



Marriage and Estoppel in Probate

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By: [Bryan J. Nowlin](#)

The recent tragedy in Tulsa involving the death of Terrence Crutcher brings common law marriage in the context of probate to our headlines. Oklahoma is one of a declining number of states which acknowledge common law marriage, understood to be marriage without a state issued license.

Common law marriage, however, is the same as a licensed marriage under Oklahoma law. While parties may establish a common law marriage without a marriage license, once established there is no such thing as a common law divorce. If married, those partners are married for life until there is a divorce in a court. At least, that is under most circumstances.

Most cases involving a contested common law marriage are in the family courts. In a divorce, both parties are living and capable of testifying to all of the events that one side alleges constitute the common law marriage. A probate by its nature does not allow for both parties to testify as one is necessarily deceased. The standard of proof for a common law marriage is clear and convincing evidence. The heightened burden is all the more difficult to prove in a probate proceeding where one of the alleged marriage partners is deceased. Moreover, the persons contesting the common law marriage in probate are often competing potential heirs with a direct pecuniary interest.

The Oklahoma Supreme Court in the *Brown v. Alley* decision now confuses marital issues in probate further. The *Alley* decision endorses the use of equitable estoppel to prevent what the dissenting opinion referred to as an undisputed legal spouse from claiming rights in a probate over an illegitimate subsequent spouse. In *Alley*, the unsuccessful party, Rhonda, was legally married to the decedent and never divorced, but separated for over a decade during which the parties led largely separate lives.

Rhonda was separated from the decedent over a decade before his death. She even entered into an invalid marriage with another man via a marriage license in that time period. But there was no divorce. The Court held these facts sufficient to invoke the doctrine of estoppel to prevent her from claiming legal rights as a surviving spouse in the probate. The result for lawyers is that a marriage, common law or ceremonial, may not be a "real" marriage for probate purposes if a person's actions are sufficiently inconsistent with marriage to convince a probate court to invoke the doctrine of estoppel.

Attorneys

- Bryan J. Nowlin