Putative Spouses in Texas Courts

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INTRODUCTION

Imagine the following scenarios played out in a law office somewhere in Texas:

1. A woman walks into a lawyer's office without an appointment. She is very upset, and she needs to speak to an attorney right away. After speaking with her for a few minutes, the attorney discovers that the woman's husband died last week. The woman is visibly grief-stricken over the death of her loved one, but the attorney is curious as to why this is an emergency. There appears to be more at issue than the simple probate of a will. (Of course, the attorney later finds out there is no will.) Finally, the woman reveals that, piled onto her grief, she has been informed that her marriage has been a sham – that her husband's first marriage did not end in divorce as she thought it did (and as her "husband" told her it did). The first wife appeared shortly after the funeral, and she wants what is rightfully hers as the lawful wife. What are the attorney's options?

2. A woman calls to speak to an attorney. It is evident from her tone of voice that she is very angry. She wants a divorce from her husband. She makes an appointment with the attorney and comes in later in the week. The attorney files the divorce petition as she has done many times before. Two weeks later, the answer is faxed to the attorney with an intriguing affirmative defense: no marriage existed between the woman and the man because the man was never legally divorced from his first wife. What does the attorney do?

The attorneys involved in these scenarios would likely have a sense that there is something very inequitable about their clients' prospects under Texas law. However, both of the attorneys will find an equitable doctrine hidden in the case law: the doctrine of putative spouses.

This paper will introduce the putative spouse doctrine as it existed in Texas from the very first case in 1846,[1] discuss the doctrine as it presently stands, and clarify the doctrine's application in future cases.[2] Part I introduces the doctrine and discusses its historical development. Part II addresses the current doctrine and its application to various situations, such as divorce and probate. Part III compares Texas' treatment of putative spouses with the treatment accorded such spouses in the other community property states. The conclusion suggests expansion and codification of the doctrine.

II. HISTORY OF THE DOCTRINE IN TEXAS

Spanish and Mexican law governed in Texas until the adoption of the English common law in 1840,[3] and Spanish law, and specifically *Las Siete Partidas*,[4] made a significant legal impact on Texas. As Marian Boner states in her Texas legal history reference guide:

> The first true Spanish code, Las Siete Partidas, was compiled late in the thirteenth century but was not promulgated until 1348. Nearly two hundred years later, in 1530, its authority was extended to the New World by its incorporation into the Recopilación de las Leyes de Indias. Later compilations superseded but did not repeal the Partidas, and its provisions were considered to be still in force in Texas until the reception of the common law by the Act of 1840.[5]

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[1] Smith v. Smith, 1 Tex. 621 (1846).

[2] This paper does not discuss whether the putative spouse doctrine should be a part of Texas law. The author believes that the doctrine is a vital part of Texas case law and leaves public policy arguments for another forum.

[3] Act approved Jan. 20, 1840, 4th Cong., R.S., 1840 Repub. Tex. Laws, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177 (Austin, Gammel Book Co. 1898). As we shall see later, the act excepted from its coverage "all land grants, mineral rights, and marital-property concepts. In these areas and in the system of courts and pleadings, the civil law prevailed." MARIAN BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 9 (1976).

[4] LAS SIETE PARTIDAS (1348) (Spain), *translated in* LAS SIETE PARTIDAS (Samuel Parsons Scott trans., CCH 1931).

[5] BONER, *supra* note 3, at 1 (footnote omitted).

No provision of Las Siete Partidas specifically addresses the putative spouse doctrine. The doctrine was inferred from Partida IV, Title VIII, Law I which concerned the legitimacy of children:

> If between those who are married openly in the face of the church, such an impediment should exist that the marriage must be annulled on account of it, the children begotten before it was known that an impediment of this kind existed will be legitimate. This will also be the case where both the parties did not know that such an impediment existed, as well as where only one of them knew it, for the ignorance of one alone renders the children legitimate. But, if after it had been certainly ascertained that such an impediment existed between the parties, they should have children, all those born subsequently will not be legitimate.[6]

This provision was cited in *Smith v. Smith*[7] when the Texas Supreme Court first discussed the putative spouse doctrine. John W. Smith had married Harriet Stone in Missouri.[8] Several years later, in 1830, he married Maria de Jesusa Smith in San Antonio.[9] When Mr. Smith died, Samuel Smith, an alleged son of Mr. Smith by Harriet Stone, petitioned for letters of administration for Mr. Smith's estate.[10] John Smith claimed that Maria was not the "surviving wife" of Mr. Smith under the probate statutes in effect at the time of Mr. Smith's succession, and therefore the letters should be granted to Samuel as the "next of kin."[11]

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[6] LAS SIETE PARTIDAS Partida IV, tit. XIII, law I, *translated in* LAS SIETE PARTIDAS 948.

[7] 1 Tex. 621 (1846).

[8] *Id*. at 621.

[9] *Id*. at 625-26.

[10] *See id*. at 622.

[11] *Id.* at 623-24 (citing Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 110, 110-11, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 284, 284-85 (Austin, Gammel Book Co. 1898).

The court first addressed the issue of whether the evidence establishing the first marriage was legally sufficient.[12] The court concluded that it was not, but stated that, even if the evidence had been legally sufficient, Samuel would not have been entitled to the administration.[13]

The court reached this conclusion by addressing the issue whether, assuming the existence of the first marriage, Maria was nevertheless entitled to all of the rights and privileges of a surviving spouse.[14] The court concluded that Spanish jurisprudence would govern the rights and obligations of a marriage "contracted before the introduction of the common law."[15] The court then cited Las Siete Partidas[16] as authority for the putative spouse doctrine.[17] Citing Partida IV, Title XIII, Law I regarding legitimate children, the court stated:

> This law, in its terms extends only to the legitimation of children whose parents, or one of them, have the misfortune through ignorance, to contract marriage during the existence of an impediment which would annul such provision; but the spirit of the provision would extend the same protection to the innocent parent, as to the innocent offspring. . . . The legitimation of the children, should be considered as only one of the effects of the innocence of the parents, and not as precluding the parent herself, whose claim is equally as strong, from all benefit on the same grounds.[18]

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[12] *Smith*, 1 Tex. at 624.

[13] *See id.* at 626.

[14] *Id*. at 624.

[15] *Id.* at 626-27.

[16] LAS SIETE PARTIDAS Partida IV, tit. XIII, law I (1348) (Spain), *translated in* LAS SIETE PARTIDAS 948 (Samuel Parsons Scott trans., CCH 1931).

[17] *Smith*, 1 Tex. at 627.

[18] *Id.* at 627.

The court found support for extending the law's protection of children to cover spouses in *El Diccionario de Legislacion*.[19] This work, according to the court, defined a putative marriage as:

> [A] marriage, which being null on account of some dissolving impediment, is held, notwithstanding, for a true marriage, because of its having been contracted in *good faith*, by both or one of the spouses being ignorant of the impediment. Good faith is always presumed, and he who would impede its effects, must prove that it did not exist. To make the *good faith* perfect, it is necessary that the marriage should have been celebrated with the prescribed solemnities–that the spouses may have been ignorant of the annulling vice, and that their ignorance be excusable.[20]

The court stated that the end of a putative marriage produces the same effects as the end of a lawful marriage, but the effects will only benefit a spouse who acted in good faith.[21] The court also recognized that a putative marriage may be converted into a lawful marriage once the impediment is removed.[22]

Turning to the facts of the case, the court concluded that Maria was the decedent's lawful wife under the law in place at the time of marriage (Spanish law).[23] Therefore, the court held that she should be allowed to administer her deceased husband's estate.[24] Her right rested on the facts

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[19] *Id*. at 628. The publication cited by the court is probably an earlier version of D. JOAQUIN ESCRICHE ET AL., DICCIONARIO RAZONADO DE LEGISLACION Y JURISPRUDENCIA [THE WELL-GROUNDED DICTIONARY OF LEGISLATION AND JURISPRUDENCE] (Madrid, J.M. Biec y Dronda 1874-76) [hereinafter DICCIONARIO DE LEGISLACÍON]. This book was first published in 1831. M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 ST. MARY'S L.J. 639, 658 n..89 (1993). It contains language exactly parallel to language the court attributes to the source with the exception that the book contains citations. *Compare* 3 DICCIONARIO DE LEGISLACÍON 49, *with Smith*, 1 Tex. at 629 (1846). However, the first edition of the book did not contain citations. 1 DICCIONARIO DE LEGISLACÍON at vii (discussing the absence of citations in the first edition of the book).

[20] *Smith*, 1 Tex. at 628-29 (apparently translating 3 DICCIONARIO DE LEGISLACÍON 49).

[21] *Id*. at 629.

[22] *Id.* at 629.

[23] *See id*. at 633.

[24] *Id*. at 633-34.

that the marriage had lasted fifteen years and that Maria was the mother of the decedent's children, which meant that Maria had "a larger interest in the property than any other person."[25]

The Texas Supreme Court did not have a problem applying the putative spouse doctrine in cases involving pre-1840 marriages because Spanish law applied.[26] However, marriages contracted post-1840 were another matter. In 1882, the supreme court was asked to decide whether the putative spouse doctrine still existed.[27] Although the court left open the question of what a person in the putative spouse's position would receive, it did imply that the common law of England as adopted in 1840 governed the marriage contract.[28] Therefore, Spanish law and the Texas cases citing to Spanish law could not be invoked.[29]

This case left the Court of Civil Appeals with no guidance as to the status of the putative marriage doctrine. Subsequent cases demonstrate this lack of guidance. In *Morgan v. Morgan*,[30] a court of civil appeals held, without referring to the doctrine, that a woman who in good faith marries a man she believes to have been divorced is entitled to a share of the property acquired by their joint efforts, notwithstanding the nullity of the previous divorce.[31] However, three years later, in

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[25] *Id.* at 634. Interestingly, this case came up on appeal ten years later in *Lee v. Smith*, 15 Tex. 142 (1856). In that case, the issue was whether the children of the first marriage were considered to be heirs. The court concluded that they were heirs, their status as such being fixed at the time of death. *Id.* at 144-45.

[26] *See* Carroll v. Carroll, 20 Tex. 732, 742 (1858). In *Carroll*, a case decided twelve years after *Smith*, the court relied on the same premises used in *Smith* to validate another pre-1840 putative marriage. *See id*.

[27] Routh v. Routh, 57 Tex. 589, 593 (1882) (appellee's argument).

[28] *See id*. at 596, 600-01.

[29] *Id.* at 595.

[30] 21 S.W. 154 (Tex. Civ. App. 1892, no writ).

[31] *See id.* at 156.

Chapman v. Chapman,[32] the court held that the second wife could not be appointed administratrix and had no rights to the husband's property since the second marriage was a nullity.[33] In *Lawson v. Lawson*,[34] the court held that property acquired in a putative marriage (although the court did not call it such) should be treated as property acquired in a partnership.[35]

In 1905, the Texas Supreme Court answered the question originally propounded in *Routh*. In *Barkley v. Dumke*,[36] the court expressly held that the common law as it existed in 1840 did not apply to the consequences of a void marriage.[37] The court cited the act itself, which expressly provided that the common law did not apply to the property rights of husband and wife.[38] The court held that a "putative wife, so long as she acts innocently, has, as to the property acquired during that time, *the rights of a lawful wife*."[39] This holding firmly secured the putative spouse doctrine in the case law of Texas. Since then, no Texas court has questioned the doctrine's usefulness. However, Texas courts have misconstrued and misapplied the doctrine, and recent appellate decisions reflect this confusion.

III. DEVELOPMENT OF THE CURRENT DOCTRINE

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[32] 32 S.W. 564 (Tex. Civ. App. 1895), *writ ref'd*, 32 S.W. 871 (Tex. 1895).

[33] *See id.* at 565.

[34] 69 S.W. 246 (Tex. Civ. App. 1902, writ denied).

[35] *See id.* at 248.

[36] 99 Tex. 150, 87 S.W. 1147 (1905).

[37] *Id.* at 153, 87 S.W. at 1148.

[38] *Id.* at 152, 87 S.W. at 1147 (citing Act approved Jan 25, 1840, 4th Cong., R.S., § 4, 1840 Repub. Tex. Laws 3, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 178 (Austin, Gammel Book Co. 1898)).

[39] *Id.* at 153, 87 S.W. at 1148 (emphasis added).

A. *The Doctrine Generally*

A marriage which is contracted during an already existing marriage is void ab initio.[40] However, courts presume that all marriages are valid, and there must be strong proof before they will hold to the contrary.[41] To rebut the presumption, it is not necessary to "prove the nonexistence of divorce in every jurisdiction where proceedings could have been possible; it is only necessary to rule out those proceedings where [the husband] might reasonably have been expected to have pursued them."[42]

Once the presumption is rebutted, the second marriage becomes void, and the second spouse must resort to having her marriage declared a "putative marriage."[43] The courts define a putative marriage as "one that is invalid by reason of an existing impediment on the part of one or both spouses; but which was entered into in good faith by the parties, or one of them, good faith being essential."[44] The putative marriage may be ceremonial or common law in origin.[45]

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[40] *See* TEX. FAM. CODE ANN. § 6.202(a) (Vernon 1998).

[41] *See* TEX. FAM. CODE ANN. § 1.101 (Vernon 1998); Davis v. Davis, 521 S.W.2d 603, 605 (Tex. 1975) (holding that where there is a second marriage there is a presumption that the first marriage was dissolved).

[42] *Davis*, 521 S.W.2d at 605; *see also* Caruso v. Lucius, 448 S.W.2d 711, 715 (Tex. Civ. App.–Austin 1969, writ ref'd n.r.e.).

[43] *See* Garduno v. Garduno, 760 S.W.2d 735, 739 (Tex. App.–Corpus Christi 1988, no writ).

[44] Dean v. Goldwire, 480 S.W.2d 494, 496 (Tex. Civ. App.–Waco 1972, writ ref'd n.r.e.).

[45] *Garduno*, 760 S.W.2d at 738. For many years, however, this was not the case. Under the original Spanish doctrine a ceremony was required. Smith v. Smith, 1 Tex. 621, 628-29 (1846). This ceremonial requirement remained even through the 1940's. *See* Papoutsis v. Trevino, 167 S.W.2d 777, 779 (Tex. Civ. App.–San Antonio 1942, writ dism'd). In 1950, an appellate court held that no ceremony was required. *See* Hupp v. Hupp, 235 S.W.2d 753 (Tex. Civ. App.–Fort Worth 1950, writ ref'd n.r.e.). The Houston Court of Civil Appeals followed suit in 1964, basing its decision in part on a Court of Criminal Appeals ruling on the doctrine in the context of child support. Whaley v. Peat, 377 S.W.2d 855, 858 (Tex. Civ. App.–Houston 1964, writ ref'd n.r.e.) (citing Curtin v. State, 155 Tex.Cr.R. 625, 635, 238 S.W.2d 187, 192 (1950)). *See also* Rey v. Rey, 487 S.W.2d 245, 248 (Tex. Civ. App.–El Paso 1972, no writ) (following the holdings in *Whaley* and *Curtin*).

Once a litigant has proven a ceremonial or common law marriage, the litigant must then prove good faith.[46] The best summary of the proof needed for this requirement comes from *Garduno v. Garduno*:[47]

> The good faith of the putative spouse is generally a fact question. When the spouse is unaware of a prior undissolved marriage, good faith is presumed. However, when the putative spouse is aware that a former marriage existed at one time, the question becomes one of the reasonableness of that party's belief that the former marriage has been dissolved. A putative spouse may believe in good faith that a prior marriage has been dissolved by divorce, even though in the eyes of the law it has not.[48]

The *Garduno* court went on to analyze Louisiana case law, which holds that once a spouse becomes aware of a possible impediment through reliable means, she has a duty to investigate further and cannot simply bury her proverbial head in the sand.[49]

B. *Putative Spouse Entitlement*

If a party can prove the requirements for a putative marriage, the court then must decide what the putative spouse is entitled to. Unfortunately, the case law on this has become muddled in recent years, due in large part to reliance on previously discarded cases. Additionally, the entitlement often depends on what assets the putative spouse is seeking.

1. General Discussion

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[46] *See Dean*, 480 S.W.2d at 496.

[47] 760 S.W.2d 735 (Tex. App.–Corpus Christi 1988, no writ).

[48] *Id.* at 740 (citations omitted).

[49] *Id.*

Two lines of authority deal with putative spouse entitlement. The first line begins with the *Morgan v. Morgan*[50] and *Barkley v. Dumke*[51] cases discussed above,[52] and ends with *Padon v. Padon*.[53] The second line begins with the *Chapman v. Chapman*[54] and *Lawson v. Lawson*[55] cases discussed above,[56] and ends with *Garduno*. Only one of these lines is correct.

The first line of cases holds that a putative spouse, "so long as she acts innocently, has, as to the property acquired during [the time of marriage], the rights of a lawful wife."[57] This statement was adopted by the commission of appeals (and the supreme court by approval) in *Lee v. Lee*,[58] again by the supreme court in *Davis v. Davis*,[59] and finally by the San Antonio Court of Appeals in *Padon*.[60]

The second line of cases holds that property acquired during a putative marriage is not community property, but jointly owned separate property.[61] The authority for this proposition is

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[50] 21 S.W. 154 (Tex. Civ. App. 1892, no writ).

[51] 99 Tex. 150, 87 S.W. 1147 (1905).

[52] *See supra* notes 30-39 and accompanying text.

[53] 670 S.W.2d 354 (Tex. App.–San Antonio 1984, no writ).

[54] 32 S.W. 564 (Tex. Civ. App.–1895), *writ ref'd*, 88 Tex. 641, 32 S.W. 871 (1895).

[55] 69 S.W. 246 (Tex. Civ. App. 1902, writ ref'd).

[56] *See supra* notes 32-35 and accompanying text.

[57] *Barkley*, 99 Tex. at 153, 87 S.W. at 1148.

[58] 112 Tex. 392, 247 S.W. 828 (1923).

[59] 521 S.W.2d 603 (Tex. 1975).

[60] *Padon*, 670 S.W.2d at 356.

[61] Mathews v. Mathews, 292 S.W.2d 662, 665 (Tex. Civ. App.–Galveston 1956, no writ).

Little v. Nicholson,[62] a Galveston Court of Civil Appeals case that cited *Chapman* as its authority.[63] *Garduno*, the most recently published decision on putative marriages, has adopted this view.[64]

After reviewing each line of authority, the first line of cases appears to be the more correct and authoritative statement of the law. First, with respect to its accuracy, the *Barkley* line of cases has more fully adopted the Spanish law doctrine, which provides that the putative wife "shall enjoy the civil rights of a legitimate wife."[65] Second, the first line of authority includes two supreme court cases that adopted the holding in *Barkley*.[66] In contrast, the second case line is based entirely on courts of appeals decisions.[67]

Third, the first line of cases provides a more equitable division of the assets. For example, in the divorce context, the first line of cases would give the putative spouse community rights. The property would thus be subject to a "just and right" division.[68] The second line, by holding that the property is jointly owned separate property, would exempt all property acquired during the putative

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[62] 187 S.W. 506 (Tex. Civ. App.–Galveston 1916, no writ).

[63] *Id.* at 507-08. *See also* Lawson v. Lawson, 69 S.W. 246, 247 (Tex. Civ. App. 1902, writ ref'd) (holding that the marriage should be treated as a partnership).

[64] *See Garduno*, 760 S.W.2d at 739.

[65] Smith v. Smith, 1 Tex. 621, 629 (1846) (translating 3 DICCIONARIO DE LEGISLACION 49).

[66] *See Lee*, 112 Tex. at 398, 247 S.W. at 830; *Davis*, 521 S.W.2d at 606 (adopting the *Barkley* rule through *Lee*).

[67] *See Garduno*, 760 S.W.2d at 739 (citing Mathews v. Mathews, 292 S.W.2d 662, 665 (Tex. Civ. App.–Galveston, no writ); *Lawson*, 69 S.W. at 248; *Chapman*, 32 S.W. at 565.

[68] TEX. FAM. CODE ANN. § 7.001 (Vernon 1998).

marriage from division by the court.[69] It would require a partition of all of the property, real and personal.[70]

Finally, and most importantly, the second line of authority is based on case law that has been overruled. *Garduno's* holding that the Spanish law doctrine of putative marriage no longer existed in Texas after the adoption of the common law was based on *Chapman*.[71] However, *Barkley* overruled *Chapman* by implication.[72] In *Barkley*, the Texas Supreme Court held that the common law did not apply to cases involving marital rights, and thus the Spanish law doctrine remained entrenched in Texas case law.[73]

The unfortunate result is that *Garduno* is now cited for the proposition that property acquired during a putative marriage is jointly owned separate property.[74] Of course, in all other aspects of putative marriages, the Corpus Christi Court of Appeals was correct, and the court also further defined the doctrine. Clearly, however, the court's holding regarding putative spouse entitlement is tenuous and contradicts the holdings of the supreme court. The next time a case involving the rights of a putative spouse gets back to the appellate courts, the issue should be re-examined and the

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[69] *See* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982) (holding that the court cannot divide the separate property of divorcing spouses).

[70] *See Little*, 187 S.W. at 508.

[71] *See Garduno*, 760 S.W.2d at 739 (citing Matthews v. Matthews, 292 S.W.2d 662, 665 (Tex. Civ. App.–Galveston 1956, no writ) (citing *Chapman*, 32 S.W. at 565)).

[72] *See Barkley*, 99 Tex. at 153, 87 S.W. at 1148.

[73] See *id*. at 152-53, 87 S.W. at 1147-48 (overruling *Chapman* by implication).

[74] *See* Estate of Hite, No. 09-98-349CV, 1999 WL 278898, at *3 (Tex. App.–Beaumont 1999, no pet.) (per curiam) (not designated for publication). A later case, *In re Marriage of Sanger*, No. 06-99-00039-CV, 1999 WL 742607 (Tex. App.–Texarkana 1999) (not designated for publication), quotes *Garduno*, but goes further to misquote *Davis* by saying that a putative spouse's rights are only "analogous" to a lawful spouse's rights. *Id*. at *3.

case law set straight. In the interim, the following discussion will assume that the first line of authority is correct.

2. Divorce

On divorce, the putative wife is "entitled to share equally in the community property" because the laws regarding property acquired in a lawful marriage apply to that acquired by the parties to a putative marriage.[75] Interestingly, even if the putative spouse subsequently becomes aware of the impediment, erasing the good faith requirement, she is still entitled to one-half of the property acquired during the time she acted in good faith.[76] This was illustrated by *Osuna v. Quintana*,[77] in which the putative wife received nothing because all the property had been acquired after her good faith was destroyed and the relationship became meretricious.[78]

Finally, one Court of Civil Appeals has held that a putative wife is not a necessary and indispensable party to a divorce action between her husband and his lawful wife.[79]

3. Heirship and Decedents' Estates

The most common situation involving putative marriages arises in probate court after the husband has died, when the first wife appears to claim her part of the husband's estate. This is usually the first time the putative wife discovers that the husband's first marriage never ended.

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[75] Dean v. Goldwire, 480 S.W.2d 494, 496 (Tex. Civ. App.–Waco 1972, writ ref'd n.r.e.).

[76] *See id.*

[77] 993 S.W.2d 201 (Tex. App.–Corpus Christi 1999, no writ).

[78] *See id.* at 210. In a meretricious relationship, each party owns "property acquired in proportion to the value of his (or her) labor contributed to the acquisition of it." *Dean*, 480 S.W.2d at 496 (quoting Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43 (1909)) (internal quotations omitted).

[79] *See* Roberson v. Roberson, 420 S.W.2d 495, 499 (Tex. Civ. App.–Houston [14th Dist.] 1967, writ ref'd n.r.e.).

The husband can bequeath his separate property to the putative wife in his will and also name her as executrix,[80] so the problem only arises when the husband is disposing of his share of the community property or when the husband dies intestate.

The community property issue is associated with the first and lawful wife. Under the *Texas Probate Code*, the putative spouse retains her interest in any community property,[81] while the husband disposes of his share by will.[82] However, the husband may only dispose of one-half of his interest because the first wife retains a one-half interest in the husband's one-half.[83] Presumably, the result will be that the putative wife receives a three-fourths interest in the community property of the putative marriage, assuming she is the beneficiary of the husband's will. The first wife will hold a one-fourth interest in such property.

The issue becomes more complicated when the husband dies intestate. Initially, only the lawful wife was entitled to a share of the husband's estate. This was the holding in *Chapman v. Chapman*,[84] and this view has been expressed by the Beaumont Court of Appeals in an unreported case from 1999.[85]

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[80] *See* TEX. PROB. CODE ANN. § 37 (Vernon 1980).

[81] *See* TEX. PROB. CODE ANN. §§ 45 (Vernon Supp. 1999).

[82] *See* Garduno v. Garduno, 760 S.W.2d 735, 741 (Tex. App.–Corpus Christi 1988, no writ).

[83] *See* Caruso v. Lucius, 448 S.W.2d 711, 712 n.1 (Tex. Civ. App.–Austin 1969, writ ref'd n.r.e.) (holding that the putative spouse is entitled to a one-half interest in all property acquired during the putative marriage, with the remaining one-half split equally between the husband and the lawful wife).

[84] 32 S.W. 564, 565 (Tex. Civ. App.), *writ ref'd*, 88 Tex. 641, 32 S.W. 871 (1895).

[85] *See In re* Estate of Hite, No. 09-98-349CV (Tex. App.–Beaumont May 6, 1999, no pet.) (not designated for publication), 1999 WL 278898, at *3.

This view is an incorrect statement of the law. Under Texas law, the surviving spouse at least retains her interest in any community property and gains a one-third interest in any separate property of the decedent.[86] While the separate property provision refers to "husband or wife,"[87] and the community property provision refers to "spouses,"[88] neither of the statutes expressly excludes putative spouses. Thus, a putative spouse would presumably have the same rights as the lawful spouse.

This is especially true in light of the two supreme court cases that addressed this issue. In *Lee v. Lee*,[89] the dispute was whether the putative wife had any interest in a death benefit that the husband's employer was to pay.[90] The husband had not designated a beneficiary under the employer's plan.[91] The benefits were therefore "payable 'according to the laws of Texas applicable to the estates of deceased persons.'"[92] The court held that the putative wife "possessed all the rights and privileges of a lawful wife."[93] It concluded that the putative wife was entitled "to a one-half interest in all community property acquired during the existence of the putative marriage," and thus

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[86] TEX. PROB. CODE ANN. § 38(b) (Vernon 1980), § 45 (Vernon Supp. 2000).

[87] TEX. PROB. CODE ANN. § 38(b) (Vernon 1980).

[88] TEX. PROB. CODE ANN. § 45 (Vernon Supp. 2000).

[89] 112 Tex. 392, 247 S.W. 828 (1923).

[90] *Id*. at 396, 247 S.W. at 829.

[91] *Id*. at 399, 247 S.W. at 830-31.

[92] *Id.* at 399, 247 S.W. at 831 (quoting the disputed insurance policy).

[93] *Id*. at 398, 247 S.W. at 830.

she was entitled to one-half of the death benefits.[94] The other half was apparently given to the husband's lawful wife.[95]

This issue was also raised in *Davis v. Davis*.[96] *Davis* involved the division of wages owed by a deceased husband's employer and the proceeds from an insurance policy provided by the employer.[97] In this case, the court held that the putative spouse was entitled to a one-half interest in each.[98] Also, the lawful wife was entitled to the remaining one-half.[99] These cases illustrate that the putative wife is–at a minimum–entitled to a one-half interest in any community property.[100] Unfortunately, no case has been decided which involved separate property, but the outcome should be the same as for community property, with the lawful wife and putative wife evenly splitting the one-third interest to which a surviving spouse is entitled (assuming the property is personal and there are no children), one-sixth each.[101]

Texas courts have discussed one final issue: the right of the putative spouse to be appointed administrator of the decedent's estate.[102] In *Chapman*, the court of appeals held that only the lawful

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[94] *Id.* at 398-99, 247 S.W. at 830, 833.

[95] *See id.*

[96] 521 S.W.2d 603, 604-05 (Tex. 1975).

[97] *Id.* at 606-07.

[98] *Id.*

[99] *See id.* at 605.

[100] *See supra* note 83.

[101] *See* TEX. PROB. CODE ANN. § 38 (Vernon 1980).

[102] *See* Walker v. Walker's Estate, 136 S.W. 1145, 1148 (Tex. Civ. App. 1911, writ ref'd); *Chapman*, 32 S.W. at 565.

wife was entitled to such appointment.[103] This view was also adopted in *Walker*, where the court further held that only the lawful wife was entitled to the homestead and allowances from the decedent's estate.[104]

Again, the Texas statute governing appointment of administrators does not specifically exclude a putative spouse.[105] The supreme court decisions in *Lee* and *Davis*, which gave a putative spouse all the rights of the lawful spouse, have probably overruled this view.

4. Insurance

As with decedents' estates, a husband can name the putative spouse the beneficiary of any proceeds from life insurance or other death benefits.[106] However, if the insurance policy is community property, the same issues dealt with regarding decedents' estates arise. The first and lawful wife could argue that one-fourth of the policy proceeds belong to her.[107] To prevail on this argument, however, the first wife would have to prove "fraud on the community," an equitable doctrine based upon constructive fraud.[108]

Whether the putative spouse can take out a policy on her husband is another question, answered only after someone adjudicated that question. In *Mendez v. Mendez*,[109] the commission

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[103] *Chapman*, 32 S.W. at 565.

[104] *Walker*, 136 S.W. at 1148.

[105] *See* TEX. PROB. CODE ANN. § 77 (Vernon 1980). The surviving spouse is second-in-line to serve, behind only the executor appointed in the decedent's will. *See id*.

[106] Mendez v. Mendez, 277 S.W. 1055, 1056 (Tex. Comm'n App. 1925, judgm't adopted).

[107] *See* Caruso v. Lucius, 448 S.W.2d 711, 712 n.1 (Tex. Civ. App.–Austin 1969, writ ref'd n.r.e.).

[108] *In re* Estate of Herring, 970 S.W.2d 583, 586 (Tex. App.–Corpus Christi 1998, no pet.) (quoting Zieba v. Martin, 928 S.W.2d 782, 789 (Tex. App.–Houston [14th Dist.] 1996, no writ)) (internal quotations omitted).

[109] 277 S.W. 1055.

of appeals held that a de facto wife is entitled to the proceeds of a life insurance policy if she is named the beneficiary.[110] The court also held that, in the absence of a named beneficiary, the lawful wife is entitled to the proceeds.[111] As the Fort Worth Court of Civil Appeals stated, "a putative wife has [an] insurable interest in the life of her asserted husband."[112]

5. Worker's Compensation

Worker's compensation is one other area in which the issue of putative marriages has arisen. While this area is related to the problems with insurance, there are significant distinctions between the two because the worker's compensation statute defines an "eligible spouse."[113]

An "eligible spouse" is "the surviving spouse of a deceased employee unless the spouse abandoned the employee for longer than the year immediately preceding the death without good cause, as determined by the commission."[114] While the word "spouse" is not defined within this definition, it has been defined by the courts.

In 1940, the Austin Court of Civil Appeals held that the word "wife" in the worker's compensation statute meant "lawful wife," and, therefore, a putative wife was not entitled to any benefits.[115] This view was subsequently adopted by the Texas Supreme Court in *Texas Employers*

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[110] *Id*. at 1056.

[111] *Id.* at 1056.

[112] Renchie v. John Hancock Mut. Life Ins. Co., 174 S.W.2d 87, 91 (Tex. Civ. App.–Fort Worth 1943, no writ) (citing *Mendez*, 277 S.W. at 1057).

[113] TEX. LAB. CODE ANN. § 408.182(f)(3) (Vernon 1996).

[114] *Id.*

[115] Woods v. Hardware Mut. Cas. Co., 141 S.W.2d 972, 978 (Tex. Civ. App.–Austin 1940, writ ref'd).

Ins. Ass'n v. Grimes.[116] The court also held that a putative wife could not recover for the wrongful death of her husband.[117]

The current statute contains nothing to obviously change this rule.[118] Thus, it seems that a putative spouse has no entitlement to any benefits under the worker's compensation statute. Indeed, the court of appeals in *Woods* even stated that a putative spouse cannot challenge the abandonment with good cause portion of the definition because of the lack of an interest.[119]

6. Conclusion

While the putative spouse may not have an interest in worker's compensation benefits, she has an interest in the rest of the husband's estate. For this reason, the definition of "eligible spouse" in the worker's compensation statute should be amended to include putative spouses. Additionally, an appellate court must resolve the major issues involved in putative spouse entitlement, or trial courts will continue to follow *Garduno v. Garduno*.[120] These issues should be addressed by the legislature or challenged on the next appeal, and the legislature or appellate court should take them seriously.

III. OTHER COMMUNITY PROPERTY STATES[121]

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[116] 153 Tex. 357, 361, 269 S.W. 332, 335 (1954) (citing *Woods*, 141 S.W.2d at 978-79).

[117] *Id.*

[118] *See* TEX. LAB. CODE ANN. § 408.182 (Vernon 1996).

[119] *Woods*, 141 S.W.2d at 978.

[120] 760 S.W.2d 735 (Tex. App.–Corpus Christi 1988, no writ).

[121] Much of the discussion in the section was made significantly easier by using Christopher L. Blakesley's broad overview of the putative spouse doctrine as a reference guide. *See generally* Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1 (1985). Also, this part does not address the doctrine as applied in non-community property states because, as Mr. Blakesley points out in his article, these states "cannot adopt the pure or classic civilian putative spouse doctrine," although a few common law jurisdiction have tried. *See id.* at 37-38.

Texas, being only one of several states with Spanish heritage, is not the only community property state to recognize the putative spouse doctrine. The doctrine has also been fully adopted in California[122] and possibly in Nevada.[123] In addition, Louisiana has adopted the doctrine as it existed in the Napoleonic Code,[124] and the Supreme Court of Washington recently invoked the doctrine's terminology for an old Washington remedy which is closely parallel.[125] Other community property states have adopted some part of the doctrine or similar principles in the interest of fairness.[126]

A. *California and Nevada*

Unlike Texas, California has codified some of the aspects of the putative spouse doctrine, especially with respect to divorce.[127] Under its scheme, a court will divide the property "which would have been community property or quasi-community property if the union had not been void or voidable."[128] California calls this property "quasi-marital property."[129] To qualify as a putative spouse, one must have the requisite good faith belief in the validity of the marriage.[130] Like Texas

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[122] CAL. FAM. CODE § 2251 (West 1994).

[123] *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1228 n.3 (Nev. 1992) (Springer, J., dissenting). The majority did not address putative spouses under Nevada law. *See id*. at 1223-25.

[124] Succession of Marinoni, 164 So. 797, 804 (La. 1935).

[125] Himes v. MacIntyre-Himes (*In re* Marriage of Himes), 965 P.2d 1087, 1100 (Wash. 1998).

[126] *See* IDAHO CODE § 5-311(1), (2)(c) (Michie 1990); WIS. STAT. ANN. § 767.255 (West Supp. 1999); Fellin v. Estate of Lamb (*In re* Estate of Lamb), 655 P.2d 1001, 1004 (N.M. 1982).

[127] *See* CAL. FAM CODE §§ 2251, 2254 (West 1994).

[128] *Id*. § 2251(a)(2).

[129] *Id*. § 2251(a)(2).

[130] *Id.* § 2251(a).

courts, California courts apply the putative spouse doctrine where an otherwise valid marriage is made invalid by an undissolved prior marriage or similar impediment.[131] However, they also apply it when an attempt to create a marriage does not meet the requirements of California law, as for instance when the ceremony is not witnessed.[132] In such cases, a spouse who would claim the protection of the doctrine must have believed reasonably and in good faith that the attempt was sufficient.[133] The court may, in addition to the division of property, order payment of support to the putative spouse.[134]

California has also provided by statute that a putative spouse who was dependent on the decedent has standing to assert a wrongful death action.[135] Along with these statutes, California courts have held that (1) a putative spouse is a "surviving spouse" for purposes of inheriting separate property,[136] (2) a putative spouse is entitled to appointment as administrator of the estate and has preference over anyone else,[137] and (3) a putative spouse is not entitled to receive a family allowance under the California Probate Code.[138] Finally, although California does not recognize common law

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[131] *See* Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807, 811 (Cal. Ct. App. 1988).

[132] *See id*. at 813.

[133] *Id*.

[134] *Id.* § 2254.

[135] CAL. CIV. PROC. CODE § 377.60 (West Supp. 2000).

[136] Smith v. Garvin (Estate of Leslie), 689 P.2d 133, 142 (Cal. 1984).

[137] *See id.*

[138] *See* Hafner v. Hafner (Estate of Hafner), 229 Cal. Rptr. 676, 691 (Cal. Ct. App. 1986).

marriages,[139] solemnization of the putative marriage is not necessary for imputation of good faith; it is, however, a major factor in the consideration of good faith.[140]

While one judge has suggested that the putative spouse doctrine may exist in Nevada as a result of the Spanish legal heritage it shares with California, the only Nevada judge to address the subject suggested its breadth was sharply limited by differences between the statutes of the two states.[141] No appellate court has ever construed the doctrine. If called upon to do so, the Nevada courts would probably defer to the California courts for guidance on the issue, aside from any differences caused by the Nevada statutes.[142]

B. *Louisiana*

Louisiana is the only other state to codify the putative spouse doctrine.[143] In keeping with Louisiana's French civil law tradition, the statute on putative spouses is based on literal translations of the Code Napoleon.[144] The applicable statute states:

> An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.
> When the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, *regardless of whether the latter*

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[139] *See* CAL. FAM. CODE § 306 (West 1994).

[140] Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807, 813 (Cal. Ct. App. 1988). California does not recognize common law marriages. *See* CAL. FAM. CODE § 306 (West 1994).

[141] *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1228 n.3 (Nev. 1992) (Springer, J., dissenting). Nevada also recognizes common law marriages. *See* Dahlquist v. Nevada Indus. Comm'n, 206 P. 197, 199 (Nev. 1922).

[142] *See* Kelly v. Kelly, 468 P.2d 359, 363-64 (Nev. 1970) (stating that Nevada adopted Spanish community property law as it existed in California at the time of California's secession from Mexico).

[143] LA. CIV. CODE ANN. art. 96 (West 1999).

[144] *See* Succession of Marinoni, 164 So. 797, 804 (La. 1935).

> *remains in good faith*, until the marriage is pronounced null or the latter party contracts a valid marriage.[145]

The emphasized language highlights the crucial difference between Texas and Louisiana law– that the putative marriage is not over when good faith ceases to exist. This was not always the law in Louisiana. In a comment to the 1987 revision, the legislature stated that it intended to abrogate the traditional Louisiana rule only in the situation where one party entered the marriage unaware of the impediment. The reason for the change is that the good faith party has no power to rectify the problem.[146]

Those matters which have been held to be civil effects under this statute include the following:

> [1] the legitimacy of the children[; 2] the right of the putative wife to claim workmen's compensation from her husband's employer[; 3] the right of the putative wife to her proportionate share of the community property[; 4] the right of the putative wife to inherit as a wife in the succession of the husband[; 5] the right of the putative wife to be considered as the "widow" under her husband's insurance policy[; and 6] the right of the putative wife to the marital portion, when she is otherwise qualified.[147]

Finally, some authority holds that a ceremony is not required in order for the marriage to qualify under the statute, and that, as in California, if a couple does not comply with the requirements for a valid marriage ceremony, a spouse who believed in good faith that they did comply can invoke

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[145] Art. 96 (emphasis added).

[146] *Id.* cmt. b.

[147] Cortes v. Fleming, 307 So. 2d 611, 613 (La. 1973) (citations omitted).

the protection of the doctrine.[148] However, other authority holds to the contrary[149] and the Louisiana legislature has explicitly left this question open for the courts to decide.[150]

C. *Washington*

The Supreme Court of Washington has always protected the innocent spouse in a marriage that proves to be void.[151] However, recently the court used the term "putative spouse" when referring to an innocent party and held that such a spouse "has equitable interests in the common property acquired during an illegal marriage."[152] Though the court did not specify what this amount would be, it cited earlier Washington cases which awarded innocent spouses one-half.[153] The common property, however, is not community property and "belongs to the one in whose name the legal title to the property stands."[154] Unfortunately, while the Washington Supreme Court has recently adopted the putative spouse terminology, it is unclear whether Washington will fully adopt the doctrine in the future.

D. *Other States*

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[148] *See* Succession of Marinoni, 164 So. at 805 (upholding putative marriage when one party believed in good faith a ceremony was not required).

[149] *See* Succession of Cusimano, 138 So. 95, 96 (La. 1931) (holding that only a "marriage actually contracted, though null" can give rise to a putative marriage).

[150] *See* art. 96 cmt. e (expressly leaving this issue for the courts).

[151] *See* Poole v. Schrichte, 236 P.2d 1044, 1049-51 (Wash. 1951); Creasman v. Boyle, 196 P.2d 835, 838 (Wash. 1948).

[152] *In re* Marriage of Himes, 965 P.2d 1087, 1100 (Wash. 1998).

[153] *See id*. (citing Brenchly v. Brenchley (*In re* Brenchley's Estate), 164 P. 913, 915 (Wash. 1917)).

[154] *Creasman*, 196 P.2d at 838 (citing Engstrom v. Peterson, 182 P. 623, 625 (Wash. 1919), *and* Hynes v. Hynes, 184 P.2d 68, 74 (Wash. 1947)).

A number of other states follow part of the putative spouse doctrine or similar rules. These states, with the exception of Idaho, have not expressly adopted the putative spouse doctrine but have used similar equitable principles to achieve a just result. All of these states reject common law marriage.[155]

The New Mexico Supreme Court has not dealt specifically with the putative spouse doctrine, but the court has indicated that it might apply equitable principles in some situations to allow for payment for services rendered.[156] In addition, an earlier decision held that a wife who in good faith disputes an action based on the invalidity of the marriage may be entitled to alimony pendente lite.[157] While it is not clear how the court would rule on an assertion of putative marriage, the chances of such an assertion winning are probably slim.[158]

Putative marriages are not now recognized in Arizona, but at one time they may have been. In 1953, the Arizona Supreme Court noted the strong precedents in some states for the putative spouse doctrine, although it did not use that term.[159] However, the court did not apply those principles to the case at bar.[160] Ten years later, the court held that where there is no valid marriage

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[155] ARIZ. REV. STAT. § 25-111(B) (1999); IDAHO CODE § 32-201(1) (1996); WIS. STAT. ANN. § 765.05 (West Supp. 2000); *In re* Estate of Lamb, 655 P.2d 1001, 1002 (N.M. 1982). However, some states have grandfathered marriages existing prior to the passage of this legislation. ARIZ. REV. STAT. § 25-111(c) (1999); IDAHO CODE § 32-201(2) (1996).

[156] *See Lamb*, 655 P.2d at 1004.

[157] Prince v. Freeman, 112 P.2d 821, 823 (N.M. 1941).

[158] *Cf.* Hazelwood v. Hazelwood, 556 P.2d 345, 347 (N.M. 1976) (rejecting the idea of a "de facto marriage").

[159] *See* Stevens v. Anderson, 256 P.2d 712, 714 (Ariz. 1953).

[160] *See id.* at 714-15.

no property rights will attach.[161] Based on these cases, it appears that Arizona courts will not recognize the putative spouse doctrine if presented with such a claim.

The Idaho legislature has carved out one niche for the putative spouse. A putative spouse is entitled to maintain an action for wrongful death.[162] This is because the putative spouse is an "heir."[163] A putative spouse is defined by the statute as one who believed in good faith the marriage was valid.[164] No Idaho decision has ever applied the putative spouse doctrine in other contexts.[165]

With its adoption of the Uniform Marital Property Act, Wisconsin became a statutory community property state.[166] Of course, without the Spanish tradition that other community property states possess, and with its statutory scheme, Wisconsin is an anomaly in the community property realm. Thus, it would seem that no elements of the putative spouse doctrine would survive, and yet one has.

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[161] Cross v. Cross, 381 P.2d 573, 575 (Ariz. 1963) (en banc) (citing Mortenson v. Mortenson (*In re* Estate of Mortenson), 316 P.2d 1106 (Ariz. 1957); Stevens v. Anderson, 256 P.2d 712 (Ariz. 1953)). The court did, however, apply principles of equity and allow the "partner" to recover for monies paid to improve the man's real property. *See id.* (citing Garza v. Fernandez, 248 P.2d 869 (Ariz. 1952)).

[162] IDAHO CODE § 5-311 (Michie 1997).

[163] *Id*. § 5-311(2)(c).

[164] *See* IDAHO CODE § 5-311(2) (1990).

[165] One case, Reichert v. Sunshine Mining Co. (*In re* Death of Reichert), 516 P.2d 704, 706 (Idaho 1973), held that there could be no common law marriage between a man and a woman where the man's prior marriage was undissolved. However, this case was decided before the wrongful death statute was enacted in 1984, *see* Act of April 2, 1984, 47th Leg., 2d R.S., ch. 158, § 3, 1984 Idaho Sess. Laws 385, 385-86 (codified as IDAHO CODE § 5-311 (Michie 1990), and the issue may be decided differently the next time around.

[166] WIS. STAT. ANN. § 766.001 (West 1993).

In Wisconsin, if two persons enter into a marriage contract while either of them has a husband or wife living, the marriage is void,[167] and suit may be brought to annul the marriage at any time.[168] The property upon annulment is divided in the same manner as with a divorce or legal separation.[169] The interesting part of the statutory scheme comes when the parties enter into a void marriage, but the impediment to the marriage is later removed. In that case, if at least one of the parties entered into the marriage in good faith, and the good faith continues until removal of the impediment, the marriage becomes legal upon the removal of the impediment.[170] Thus, even this statutory community property scheme has incorporated some aspects of the putative spouse doctrine.

CONCLUSION

The doctrine of putative spouses has always been present in Texas jurisprudence and is now completely ingrained upon our notions of equity and justice in marriage. For this reason, it is unfortunate that the doctrine has not been properly applied by certain courts of appeals. The best way to remedy this problem is to codify what has been articulated herein as the correct line of authority on the issue of putative spouse entitlement, especially in the context of divorce and decedents' estates, and to amend already existing codifications such as the worker's compensation statute to include putative spouses.

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[167] *See id.* §§ 765.03, 765.21 (West 1993). One case has held that the marriage is not void, but voidable at the court's discretion. Smith v. Smith, 190 N.W.2d 174, 176-77 (Wis. 1971). *Contra* Sinai Samaritan Med. Ctr. v. McCabe, 541 N.W.2d 190, 192 n.3 (Wis. Ct. App. 1995) (holding that such a marriage is "void").

[168] WIS. STAT. ANN. § 767.03(4) (West 1993).

[169] *See id.* § 767.255 (West 1993) (providing a single scheme for the division of property in "annulment, divorce or legal separation").

[170] *See id.* § 765.24 (West 1993); *Smith*, 190 N.W.2d at 176.

Additionally, the legislature should adopt a broad statute like that of Louisiana. However, if the legislature does codify this doctrine, it should go beyond the statutes of California and Louisiana to make the doctrine uniformly applicable to all situations, leaving little room for interpretation.

Given that the putative spouse situation is encountered so infrequently, it is unlikely such a codification will occur. For that reason, the next case that involves these issues should address them completely, perhaps laying the predicate for the Texas Supreme Court to set the record straight.