MEMORANDUM

TO: Partner Wanda M. Temm

FROM: Associate
Workshop A-1-A

DATE: August 19, 2011

RE: Client William Partridge – File No. 10-123
Validity of Kansas common law marriage

INTRODUCTION

On June 12, 2011, the woman known both as Ellen Dorring and Ellen Partridge passed away. William Partridge has hired the firm to determine his rights to survivorship benefits from Ellen’s estate on the basis that he and Ellen had a valid common law marriage. In all likelihood, a valid common law marriage existed under Kansas law. Both parties had sufficient capacity to enter a marriage. Both agreed and intended to be married and both held themselves out as husband and wife.

STATEMENT OF FACTS

William Partridge and Ellen Dorring/Partridge lived together from February 2006 until her death on June 12, 2011. William and Ellen never requested nor received a marriage license. William will not be entitled to survivorship benefits from Ellen’s employer or from Social Security unless he and Ellen had a valid common law marriage.

During college, Ellen became addicted to heroin. Ellen was constantly “high” and was always in trouble with the police for the antics she pulled when she was taking heroin. During her first year of college, Ellen once beat up a person, and, immediately
afterwards, she told police she did not know that she hit anyone and did not know that her
hitting a person would cause injury. Ellen continued using heroin throughout her alleged
common law marriage to William and until her death in 2011.

Ellen and William met in May 2006 and moved in together in February 2006. One
reason the couple moved in together was to save money on living expenses. Nonetheless,
Ellen and William shared all the household duties as well as the master bedroom. The
couple never obtained a marriage license or exchanged vows. While on a trip to New
Orleans, however, William gave Ellen his grandmother’s antique emerald ring, which
Ellen wore on her left-hand ring finger. On that occasion, the couple decided they were
married. During that trip, the couple registered as Mr. and Mrs. William Partridge. The
couple told all of their friends the trip was their honeymoon, and William told his parents
that he and Ellen were married.

After their trip, the couple obtained a farm loan and signed the loan documents as
Mr. and Mrs. William Partridge. The following year, the couple applied for another loan.
When asked for copies of their federal income tax returns, they presented the loan officer
with individual tax returns. Both filed separate income tax returns, and Ellen had filed
her tax return under the name “Ellen Dorring.” Additionally, the loan officer noted that
Ellen maintained a separate savings account under the name “Ellen Dorring” until her
death.

In October 2006, a county census worker, spoke with Ellen while taking the
annual census for the county. Ellen introduced herself as “Ellen Dorring” and showed
the worker three forms of identification. Ellen’s driver license and Visa card both listed her name as “Ellen Dorrin,” while her library card listed her name as “Ellen Partridge.”

Ellen died on June 12, 2011. William Partridge now claims he is entitled to all or part of Ellen’s estate as her husband on the basis that he and Ellen had a valid Kansas common law marriage.

**DISCUSSION**

A common law marriage existed between Ellen and William Partridge at the time of her death. As a result, William Partridge is entitled to survivorship benefits from Ellen’s employer and Social Security. A common law marriage is valid in Kansas if it meets three requisite elements: (1) both parties have the capacity to marry, (2) a present marriage agreement exists between the two parties, and (3) the parties hold each other out as husband and wife to the general public. *Antonopoulos v. Antonopoulos*, 993 P.2d 637, 647 (Kan. 1999); *Eaton v. Johnson*, 681 P.2d 606, 608 (Kan. 1984). The person asserting the existence of a valid common law marriage has the burden of proof, and this burden must be met with substantial competent evidence. *Antonopoulos*, 993 P.2d at 647.

**I. Capacity of the Parties to Marry**

Both William and Ellen had the capacity to enter into a marriage contract. “Capacity to marry relates to whether or not a legal impediment exists to entering into a marriage contract.” *In re Hendrickson*, 805 P.2d 20, 21 (Kan. 1991) (citing 52 Am. Jur. 2d *Marriage* § 14 (1991)). The capacity to marry includes mental and physical capacity, the absence of a spouse, and being of sufficient age to marry. *Id.* (applying Oklahoma
No question exists concerning William’s capacity. Ellen’s capacity to marry is at issue.

Mental capacity to marry exists if a person understands the nature of the contract and the duties and responsibilities that the contract creates. *Id.* at 23 (citing *Johnson v. Johnson*, 104 N.W.2d 8, 14 (N.D. 1960)). “The test of mental capacity to contract is whether the person possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which he is engaged.” *DeBauge Bros., Inc. v. Whittsitt*, 512 P.2d 487, 490 (Kan. 1973). If the mind has been “so far affected by disease or the decay of his faculties as to render him incapable of knowing the effect of the act he is about to perform, and of intelligently consenting to the marriage ceremony, then there is an incapacity on his part to contract.” *Hendrickson*, 805 P.2d at 23 (quoting *Baughman v. Baughman*, 4 P.3d 1003, 1007 (Kan. 1994)).

In Kansas, a person is presumed sane and competent until proven otherwise by the party alleging incapacity. *Id.* at 24 (holding decedent’s diminished mental abilities were insufficient to overcome presumption of capacity). Thus, the decedent in *Hendrickson* had the capacity to marry even though he was hospitalized, on oxygen, looked ill, and told his relatives that he did not realize what was going on. *Id.* at 22, 25. Similarly, intoxication caused by a whiskey highball prior to the signing of a contract did not render a person mentally incapacitated to enter into a contract. *Crawford v. Crawford*, 271 P.2d 240, 243 (Kan. 1954). In short, the party contesting capacity must present substantial evidence to overcome the presumption of sanity.
Ellen’s history of heroin usage will not overcome the presumption of sanity. Although heroin use can affect mental capacity, no evidence exists that Ellen was under the influence of drugs when she entered into a marriage contact with William. If evidence did exist, the issue would be whether Ellen was capable of understanding the effect of the marital agreement and whether she intelligently consented to the marital agreement. Besides Ellen, William was the only other individual present at the time of the marital agreement, and he did not mention anything about Ellen being under the influence of drugs at the time. Just as the frail, hospitalized decedent’s condition in *Hendrickson*, and the intoxicated spouse’s condition in *Crawford* were deemed inadequate to overcome the presumption of capacity, Ellen’s history of heroin use is likewise inadequate. As a result, Ellen will be presumed to have understood the nature of the marriage contract and the resulting duties and responsibilities. Therefore, William will be able to prove by a preponderance of the evidence that both he and Ellen had the requisite capacity to enter into a common law marriage.

**II. Present Marriage Agreement Between the Parties**

A present marriage agreement existed between Ellen and William. Marriages are generally solemnized by a religious ceremony; however, “no religious rite or ceremony is prescribed… and no religious qualification is required.” *Kansas v. Walker*, 13 P.279, 307 (Kan. 1887). While a present marriage agreement does not need to be in a particular form, “it is essential that each have a mutual present consent to the marriage.” *Kansas v. Johnson*, 532 P.2d 1325, 1329 (Kan. 1975), *overruled on other grounds*, *State v. Lee*, 977 P.2d 263, 271 (Kan. 1999); see Kan. Stat. Ann. § 23-101 (2000). The parties must have a
present intent to be married as opposed to an intent to be married in the future. *Johnson*, 532 P.2d at 1329.

Words and actions may evidence intent. *Antonopoulos*, 993 P.2d at 647. For example, a private ring-exchanging ceremony that was witnessed by two others has been held to be a present marriage agreement. *Id.* In contrast, when a man asked his girlfriend if she was his “old lady,” and she replied, “if you want to put it that way,” that exchange of words was not sufficient to support a present marriage agreement even though the woman wore a wedding ring. *Driscoll v. Driscoll*, 552 P.2d 629, 631-32 (Kan. 1976).

When William gave Ellen a family ring, they decided they were currently married. Ellen always wore the ring on her left-hand ring finger, symbolic of being married. Similarly to the private ring-exchange and commitment ceremony of *Antonopoulos*, here the ring and the mutual agreement to be married occurred simultaneously. This was an agreement to be married from that point forward, rather than an agreement to marry at some later date and was much more than the simple exchange of a term of endearment, “my old lady,” as in *Driscoll*.

On the other hand, William’s testimony is the only account regarding this exchange. Similar to the party in *Driscoll* whose uncorroborated account of a purported marriage was insufficient to meet the burden of proof, William’s testimony cannot be confirmed and may fail to meet the burden of proof. This uncontroverted evidence of Ellen and William’s present marriage agreement should be sufficient, however, to support the second element of a valid common law marriage in Kansas.
III. Holding Out to the Public as Husband and Wife

Ellen and William held themselves out to the public as husband and wife and, thus, fulfilled the third element of a valid common law marriage in Kansas. In order to have a valid common law marriage, the parties must have not only the capacity to marry and a present marriage agreement, but the parties must also hold one another out to the public as husband and wife. *Chandler v. Central Oil Corp.*, 853 P.2d 649, 651 (Kan. 1993); *Eaton v. Johnson*, 681 P.2d 606, 607-08 (Kan. 1984)(holding insufficient evidence existed of “holding out” where the woman continually denied that she was married, the couple filed individual tax returns as unmarried or single, and the man told his friends that he planned to marry another woman).

A holding out of one another as husband and wife on an occasional basis is not enough to fulfill the third element of a common law marriage. *Driscoll*, 552 P.2d at 631-32 (finding that a couple’s actions did not rise to the level of holding one another out as husband and wife when the couple held themselves out as husband and wife only when they arrived at the hospital for the birth of their child and when they sent out birth announcements). Conflicting evidence is insufficient to establish that a holding out as husband and wife occurred. *Hineman v. Hineman*, 297 P.2d 149, 150 (Kan. 1956) (holding the evidence insufficient to establish a holding out when the man told the undertaker that the decedent was single and the couple planned to marry, when they shared an automobile and trailer owned in the decedent’s maiden name, but the couple borrowed money from a bank as a married couple and filed a joint tax return).
Here, William and Ellen may have sufficiently represented themselves to the
general public as husband and wife. They held each other out as husband and wife to
their friends and his parents, and registered at the hotel in New Orleans as “Mr. and Mrs.
Partridge.” Ellen’s library card stated that her name was “Ellen Partridge.” While other
documents were in her maiden name, a woman using her maiden name rather than her
married name is not unusual in this day and age, particularly regarding professional
matters. Married people sometimes maintain separate savings accounts.

Additionally, similar to the couple in Hineman, William and Ellen obtained bank
financing as husband and wife. Unlike the facts in Eaton, no evidence exists that Ellen
denied being married to William. Moreover, neither William nor Ellen were romantically
involved with anyone else or had plans to marry anyone else like the parties in Eaton.
Finally, on the day of her death, the hospital representative referred to Ellen as William’s
wife.

On the other hand, the couple may have held themselves out as unmarried at
certain times. The couple filed individual income tax returns as unmarried or single even
after their marriage agreement. Additionally, Ellen maintained a separate personal
savings account, her driver’s license, and a charge card under her maiden name. She
introduced herself as “Ellen Dorríng” to the county census worker. Repeated use of her
maiden name may be sufficient to establish that Ellen did not hold herself out as
William’s wife.

Viewing the evidence as a whole, however, the court most likely will find that
Ellen and William held one another out as husband and wife. William likely can show
sufficient evidence of the parties’ representing themselves as married to prove the couple held themselves out as man and wife.

**CONCLUSION**

Ellen and William had a valid common law marriage at the time of her death. Both parties had the legal, physical and mental capacity to enter into a marriage contract. The parties had a present marriage agreement, and the parties held out one another as husband and wife to the public. Therefore, William would succeed in proving that a valid common law marriage did exist between Ellen and him at the time of her death.