3 Stein, "Common Law Marriage: Its History
4 and Certain Contemporary Problems," 9 J. Fam.
5 L.271, 293(1969); J. Sirmamake, The American
6 Family in the Twentieth Century 69 (1953)).

7
8 dependency on men. In any event, the abolition
9 of common-law marriage in Pennsylvania will
10 impose economic hardship on women who often
11 have been involved in long-term marriage
12 arrangements but are left with nothing.

13 Another related group adversely affected
14 by the elimination of common-law marriage are
15 children.³¹ Often, the women seeking to
16 establish a common-law marriage have had children
17 with their common-law husband. When the parents'
18 relationship is not legally recognized, the
19 children are considered illegitimate. In
20 addition to whatever stigma still may be
21 associated with illegitimacy, that status may
22 affect those children's rights to intestate
23 succession.

24 Finally, some commentators have noted
25 that the abolition of common-law marriage may

1 adversely affect some minority groups.³²
2 Members of some ethnic groups may use the
3 informal mechanism of a common-law marriage
4 more often than white middle-class society.
5 Therefore, the elimination of common-law
6 marriage could disproportionately affect
7 members of that group. For these reasons,
8 the non-recognition of common-law marriage
9 may leave certain segments of society more
10 vulnerable than others.

11 We would respectfully request the
12 legislature not to abolish common-law marriage
13 in Pennsylvania.

16 ³¹Vaughn, supra note 25, at 1145.

17 ³²Vaughn, supra note 25, at 1147.

18 MR. VERTZ: Good morning. My name is Brian
19 Vertz. I have prepared from written testimony which
20 I have given to you. The level of the discussion
21 seems to be somewhat more sophisticated than the
22 level of my testimony. So, if I may, I'm going to
23 depart somewhat from the written testimony to comment
24 on the discussion I have just heard.

25 First of all, I should let you know that I

1 am an attorney who is engaged in the practice of law
2 in Pennsylvania and have done so since 1992. My
3 practice is focused entirely in the area of domestic
4 relations and although I cannot represent them in
5 an official capacity, I have discussed my testimony
6 with Harry Gruener, who is the President of the
7 Pennsylvania Chapter of the American Academy of
8 Matrimonial Lawyers, David Pollock, who was my former
9 boss and is currently the President of the Family Law
10 Section of the Pennsylvania Bar Association and Carol
11 McCarthy who is my current boss and is the President of
12 the Family Law Section of the Allegheny County Bar
13 Association.

14 Most of the family lawyers that I know
15 favor the passage of this bill which would abolish
16 common-law marriage. The reason is not primarily as
17 the professors before me have said because of the
18 administrative burdens on the courts, but because
19 there is a great potential for fraud and perjury
20 involved in this doctrine. Many persons, many couples
21 throughout Pennsylvania choose not to be married.
22 They choose not to have the entanglements, the legal
23 entanglements of a marriage. They choose to maintain
24 separate property and separate finances. They choose
25 to keep their estates separate and they may have very

1 good reasons for doing so. For those persons it's
2 important to facilitate their ability to do that.

3 There is also a mythology, a street law,
4 if you will, out there. Many people had misconceptions
5 about how it is a common-law marriage is formed. There
6 is a common misconception that a common-law marriage
7 is formed by living together for seven years and we
8 have all heard that. That is not true. It may be
9 true if there is also an oral contract between the
10 parties, if they have exchanged informal vows, words
11 of present intention to form a common-law marriage,
12 but as I said, in many cases they simply have chosen
13 to live together and not to form a common-law marriage
14 or to have a ceremonial marriage. In those cases, when
15 one of those spouses dies, there is the surviving
16 spouse. I shouldn't say spouse actually because, as
17 I said, they are not intending to be married under
18 the common-law but the surviving partner may seek
19 Social Security benefits, may seek pension or life
20 insurance benefits, may seek to receive a spouse's
21 share of the deceased partner's estate or to elect
22 against the will and in those cases they should not be
23 permitted to do so.

24 Because this mythology exists, the
25 mythology will exist whether or not the statutory law

1 says that common-law marriage is abolished. Even
2 after common-law marriage is abolished, there will be
3 some people out there that still believe that they can
4 be married by living together for seven years and this
5 will not change that.

6 There are -- Mr. Chairman, you asked whether
7 there were substitutes for a common-law marriage and
8 substitutes exist today. Unmarried partners can get
9 bank accounts that are titled as joint tenants with
10 rights of survivorship. They can designate each other
11 as beneficiaries of life insurance and pension benefits
12 and such. They can draft wills and name each other as
13 the beneficiaries. There are certain benefits that
14 they cannot confer on each other such as Social
15 Security benefits or other spousal benefits that are
16 governmental entitlements but those rules could
17 always be changed.

18 One situation that the professors described
19 was a situation where a surviving spouse came to the
20 Clinic and sought benefits that would be attributable
21 to her common-law husband's earnings and that is a
22 common occurrence. The legislation that has been
23 proposed contains a savings clause and if this
24 legislation were passed, my understanding is that it
25 would not have affected Mrs. Smith's entitlement to

1 those benefits because her marriage, her common-law
2 marriage, was contracted before the enactment of
3 this legislation. Similarly, this legislation con-
4 tains a provision which would delay the effective date
5 for one year, which would give an opportunity for the
6 newspapers and for various public agencies to get out
7 the word and start to change the street law so that
8 people who don't have common contact with attorneys,
9 indigent persons who are not getting good legal advice,
10 could begin to hear that common-law marriages have
11 been abolished and they should go through the steps
12 to get a ceremonial marriage. A ceremonial marriage
13 is not exceedingly difficult or expensive to get in
14 Pennsylvania. There is a courthouse in every county
15 of this Commonwealth and the fees are not exorbitantly
16 high.

17 Mr. Preski, you ask the professors about
18 the idea of a registry and you suggested that perhaps
19 it would be a good idea if only one of the putative
20 spouses had to sign the registry in order to perform
21 a marriage. The problem is that again there is a great
22 potential for fraud because we frequently see cases
23 where one spouse is, after the death of one of the
24 partners, the other partner is seeking a share of the
25 estate or seeking life insurance or pension benefits

1 and is in an adversarial position to the deceased
2 partner's family. Having one spouse sign a registry
3 would probably not ameliorate the potential for fraud.

4 You asked also about the case that Mr.
5 Raphael described, the Supreme Court case. The name
6 of the Supreme Court case is Staudenmayer and I have a
7 copy if you would like. In this Staudenmayer case,
8 the parties did have a ceremonial marriage. They
9 simply lived together for eight years before they got
10 their ceremonial marriage and when they were divorced,
11 the wife in this instance sought to get a share of
12 personal injury settlement proceeds that were awarded
13 to the husband before they were ceremonially married
14 and in that case the Supreme Court decided to affirm
15 the trial court, which had denied her that right. They
16 found that there was no evidence of an exchange of
17 vows prior to their ceremonial marriage and the state
18 of the law in Pennsylvania was somewhat murky before
19 the Staudenmayer case. It was not clear that a
20 common-law marriage could not be established by
21 reputation of marriage and cohabitation when both
22 spouses were living. So, the bifurcated approach the
23 professors described is new. It was only enunciated
24 by the Supreme Court in July of 1998 when the
25 Staudenmayer decision came out.

1 In my view the abolition of common-law
2 marriage would not significantly worsen the plight of
3 the indigent. Common-law marriage, as I have
4 suggested, is almost universally misunderstood by lay-
5 persons of every economic level. Just commonly
6 believed, as I said, that a common-law marriage is
7 established by living together for seven years. This
8 myth and other myths will probably survive that the
9 street law can be changed over time if there is a
10 concerted effort to get out the word after this
11 legislation is passed.

12 I would conclude my testimony by saying
13 that most of the lawyers I have spoken to favor
14 the passage of this legislation.

15 CHAIRMAN GANNON: One of the things that
16 strikes me, I was looking at this brief summary of
17 the Staudenmayer case. You know, it's apparent that
18 here they lived together eight years prior to 1984.
19 He was involved in an accident in 1982, which would
20 have been six years, they had been living together
21 for six years and they get married. They are both
22 alive at the time she decides she should get a whack
23 at this personal injury settlement and the court comes
24 back and says, you might have been engaged but you
25 weren't in common-law marriage and then the court,

1 somebody on the court says, you know, we ought to
2 repeal common-law marriage. It just seems to me that
3 the court may have come to the correct conclusion in
4 this Staudenmayer case based on the fact that I'm not
5 all that certain that that case considering that
6 factual situation would justify a repeal of common-law
7 marriage because they didn't find a common-law
8 marriage. I can see where they are sitting there and
9 agonizing over it. We have to find a common-law
10 marriage here but we really don't want to but all of
11 the law and the precedent and everything says we have
12 to do it. The only remedy so that this doesn't
13 happen again is the legislature has to repeal common-
14 law marriage because this is just totally outrageous,
15 the result that occurred, but we had to do it. That's
16 not the case here. They said, there is no common-law
17 marriage and the legislature should abolish common-law
18 marriage. So, we don't have to look at cases like
19 this. What are you hired for? That's your job. They
20 don't want to look at cases that they feel are taking
21 up their time. I guess, as pointed out in this
22 little summary, this litigation went on and on and on.
23 I would imagine that there was a substantial sum
24 involved here and perhaps that's what really got the
25 ire of the justices, you know, that these people just

1 wouldn't let go and they had to deal with it. I'm
2 not that sympathetic in a situation like that. But
3 I'm just wondering in my own mind whether those facts
4 would warrant, you know, justification for a public
5 policy change -- we are going to do away with common-
6 law marriages because our Supreme Court justices just
7 don't feel like hearing these kind of cases.

8 MR. VERTZ: Well, Your Honor, I think there
9 is more to this case than just the administrative
10 burden. I think that what one of the problems is,
11 this case highlights the paltriness of evidence that
12 often comes before a court when it comes to deciding
13 common-law marriage. There were interesting facts
14 here. She had changed her license. She had obtained
15 a Social Security card in his name. She had adopted
16 his last name before they were ceremonially married
17 and they had had joint bank accounts, filed joint
18 tax returns. There were a lot of the incidence of
19 marriage but because there was this later ceremonial
20 marriage and because there was no solid evidence of an
21 exchange of vows, the Supreme Court and trial court
22 were compelled to find there was no common-law
23 marriage, I think the exasperation that Justice Nigro
24 expressed there is that if common-law marriage were
25 abolished, street law would eventually change. People

1 would eventually learn that they must get ceremonially
2 married and that would eliminate the uncertainty that
3 these families have and it would also ease the
4 administrative burden and it would also reduce the
5 potential for fraud and perjury. So, there is no way
6 the courts alone can change the law. They don't feel
7 that they should do that. Certainly, they could do
8 that but they don't feel they should do it. They feel
9 it should come from the legislature and that is
10 probably correct.

11 CHAIRMAN GANNON: That's a good point. I
12 mean, common-law is under the control of the courts.
13 I mean, the courts could issue an order saying we are
14 not recognizing common-law marriage as a matter of
15 common law. If the legislature wants common-law
16 marriages, they are going to have to enact a statute
17 that says we are going to recognize common-law
18 marriages.

19 MR. VERTZ: Well, there is a statute on the
20 books currently that says that common-law marriages,
21 that the law pertaining to common-law marriages will
22 not be affected by the enactment of the divorce code.

23 CHAIRMAN GANNON: You are right. I'm sorry.
24 I misspoke. I forgot that.

25 MR. VERTZ: It does require legislative

1 action.

2 CHAIRMAN GANNON: So, they couldn't change
3 that by court decision. It would have to be a
4 statutory remedy.

5 There was one other element in that case
6 that kind of struck me too and I can see, and I guess
7 this is really maybe where the dilemma comes into play
8 and that is you have a relationship that is developed
9 over a period of time where a couple lives together.
10 They accumulate assets together. They accumulate
11 wealth together. It's not an event-driven type of
12 thing. It happens over a period of time. They get
13 jobs and they start to develop savings and acquire
14 assets and whatever. Now, that situation is terminated
15 for whatever reason and one or the other says, I
16 should get a share of that because we developed that
17 together and some of that should be rightfully mine
18 and I don't think myself or anybody up here or the
19 courts would say, yes, we are going to see what we can
20 do to try to -- whereas now you have this as event-
21 driven This is one single event. Somebody had an
22 accident, they got -- it's like -- I don't want to
23 draw the comparison that that is anything like the
24 lottery but all of a sudden there was this sum of
25 money placed in one party's hands. It wasn't some-

1 thing accumulated over time and now the other party
2 says, I want some of that too and I think that might
3 have been a little bit different. That wasn't
4 something that both had accumulated over time. There
5 was probably no loss of consortium.

6 MR. VERTZ: Although if there was a common-
7 law marriage, there might be.

8 CHAIRMAN GANNON: There might be. What I'm
9 thinking is the court said, you know, it's awfully
10 difficult for us to shoehorn something like that into
11 a common-law marriage whereas it's easy for us to justi-
12 fy finding a common-law marriage when you are talking
13 about pension benefits and stock that you both bought
14 over time or investments that you made or you bought
15 a house or whatever, your assets became intermingled
16 and now we are going to try to sort that out as opposed
17 to, well, we lived together and he hit the lottery and
18 now I want some of that money because we got married
19 six years later.

20 MR. VERTZ: Well, you have to keep in
21 mind that if at the time when one of the partners
22 seeks a share of those assets that are acquired
23 together, if both of the partners are alive, the
24 common-law marriage doctrine is not helping that
25 spouse or that partner, that dependent partner, because

1 what the Staudenmayer case says is that they haven't
2 had an event, if they haven't exchanged vows, there
3 is no common-law marriage. So, there is no equitable
4 distribution remedy.

5 CHAIRMAN GANNON: What I'm saying is I
6 think in this case the court was less driven to find
7 a common-law marriage. In other words, they said,
8 well, you know, the guy got a lump sum of money. It
9 was six years before. You know, we're not going to
10 try to shoehorn this thing and so unless she comes up
11 with some really solid evidence which she apparently
12 did not, they said no. Where I could see, if that
13 was not a factor in play, but they might have found
14 another decision. I'm just speculating, where they
15 would try to provide some benefit for that.

16 MR. VERTZ: An interesting related topic
17 is that under the current state of the law, if there
18 were children involved here, the children probably
19 would have been entitled to child support based upon
20 that personal injury settlement. We have cases in
21 Pennsylvania that say that lump sum awards, personal
22 injury settlements, inheritance, other kinds of lump
23 sums can be considered as income for child support
24 purposes. And so in a situation where they are living
25 out of wedlock and have children, those children will

1 get the benefit of the dollars that flow into either
2 partner's possession.

3 MR. PRESKI: In your years of family law
4 practice, have you ever had any occasion to argue in
5 favor of a creation of the common-law marriage?

6 MR. VERTZ: I have and it's exceedingly
7 difficult to do so particularly when there is no real
8 good evidence of an exchange of vows.

9 MR. PRESKI: Now, let me -- from your
10 testimony, if I could paraphrase, basically the
11 practitioner who has a client in front of them who
12 in order to, Chairman's words, get a whack at whatever
13 is out there, you basically then are put in this
14 position where you say to your client, Mr. and Mrs.
15 Jones, the common-law marriage doctrine in
16 Pennsylvania says that sometimes -- you just state a
17 present sense intention that you were married.
18 Understand, if you answer that question yes, we can
19 move forward and you can get your whack at the money.
20 If you say no, then we are pretty much out of court.
21 Well, then you would ask the question, have you ever
22 stated a present sense intention to be married. My
23 assumption is that the answer is always yes and that's
24 your greatest concern, that inherent in the question
25 that has to be asked will always be the potentially

1 fraudulent or perjurious answer.

2 MR. VERTZ: Of course, I would never put
3 those words in my client's mouth in that manner but
4 at the time when I had a case of this nature, it
5 preceded Staudenmayer and so I had plenty of cards
6 saying to my husband on his birthday and joint accounts
7 and they didn't file tax returns together, but other
8 kinds of things but the answer is yes, there is a great
9 potential. There is a temptation for a partner to
10 perjure himself or herself and say, yes, or to even
11 construe words that are not specifically, will you
12 marry me, yes, or do you want to be my wife, yes; to
13 construe other sort of affectionate words as an
14 exchange of vows.

15 MR. PRESKI: Okay. I guess my next
16 question would be, is that the professors pretty much
17 intoned that if we adopt House Bill 43 and do away
18 with common-law marriages, that the courts are going
19 to run in and bring something else that is judicially
20 creative in order to fill this need for, what they
21 described it as, was an indigent population. Do you
22 have any concerns or thoughts about that?

23 MR. VERTZ: I think Staudenmayer demon-
24 strates the court's unwillingness to do that. If the
25 court were inclined to fashion judicial remedy for

1 these situations, they have had the opportunity to do
2 that in the past. There are plenty of cases that
3 have come before the court where there was not an
4 exchange of words, where there was simply this
5 reputation and cohabitation where they have declined
6 and the courts have consistently narrowed the scope
7 of the common-law marriage doctrine over the past 10
8 to 15 years. So, I would expect that to continue. I
9 really wouldn't expect, and our courts have also
10 considered the issue of palimony, if you will, and
11 declines to make that remedy.

12 MR. PRESKI: All right. Thank you.

13 MR. SCOTT: Thank you, Mr. Chairman.

14 Attorney Vertz, I can understand when you say a layman,
15 no matter what their economic strata, I'm still some-
16 what perplexed. First, let me say the registry
17 point you brought up that Attorney Preski mentioned,
18 I can understand. It sounded good, what Brian said
19 initially but the fact that it would be replete with
20 fraud if one person is deceased, I can understand why
21 two people would have to sign. That was a good point.

22 In the Staudenmayer case you mentioned
23 there were no exchange of vows but it was my under-
24 standing, and this is why I am saying this as a layman.
25 I have never dealt with this in my practice but if you

1 have cohabitation and you need a written declaration
2 or do you need a verbal exchange of vows with a
3 witness? A written declaration is fine?

4 MR. VERTZ: What the Staudenmayer case says
5 is if both spouses are living, there must be a verbal
6 or written exchange of vows. If one of the spouses
7 is deceased, then the court can look to cohabitation,
8 constant cohabitation, and a general and broad
9 reputation in the community as married persons. The
10 reason being that if one of the spouses is dead, the
11 dead man's rule bars the surviving spouse from putting
12 words in the mouth of the dead person and so they
13 can't testify as to an exchange of vows.

14 MR. SCOTT: I know it just appears to me
15 that if you change your Social Security number to get
16 the other spouse's name, if you have a joint bank
17 account, and I know a lot of husbands and wives,
18 ceremonial, that have separate accounts, and what was
19 the third one, oh, your driver's license, that's
20 really a whole thing. I don't know why -- I can
21 understand what she said but why the court found it
22 so difficult. I mean, they had been living for eight
23 years together prior to. This woman went through all
24 of these changes and then for the court to say no,
25 you're not married.

1 MR. VERTZ: The problem is that one spouse
2 or one partner can probably do that unilaterally
3 without the other partner's consent and there was no
4 evidence in this particular case. They asked whether
5 she had, whether the male partner had given consent to
6 any of these things and he testified that he hadn't
7 consented to any of these things. She did it on her
8 own. She was living in a fantasy world. I'm over-
9 stating the point here but that is what they found in
10 that case.

11 MR. SCOTT: That would cover the rebuttable
12 presumption then. I mean, if, in fact, she went out
13 and put a thousand dollars in for her and her husband
14 and he never knew about it, I guess you could change
15 your license to someone else's name if you got the
16 mail in a timely fashion. It seems like one of them
17 would have blinders on. I agree with what you said
18 because there are people, I won't say women because
19 I guess males also that try to be surreptitious
20 and can do those types of things. Okay, at first
21 blush it just seems like you can do anything but you
22 have answered that, counselor pretty good. Thank
23 you.

24 MS. MENDLOW: Given the fact that
25 Pennsylvania is in the minority in terms of the states

1 that have retained the common-law marriage doctrine,
2 could you give us some insight as to experiences that
3 occur in other states because I'm sure the practice
4 really hasn't been discontinued of people living
5 together and making some assumptions about what is
6 rightfully theirs as a result of their union and
7 cohabitation. Can you give us any cite as to what is
8 the trend or, as you would say, changes in thinking or
9 something like that?

10 MR. VERTZ: I'm afraid I haven't studied
11 the national trends on this and I really haven't read
12 any studies about the impact of this. I have heard
13 **anecdotes** about it. There is one prominent attorney
14 in town who mentioned during the discussion of this
15 subject at the Allegheny County Bar Association
16 meeting that in one state that recently abolished,
17 that some family lawyers there were seeing results
18 that they thought were somewhat inequitable in cases
19 where there had been a long term common-law marriage
20 and the statute abolishing common-law marriage didn't
21 provide a saving clause and so after a 20-year
22 relationship where there were children and comingling
23 of assets, the spouse, at the end of that relationship,
24 wasn't able to get her fair share. But as I said,
25 that was in a state that didn't have a saving clause in

1 their legislation. And so, I don't know that that
2 would be as much of a problem with this legislation.

3 MR. SCOTT: What's a saving clause?

4 MR. VERTZ: As this legislation is drafted,
5 any common-law marriage prior to the enactment of
6 the legislation would be judicially recognized in
7 perpetuity.

8 REPRESENTATIVE MAYERNIK: So, you are
9 speaking of a grandfather clause?

10 MR. VERTZ: A grandfather clause.

11 REPRESENTATIVE MAYERNIK: States that have
12 abolished common-law, what benefits have they seen?

13 MR. VERTZ: I'm not sure that I can answer
14 that. My practice is limited to the Commonwealth and
15 I haven't reviewed the state of the law nationally.
16 So, I'm not sure that I can answer that. I can only
17 speculate that it was resolved in fewer cases coming
18 to court on that issue.

19 REPRESENTATIVE MAYERNIK: Do you have any
20 idea or would you find out for us in answer to the
21 prior question as well as in Allegheny County, can
22 you find out what you would estimate the savings to be
23 or how many cases are heard regarding the common-law?
24 I'm trying to get some savings aspect on judicial
25 economy on passing the legislation?

1 MR. VERTZ: I'd be happy to do that.

2 CHAIRMAN GANNON: This Staudenmayer case
3 just intrigues me because it's pretty obvious that
4 there wasn't any fraud involved here because she said,
5 I can't remember any occasion when we exchanged words.
6 If there was any kind of perjury or fraud, she would
7 have said, oh, yes, plenty of times. So, she was
8 pretty honest.

9 The other thing that struck me is I was
10 thinking about this settlement that occurred in '82.
11 They were living together for six years. Why wouldn't
12 she have raised this common-law marriage at that time
13 and tried to get some loss of consortium? You know,
14 we are married. So, I'm entitled to that unless all
15 of this occurred, this accident that gave rise to the
16 settlement occurred prior to their cohabitation but I
17 am speculating. It intrigues me that there are some
18 facts here. We always talked about years ago we had
19 a saying and I guess we still do, good cases make bad
20 law and it seems to me that this is a good case. It's
21 not a bad case because it came to a -- and from what
22 I'm reading here, it was just over this one issue.
23 Apparently, all of the other economic issues have
24 been settled.

25 MR. VERTZ: It appears so.

1 CHAIRMAN GANNON: It looks like it was
2 just this personal injury settlement that was in
3 dispute.

4 MR. VERTZ: And it just demonstrates the
5 difficulty of proving an oral contract, period. She
6 may have believed all of the time that they had a
7 common-law marriage; that they had contracted with
8 each other and that he may have had some different
9 thought in his mind.

10 CHAIRMAN GANNON: You know, you talk about
11 street law. My vision of a common-law marriage, you
12 know, wasn't like, you know, you spent a weekend at
13 the Poconos and said, oh, we are married between
14 ourselves. My vision is that it was something that
15 developed over time; that you began to develop that
16 relationship and that bond and that you, just as a
17 matter of course, considered yourself husband and
18 wife where you had that relationship and you presented
19 that to the world, you know, when you went to a
20 party or you went to some kind of event. Who's this,
21 oh, that's my wife, Sally; that's my husband, Joe,
22 and you presented yourself that way. It evolved over
23 time. I guess that's why, like you said earlier, oh,
24 if you lived together for seven years, that's common-
25 law marriage. I don't think anybody, even at that

1 level, they didn't think it was event driven. You
2 had to go someplace or do something to exchange
3 promises or vows even though it wasn't done in a --
4 it might have been done in a formal ceremony but it
5 wasn't done before a civil or religious person who was
6 by law authorized to do that. So, I always looked at
7 it that way. I think most people do. That struck me
8 that they even asked that question. Well, Ms.
9 Staudenmayer, did you ever get together and light
10 candles and say you are married. No, no, we didn't
11 do that. Well then, you're not married.

12 MR. VERTZ: That would be an interesting
13 case. I haven't seen that one. The other interesting
14 case would be where there was a defective ceremonial
15 marriage such as a formal ceremony but it turns out
16 that the legal authority for some reason is not there.
17 But I haven't seen those cases yet.

18 MR. PRESKI: Have you ever had a situation
19 where they have lived together but they very clearly
20 said they are not married?

21 MR. VERTZ: Oh, absolutely. As family
22 lawyers, sometimes we draft cohabitation agreements
23 which spell out their rights. My property remains
24 my property and her property remains her property and
25 she is not entitled to support, those kinds of things,

1 and sometimes in most cases there are even provisions
2 for what will happen with custody or support of
3 children if they plan to live together without being
4 married but have children.

5 CHAIRMAN GANNON: They are the pre-
6 nuptials without the nuptials.

7 MR. VERTZ: Without the nuptials.

8 MR. PRESKI: To try and break it down, this
9 is really about education. I mean, you talked about
10 street law where this whole other body of law exists
11 outside of everything. It's really just about
12 education?

13 MR. VERTZ: It is, sir.

14 MR. PRESKI: Okay. Thank you.

15 CHAIRMAN GANNON: Thank you very much,
16 Mr. Vertz, for sharing that testimony. It's very
17 interesting and enlightening. Is that it?

18 MR. PRESKI: We have a variety of other
19 testimony that is going to be presented in written
20 form to the Committee. We'll keep the record open.
21 I'll submit that to you and what we will do is after
22 that is all brought in, we will prepare a booklet for
23 the members who were here and those not.

24 REPRESENTATIVE MAYERNIK: I'd like to take
25 this opportunity to thank Chairman Gannon for

1 attending and bringing the Committee to Pittsburgh
2 to hear testimony regarding this issue, the bill I
3 sponsored, at the urging of Mr. Gruener, who is one
4 of my constituents and thanks for bringing the
5 testimony today, to listen and hear what people have
6 to say. I know time is very difficult and I appreci-
7 ate you being here. I apologize for my tardiness but
8 I had another function earlier this morning with
9 several other Allegheny County representatives that
10 we were breaking ground for the Family House.

11 (The following was submitted for inclusion
12 in the record:)

13 TESTIMONY OF BRIAN C. VERTZ, ESQ. .

14 My name is Brian Vertz. I am an attorney who
15 has been licensed to practice law in Pennsylvania
16 since 1992. My law practice is dedicated
17 exclusively to the area of domestic relations --
18 divorce, child support, custody and related areas.
19 I am a member of the Section Council for the
20 Family Law Section of the Allegheny County Bar
21 Association and chair of the Program Committee
22 for the Family Law Section of the Pennsylvania
23 Bar Association. I am not representing those
24 organizations in an official capacity, but I
25 have discussed my testimony with Harry Gruener,

1 president of the Pennsylvania chapter of the
2 American Academy of Matrimonial Lawyers, David
3 Pollock, chair of the Family Law Section of
4 the Pennsylvania Bar Association; and Carol
5 McCarthy, chair of the Family Law Section of
6 the Allegheny County Bar Association.

7 Most of the divorce lawyers that I have
8 spoken with favor the passage of legislation
9 that would abolish common-law marriage. The
10 doctrine of common-law marriage is obsolete
11 and rife with fraud and perjury. Generally, a
12 common law marriage is formed when a man and a
13 woman exchange vows, or words expressing their
14 present intent to be married, without obtaining
15 a marriage license. Proving a common-law
16 marriage can be exceedingly difficult. There is
17 usually no written record of the event, and in
18 perhaps the majority of cases, there are no
19 witnesses when these words are exchanged. When
20 there is no other evidence, a common law marriage
21 may be established by proving that the spouses
22 lived together and were known in the community
23 as a married couple.

24 Our courts must determine the existence
25 of a common-law marriage when one spouse dies

1 and the surviving spouse seeks a statutory
2 share of the decedent's estate, or in a divorce
3 context, when one spouse seeks support, alimony,
4 or equitable distribution of marital property.
5 Pension administrators and life insurance
6 companies confront common-law marriage when a
7 spouse's consent is required to change a bene-
8 ficiary designation or a spouse might be entitled
9 to a survivor benefit. Governmental agencies,
10 such as the workers' compensation board, must
11 determine whether a common-law marriage existed
12 when a spouse seeks benefits. In most cases,
13 there is very little hard evidence, and one spouse
14 is usually adversarial to the other spouse or
15 his/her surviving family.

16 In modern times, some couples choose to
17 live together without being married. They may
18 have good reasons for maintaining separate
19 finances and avoiding the commitment of a legal
20 marriage. When an informal relationship breaks
21 up, an angry or opportunistic partner may
22 attempt to extract money or property from the
23 other partner by claiming that a common-law
24 marriage existed. Common-law marriage was a
25 useful doctrine in the frontier days, when people

1 lived far from courthouses or authorities who
2 were empowered to sanction their union. Today,
3 marriage authorities are readily available in
4 every county of this Commonwealth, and marriage
5 licenses are not exceedingly expensive or
6 difficult to obtain. The potential for fraud
7 and perjury substantially outweighs the usefulness
8 of the doctrine. Common-law marriage is a remnant of
9 ancient law that has simply outlived its function-
10 al utility.

11 House Bill 43 was drafted in response to
12 the Pennsylvania Supreme Court's decision in
13 Staudenmayer v. Staudenmayer. Mr. and Mrs.
14 Staudenmayer lived together for eight years
15 before they were formally married in 1984.
16 When they divorced in 1992, Mrs. Staudenmayer
17 asked the divorce court to divide a personal
18 injury settlement that her husband had received
19 in 1982, before they were formally married. The
20 wife was not entitled to a share of the husband's
21 personal injury settlement unless the parties
22 had established a common-law marriage prior to
23 their ceremonial marriage in 1984. The Pennsylvania
24 Supreme Court held that there was insufficient
25 evidence of a common-law marriage because Mrs.

1 Staudenmayer could not recall a specific
2 occasion when she and Mr. Staudenmayer had
3 exchanged words of present intent to be
4 married. However, the litigation was pro-
5 tracted and costly because there was substantial
6 testimony and evidence about their cohabitation
7 and reputation in the community as married persons.

8 Staudenmayer is the latest in a series of
9 decisions that have attempted to narrow the
10 scope of the common-law marriage doctrine. In
11 his concurring opinion, Mr. Justice Nigro called
12 upon our legislature to abolish common-law
13 marriage stating, "I would advocate the abolish-
14 ment of common-law marriage in Pennsylvania so that
15 official records, and not the courts, may
16 determine if and when the parties were married."

17 House Bill 43 was drafted also in response
18 to the report of the Joint State Government
19 Commission's Advisory Committee on Domestic
20 Relations Law, which was formed by the
21 Pennsylvania Legislature in 1995 to recommend
22 changes to the Pennsylvania Divorce Code. The
23 committee included twenty-eight well-known divorce
24 lawyers, judges, and law professors, who worked
25 for four years to reach consensus. The Advisory

1 Committee also endorsed the abolition of
2 common-law marriage.

3 I have testified that most divorce lawyers
4 favor the abolition of common-law marriage, but
5 there is a dissenting view. Legal services
6 lawyers, in particular, are concerned about the
7 impact that House Bill 43 would have on the
8 population that they serve. Indigent persons
9 often cannot afford good legal advice. Instead,
10 they rely upon the "street law," which consists
11 of rumors and popular misinformation that may
12 contain a kernel of truth. Lawyers who serve
13 the indigent worry that they will continue to
14 cohabit together, bear children, combine their
15 property and finances, and structure their lives
16 as married persons without having entitlement
17 to spousal support, equitable distribution of
18 marital property, statutory share of a spouse's
19 estate, right to elect against the will of a
20 spouse, right to receive spousal life insurance
21 and pension benefits, and other legal protections.
22 They worry that children will be raised in
23 families that are illusory.

24 In my view, the abolition of common-law
25 marriage will not worsen the plight of the indigent.


1 Common-law marriage is almost universally mis-
2 understood by laypersons at every economic
3 level. It is commonly believed that a common-
4 law marriage is established by living together
5 for seven years. Actually, there is nothing magi-
6 cal about seven years; it is a myth. Some myths
7 will probably survive, but "street law" will
8 eventually catch up with the changes in statutory
9 law.

10 To give the media sufficient time to inform
11 the public, House Bill 43 would not become
12 effective for twelve months after its passage.
13 The bill contains a saving clause, which would
14 preserve the legitimacy of common-law marriages
15 that were contracted before passage of the bill.
16 I favor the passage of House Bill 43 to abolish
17 common-law marriage.

18 (The hearing terminated at 10:52 a.m.)

19 * * *

20 I hereby certify that the proceedings and
21 evidence taken by me in the above-entitled matter are
22 fully and accurately indicated in my notes and that this
23 is a true and correct transcript of same.
24
25


Nancy J. Grega, RPR/mma

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