MEMORANDUM

TO: Partner Barbara Wilson

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 Dorrning and Ellen Partridge passed away. William Partridge 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 Dorrning/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 her behavior when she was taking heroin. During her first year of college, Ellen beat up her roommate and, immediately afterward,
she told police she did not know that she hit anyone and did not know that hitting a person would cause injury. Ellen continued her heroin use throughout her alleged common law marriage to William and until her death.

Ellen and William met in May 2005 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.

Although the couple never obtained a marriage license or exchanged vows, William did give Ellen his grandmother’s antique emerald ring, which Ellen wore on her left-hand ring finger. According to William, the ring was his gift to Ellen while the couple was on a trip in New Orleans. When William gave Ellen the ring, the couple decided that 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 for their honeymoon, and William told his parents that he and Ellen were married.

After their trip, the couple obtained a farm loan, which they signed as “Mr. and Mrs. William Partridge.” The couple applied for another loan the following year. When asked for copies of their federal income tax returns, they gave the loan officer individual tax returns. Both filed separate income tax returns, and Ellen had filed her tax return as “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. Ellen introduced herself as “Ellen Dorring” and showed the census worker three
forms of identification: Ellen’s driver license and Visa card, which both listed her name as “Ellen Dorrin,” and her library card, which 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**

William Partridge likely is entitled to survivorship benefits from Ellen’s estate on the basis that a common law marriage existed between Ellen and him at the time of her death. A common law marriage is valid in Kansas if both parties have the capacity to marry, a present marriage agreement exists between the two parties, and the parties hold out each other as husband and wife to the general public. *Antonopoulos v. Antonopoulos*, 993 P.2d 637, 647 (Kan. 1999). 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. *Id.*

I. **It is likely that 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 law but noting that Oklahoma and Kansas common law marriage laws are identical).
Mental capacity to marry exists if a person understands the nature of the contract and the duties and responsibilities created by the contract. *Id.* at 23 (internal citations omitted). “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). Hence, if the mind has been “so far affected by disease or decay” to make a party “incapable of knowing the effect of the act he is about to perform, and of intelligently consenting to the marriage ceremony,” then the party lacks the capacity to enter into the marriage contract. *Hendrickson*, 805 P.2d at 23 (internal citations omitted).

Nonetheless, in Kansas, a person is presumed sane and competent until proven otherwise by the party alleging incapacity. *Id.* at 24 (holding decedent’s frail health and 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, alcohol intoxication prior to the signing of a contract did not render a person mentally incapacitated to enter into a marriage contract. *Crawford v. Crawford*, 271 P.2d 240, 243 (Kan. 1954). In short, the party contesting capacity must provide substantial evidence to overcome the presumption of sanity.

It is unlikely that Ellen’s history of heroin abuse will overcome the presumption of sanity. Although heroin use can affect mental capacity, no evidence exists that proves Ellen was under the influence of drugs when she entered into a marriage contract with William. Even if evidence did exist, the issue would be whether Ellen was capable of
knowing the effect of the marital agreement and if she intelligently consented to the marital agreement. William was the only other individual present at the time of the marital agreement, and he has mentioned nothing about Ellen being under the influence of drugs at the time. Like the frail, hospitalized decedent in Hendrickson, and the intoxicated spouse in Crawford, Ellen’s history of heroin use is inadequate to overcome the presumption of capacity. As a result, Ellen will be presumed to have understood the nature of the marriage contract and the resulting duties and responsibilities. No dispute exists concerning William’s capacity. 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. A present marriage agreement existed between Ellen and William.

Although marriages are generally solemnized by a religious ceremony, “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.” Kan. Stat. Ann. § 23-101 (2000). In other words, the intent of the parties must be a present intent as opposed to an intent to be married in the future. Kansas v. Johnson, 532 P.2d 1325, 1329 (Kan. 1975).

The parties’ words and actions may provide evidence of their intent. Antonopoulos, 993 P.2d at 647. For example, a private ring-exchanging ceremony that was witnessed by two others was 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 later wore a wedding ring. *Driscoll v. Driscoll*, 552 P.2d 629, 631-32 (Kan. 1976).

When William gave Ellen the ring, William and Ellen decided they were married. Although no others witnessed the ring-exchanging ceremony, the parties mutually agreed that they were married from that point forward, rather than agreeing to marry at some later date. The gift of the ring and the mutual agreement to be married occurred simultaneously.

While William’s testimony is the only account regarding this exchange, his testimony is corroborated by Ellen always wearing the ring on her left-hand ring finger. Moreover, while the ring was insufficient evidence of a present agreement to marry in *Driscoll*, here William and Ellen expressed a clear present intent to be married rather than merely exchanging a term of endearment. This uncontroverted evidence of Ellen’s and William’s present marriage agreement should be sufficient to support the second requisite element of a valid common law marriage in Kansas.

**III. Ellen and William held themselves out to the public as husband and wife.**

To have a valid common law marriage, the parties must have not only the capacity to marry and a present marriage agreement, but they must also hold out one another as husband and wife to the public. *Chandler v. Central Oil Corp.*, 853 P.2d 649, 651 (Kan. 1993).

If sufficient competent evidence exists that the couple held each other out as married, a common law marriage exists. *Id.* 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 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 the birth announcements for their child).

Likewise, highly conflicting evidence of the parties’ intent can undermine proof of holding out. *Hineman v. Hineman*, 297 P.2d 149, 150 (Kan. 1956) (holding the evidence too conflicting to support holding out when the couple borrowed money from the bank as a married couple and filed a joint tax return, but the shared automobile and trailer were titled only in the decedent’s maiden name, and the man told the undertaker that the decedent was single and that the couple had planned to get married). Similarly, the court found insufficient evidence 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. *Eaton v. Johnson*, 681 P.2d 606, 607-08 (Kan. 1984).

Here, evidence exists that William and Ellen 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.” Additionally, similar to the couple in *Hineman*, William and Ellen obtained bank financing as husband and wife. Finally, on the day of her death, the hospital representative referred to Ellen as William’s wife.
On the other hand, the couple held themselves out as unmarried at certain times. They filed income tax returns as unmarried or single even after their marriage agreement. Additionally, Ellen maintained a separate personal savings account, a driver’s license and charge card under her maiden name, and she introduced herself as “Ellen Dorrin” to the county census worker. This evidence, while not conclusive, suggests that at least some of the time Ellen did not wish to be known as William’s wife. Nonetheless, when viewed as a whole, the court most likely will find substantial competent evidence supporting that Ellen and William held out one another as husband and wife.

**CONCLUSION**

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