

Common-Law Marriage Handbook



**For Claims Examiners and Hearing
Representatives**

**Division of Energy Employees
Occupational Illness Compensation**

June 2023

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Introduction

This handbook is intended to assist claims examiners with both the identification and development of survivor claims filed under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA) that involve common-law marriages, which are marriages that have legal effect without the formal registration with a state or tribal authority necessary for traditional civil or ceremonial marriages. To successfully adjudicate such a claim, claims examiners will need to reliably identify the existence of a common-law marriage issue and also develop the necessary factual evidence so they can properly assess the validity of the common-law marriage. This handbook is to be used in conjunction with the Federal (EEOICPA) Procedure Manual, including the guidance it contains for the routine development of survivor eligibility.

Section I provides information to help claims examiners identify when a common-law marriage issue exists in an EEOICPA claim. Section II discusses the federal and state laws effecting common-law marriages and contains an explanation of the five standard elements required to establish the existence of a common-law marriage. Section III provides guidance on developing the factual evidence necessary to adjudicate the issue of whether a valid common-law marriage exists. And finally, an Appendix at the end of this Handbook contains a brief description of the relevant laws of the 19 jurisdictions that currently recognize – or until recently recognized – common-law marriages.

I. Identifying a Potential Common-Law Marriage Issue

Issues of common-law marriage do not arise in the vast majority of EEOICPA claims, and when they do, it is not always obvious. However, claims examiners should be aware that a common-law marriage issue may be involved in some survivor claims and should look out for that possibility when developing those claims. Signs of a potential common-law marriage issue commonly include: (1) an affirmative assertion by the alleged spouse or child of the deceased employee that a valid marriage existed based on common-law principles or lengthy cohabitation; (2) an allegation that a marriage existed *without* the submission of a valid marriage license *or* an allegation of a common-law marriage; or (3) the submission of evidence that a licensed marriage took place less than one year before the employee died. None of these signs is dispositive that a common-law marriage exists, but if a claim presents one or more of them, the claims examiner should consider whether development for a potential common-law marriage is necessary.

Affirmative Claim of Common-Law Marriage or Claim of Lengthy Cohabitation

An individual claiming as a surviving spouse or child of a deceased covered employee may openly assert that their survivor eligibility is based on a common-law marriage of the deceased employee. Alternately, an alleged spouse or child may assert that merely lengthy cohabitation supports their eligibility for survivor benefits without providing any evidence to show that a common-law marriage existed. However, while states that allow for the creation of a common-law marriage all require cohabitation, cohabitation alone is not enough to establish a common-law marriage. Despite this, if an alleged spouse or

child merely asserts survivor eligibility based on cohabitation, they *may* be eligible, and all of these scenarios should be developed with the principles of common-law marriage in mind.

Allegation of Marriage without Submission of a Valid Marriage Certificate

A claimant may allege they are the spouse or child of a deceased employee without submitting documentary evidence that a legal marriage occurred (*i.e.*, no marriage certificate issued by a state or tribal authority). Absent documentary evidence that establishes a legal marriage, the claims examiner should attempt to obtain such evidence (*i.e.*, a marriage certificate issued by a state or tribal authority). If no documented evidence is produced, the claims examiner should consider developing the claim for the existence of a common-law marriage.

Proven Marriage of Insufficient Duration

Under EEOICPA, a surviving spouse must prove they were legally married to a deceased covered employee for at least one year immediately preceding the employee's death. If evidence proves a valid marriage took place, but such marriage occurred less than one year before the employee died, further development may be necessary to determine whether a common-law marriage existed prior to the proven marriage that would save the claimant's survivor eligibility.

II. Laws Affecting Common-Law Marriage Determinations in EEOICPA Claims

In order for a surviving spouse to be eligible under Parts B or E of EEOICPA, they must establish a marital relationship with the employee throughout the entire final year of the deceased employee's life, either through a licensed marriage, a common-law marriage or an uninterrupted combination of the two. DEEOIC is obligated to determine whether marital relationships exist in order to properly adjudicate EEOICPA claims. However, because EEOICPA does not define marriage, DEEOIC relies on particular factors set out in state, local or tribal law to determine the validity of a marriage.

Once a claims examiner determines that a case may involve a common-law marriage issue, it is critical to determine: (1) where the common-law marriage was allegedly entered into; and (2) did that state (or other jurisdiction) allow creation of such marriages within its borders at the time the marriage was allegedly entered into. If, after fully developing the claim, evidence shows the alleged marriage occurred in a state that did not allow the creation of such marriages within its borders, and no other state is involved, no further development is necessary.

However, if two people made their permanent home in a state that recognizes common-law marriage, during the time when such marriages were recognized by that state, and the elements of a common-law marriage were established in that state, the marriage is valid and the individuals are spouses for the purposes of EEOICPA. If the state where the

parties were domiciled does not recognize common-law marriage, but the claimant alleges to have contracted a valid marriage in another state that does recognize common-law marriage, then the marriage may still be valid, unless the domicile state has a strong public policy against common-law marriage and refuses to recognize such marriages.¹

Common-Law Marriage Jurisdictions

At the time this 2023 version of the handbook was issued, the District of Columbia and ten states are the jurisdictions in which common-law marriages can still be contracted: Colorado; Iowa; Kansas; Montana; New Hampshire; Oklahoma; Rhode Island; South Carolina; Texas; and Utah. Also, at least two federally recognized tribes (the Navajo Nation and the Pueblo of Acoma) currently recognize common-law marriages.² Six other states have recently abolished common-law marriage in their jurisdictions: Alabama; Florida; Georgia; Idaho; Ohio; and Pennsylvania.³ A brief description of the relevant statutory provisions and case law of these 19 common-law jurisdictions are set forth in the Appendix of this handbook.⁴

While jurisdictions that expressly allow establishment of a common-law marriage are in the minority, it is important to note that all states recognize validly contracted “foreign” marriages contracted outside a state’s borders by individuals domiciled in that other state, and therefore all jurisdictions will recognize validly contracted, out-of-state common-law marriages.⁵

The Five Basic Elements of a Common-Law Marriage

When an alleged surviving spouse or child fails to present clear and uncontradicted evidence of survivor eligibility under EEOICPA, further development – including a determination of whether a common-law marriage was established – is necessary. The descriptions of jurisdictional common-law marriage requirements noted below and in the Appendix are designed to assist claims examiners in identifying and understanding the elements necessary to prove the existence of a common-law marriage.

Generally, there are five basic factors that are usually considered when it is necessary to determine if parties entered into a valid common-law marriage: capacity; agreement; cohabitation; holding out; and reputation. Courts do not all employ the same exact calculus in determining whether a common-law marriage has been created within their respective borders. Some states use different terminology and some states couple various factors together, treating them as one. A state may even determine that proof of one or more of these elements may give rise to a presumption that another element is satisfied.

- *Capacity*

Each party to a marriage must have the legal capacity to enter into marriage. That is, they must have the capacity to consent (*i.e.*, minimum age and mental capacity) and they must be free of marital ties to any other person. Capacity to marry is a requirement for traditional, ceremonial marriages, just as it is for common-law marriage.

In determining capacity, claims examiners should note that states may have requirements related to a person's age, consanguinity (degree of relation), whether a prior marriage has not yet been dissolved and mental capacity. If an EEOICPA claim involves an alleged common-law marriage between parties of close relations (*e.g.*, first cousins) or there is a claim of diminished mental capacity of one of the parties, the claims examiner should discuss development with their District Director who may decide to seek early direction from the Solicitor's Office regarding the applicable state law.

Similarly, states that allow common-law marriage specify a minimum age requirement for any party to common-law marriage. In Kansas, for instance, both parties must be at least 18 years of age to establish a valid common-law marriage.⁶ In Colorado, common-law marriages established on or after September 1, 2006 are only valid if each party is at least 18 years old, although the parties may be as young as 16 if they have parental consent or judicial approval.⁷ South Carolina allows common-law marriages between persons as young as 16.⁸ States without a statutory age requirement for common-law marriages may apply well-recognized common-law ages for marital consent (12 for girls, 14 for boys) or they may apply the ages listed in the state's licensing requirements for licensed marriages (generally 18, unless parental consent is given for those younger). Some states treat marriages involving a party less than the minimum age as void while others treat them as merely voidable. Whenever the claimed common-law marriage involves a party who was less than 18 years old at the time it was contracted, the claims examiner should fully develop the evidence of age and parental consent along with the evidence regarding the balance of the required elements.

The common-law marriage jurisdictions also prohibit the creation of a common-law marriage if one or both of the parties remains married to a third party. The principal is straightforward: plural marriages are always prohibited and an existing marriage is an impediment to the formation of a new marriage in every American jurisdiction. Thus, a person may not enter into a common-law marriage with another if either of them has an existing marriage that has not been extinguished, whether through death, divorce or annulment. Nor may a person enter into a licensed marriage if they previously entered into a common-law marriage and did not extinguish that marriage by death, divorce or annulment. Any time there is evidence of multiple marriages or multiple cohabitations, either by the deceased employee or a purported common-law spouse, the claims examiner should engage in development efforts to uncover the nature and extent of relationships that may serve as a legal impediment to the capacity of a party to enter into the claimed marriage, whether it be common-law or licensed marriage. This development should include gathering a copy of any divorce decree from the appropriate state, if possible.

In the context of tribal marriages, the parties must be members of the tribe. For example, membership in the Navajo Tribe is a requirement of a common-law marriage under the Navajo Nation Code and if tribal membership is not proven, the party will not have established the capacity to enter into a common-law marriage under that law.⁹

- *Agreement*

The element of agreement requires that both parties mutually intend, consent and agree to have a present, immediate and permanent marital relationship with each other. All common-law jurisdictions emphasize that the mutual agreement of the parties must be a present agreement to immediately be spouses, not a promise or an agreement that they will get married at some time in the future. The common-law jurisdictions also require evidence that both parties intended and agreed to the immediate and permanent marital status. For purposes of proof, however, the declared intent of the surviving spouse to establish an immediate common-law marriage may be coupled with the actions and conduct of the deceased employee that are consistent with that intent.¹⁰ However, if the purported spouse asserts that they considered themselves to be married to the employee but there is probative evidence showing that the employee did not intend or agree to such a relationship, the claims examiner should develop this element further and should specifically ask the claimant for affirmative evidence that the employee intended and agreed to be their common-law spouse.

It is typical of common-law marriages that parties may not have evidence of a written agreement that clearly pronounced that the parties would go henceforth as spouses. This may particularly be the case where a substantial amount of time has passed or where one of the spouses is now deceased. Common-law marriage jurisdictions allow the element of agreement to be proven by either words or conduct and hold that it need not be directly proven through production of a written contract or letter evidencing such an agreement. When evaluating such an implied agreement, common-law marriage jurisdictions often look to the cumulative evidence of the other four elements as establishing or supporting the existence of an agreement. However, while most common-law jurisdictions hold that evidence of cohabitation may be circumstantial evidence of the required agreement, to a greater or lesser extent, evidence of cohabitation by itself is not sufficient evidence of a common-law marriage.¹¹

- *Cohabitation*

The element of cohabitation requires that the couple live together continuously and openly as spouses. Merely residing together under the same roof is not sufficient to meet the cohabitation requirement. The character of the cohabitation must be such that it shows that the parties mutually and voluntarily assumed the rights, duties and obligations of marriage, not that they merely lived together and/or had sexual relations. Only one state, New Hampshire, sets a minimum period during which the couple must cohabit in order to satisfy the element of cohabitation.¹² All common-law jurisdictions, however, require that the cohabitation be open and continuous. For instance, if the parties secretly sleep together or periodically stay overnight at one another's homes, the cohabitation element will not be met. At least one state has required "an exclusive relationship" as part of their analysis of the cohabitation element.¹³ Finally, the required cohabitation, like the other elements, must take place in a jurisdiction that recognizes common-law marriage.¹⁴ Cohabitation in a state that does not recognize common-law marriage cannot be used to establish this element.¹⁵ Thus, cohabitation in Missouri (a state that does not

allow common-law marriages to be established within its borders) cannot be used to establish a common-law marriage in nearby Kansas (which does allow common-law marriages to be established within its borders).

- *Holding Out*

Common-law marriage jurisdictions also require that the parties openly hold themselves out in their community as a married couple, which means that they must have represented to others that they were married. However, declarations that the woman is a “girlfriend,” “better half,” “boss lady” or “housekeeper,” are not sufficient and an “isolated statement” that a woman is a man’s “wife” has been found not to be sufficient to meet the holding out requirement.¹⁶ The fact that a woman does not use a man’s last name weighs against an alleged common-law marriage as it undermines the holding-out requirement.¹⁷ But many states have found that a common-law marriage could be established in spite of the woman’s occasional or even continuous use of her maiden name.¹⁸

Like the agreement element, the holding-out element may be proven by either documents or spoken words, or by the conduct and actions of the parties. A secret relationship known only to family or a few friends does not constitute a common-law marriage and occasional introductions as husband and wife do not establish the element of holding out. At least one of the common-law states, Iowa, holds that continuous cohabitation, coupled with holding out in public as spouses, creates a presumption of common-law marriage.¹⁹

- *Reputation*

Finally, the element of reputation requires that evidence establish the existence of a reputation in the community that the couple is living together as spouses, not just having sexual relations and not just residing together for some other mutual convenience. The fact that the relationship is a marriage must be widely known in the community in which the couple lives, because there is no such thing as a secret or clandestine common-law marriage.²⁰

The parties’ reputation as spouses, however, need not be known to all. Reputation has been described as the understanding among the neighbors and acquaintances with whom the parties associate in their daily life that they are living together as a married couple.²¹ However, if the couple’s reputation in the community is divided or is contradicted, the purported common-law marriage may be found not to exist.²² Alternately, many of the common-law jurisdictions hold that open cohabitation, coupled with a reputation in the community as being married, raises a rebuttable presumption that a common-law marriage was created.²³

- *Other Considerations*

Because common-law marriage is a way to contract a lawful marriage, the same formal judicial proceeding that is required to dissolve any other marriage is required to dissolve a common-law marriage. There is no such thing as “common-law divorce.” Although it

is possible to be married by common-law in certain jurisdictions, and every state will recognize such unions, traditional divorce provisions apply to all marriages in all jurisdictions.

III. Developing a Common-Law Marriage Issue in an EEOICPA Claim

In order to establish the existence and nature of a valid common-law marriage, it is likely development efforts will be required beyond the initial submission of supporting factual evidence from the claimant. It is important that claims examiners who must engage in this development examine and analyze the currently available evidence and, using this handbook, identify the key issues upon which survivor eligibility determination might turn. From this analysis, the claims examiner should distinguish those elements that can be decided on the available evidence from those which need further development so that development may be more narrowly targeted.

As with any development letter, claims examiners should inform claimants of what facts the evidence already submitted supports and identify the evidence or type of evidence that will address the remaining weaknesses in their claim. The regulations require that DEEOIC “notify the claimant of deficiencies and provide. . .an opportunity for correction of the deficiencies.”²⁴ Development letters serve as the vehicle for that required notice and should ask narrowly tailored questions to elicit new information on those elements. While a development letter should not ask for voluminous or duplicative documentation, if the evidence in the file is contradictory or unclear, additional evidence may improve the quality of the decision and would be useful to the claims examiner.

Developing Two Threshold Issues

Although common-law marriage claims may require different targeted development efforts, two threshold issues must always be developed in every case: where the alleged marriage was entered into; and when it was entered into.

- *Where was the alleged common-law marriage contracted?*

It is critical to determine where a common-law marriage was allegedly established because state law controls the determination of whether the marriage was legally created. Accordingly, the claims examiner must fully develop the evidence establishing where each party to the marriage was domiciled during the entire period of the claimed common-law marriage, including on the date the marriage was allegedly first established.

While DEEOIC must have evidence that a common-law marriage was established in a common-law jurisdiction at a time when that jurisdiction allowed the creation of such marriages, it is not necessary for claimants to prove a common-law marriage was established in every state in which the couple lived as spouses. Neither does a claimant have to prove that every state in which the couple resided or cohabitated was a common-law marriage state. As long as the common-law marriage requirements of one state were

met at least one year prior to the employee's death and not dissolved prior to the employee's death, evidence of that marriage should be sufficient.

If development is necessary in a common-law marriage case, the claims examiner should request a narrative statement from the claimant fully describing the nature and duration of the marital relationship, including when and where the relationship began. For instance, in the case of a claimant who alleges to be a spouse via a common-law marriage but has supplied little background information about the relationship, the development letter should ask that the claimant supply a narrative statement explaining the circumstances surrounding the creation of the common-law marriage and identify specific examples of important events about which more detail is needed, such as: where the couple lived; whether and where the couple relocated and on what dates; any interruptions in periods of cohabitation; evidence of the birth of children; and, if applicable, divorce. A properly crafted development letter should also request any documents that might tend to establish the claimed relationship.

- *When was the common-law marriage established?*

The date on which the purported common-law marriage was established is important for several reasons. The first is the requirement under EEOICPA that a surviving spouse be married to the employee for one year prior to the employee's death. If development of the evidence elicits a statement from the claimant that the alleged common-law marriage was entered into only six months prior to the employee's death, the claims examiner may quickly determine that survivor eligibility has not been established. The claimed date of creation of the common-law marriage also sets the point in time at which the parties' domicile should initially be determined. Furthermore, it sets the point in time at which the parties must have the capacity to enter into a common-law marriage; because of this, the parties' ages on that date are important. The establishment date must also fall during a period of time that the domicile state allowed the creation of common-law marriages. As shown above, many states have abolished common-law marriages established within their borders, some fairly recently, but none of these laws have retroactive effect, so if the claimed common-law marriage was validly established prior to the date of abolishment, it will be recognized.

- *Examples:*

In any case where development is necessary, a development letter must be sent to the claimant. The letter should ask the claimant to submit a narrative statement and then identify specific information and documents to support their claim. For example:

It is important that your statement include as much information as possible that supports your claim that you and the employee entered into a common-law marriage. Your statement should include a narrative that describes your relationship with the employee and, additionally, provides the following information:

- *The date on which you and the employee entered into a common-law marriage and a description of the surrounding circumstances and why you believe your common-law marriage began on that date.*
- *The state which you and the employee treated as your permanent home on the date you provided in response to the above question, and a narrative description or list of any residential moves or relocations that you and the employee made after that date. Please identify the time frame (start and end dates) during which you and the employee resided together in each location as spouses.*

Developing Evidence of the Five Basic Elements of a Common-Law Marriage

Even though common-law jurisdictions may treat evidence of one of the five elements as circumstantial evidence of the existence of other elements, development letters should be designed to elicit sufficient evidence of all five common-law marriage elements unless there is already sufficient evidence of some of these elements in the file. Below are sample questions designed to elicit evidence of the five standard elements:

State the ages of both you and the employee on the date you began your common-law marriage and whether you or the employee had any marital ties to any other person on that date.

Identify the state which you and the employee treated as your permanent home as of the date you began a common-law marriage. Provide a narrative description of all locations where you and the employee lived after that date. For each location, identify the time frame (start and end dates) during which you and the employee lived together as a married couple.

Provide a narrative description of when you and the employee agreed to have a present, immediate and permanent marital relationship as spouses and describe the timing and circumstances surrounding that agreement.

Provide a narrative description of whether you and the employee held yourselves out to the public as a married couple and describe, to the extent possible, times, places and circumstances in which you made those representations.

Provide a narrative description of whether you and the employee had a reputation in the general community as being a married couple and identify any persons submitting affidavits or statements describing such a reputation.

Developing Evidence in a Surviving Spouse Claim

Even apparently simple, straightforward common-law marriage claims, such as where a claimant asserts that they are the deceased employee's surviving spouse via a common-law marriage and the evidence proves that neither party was ever married to another

person, require close attention. These claims may present themselves in various forms, for example:

- *Scenario A:* The employee and the claimant were not married in a licensed or traditional marriage and the claimant asserts they contracted a common-law marriage.
- *Scenario B:* The employee and the claimant were married in a licensed or traditional marriage and the claimant asserts that they divorced, reconciled and entered into a common-law marriage prior to the employee's death.
- *Scenario C:* The employee and the claimant entered into a licensed or traditional marriage less than a year prior to the employee's death and the claimant asserts that they established a common-law marriage prior to the licensed marriage.

In each scenario, the claimant must prove they were legally married to the employee and that the marriage was continuous for at least 365 days prior to the employee's death.

In Scenario A, the primary issues that need to be developed are: (1) whether a common-law marriage existed between the claimant and the employee; (2) if so, was it established at least one year prior to the employee's death; and (3) if both (1) and (2) are found to be true, was the common-law marriage dissolved prior to the employee's death. In order to make the determinations relating to these three primary issues, the claims examiner needs to develop the two threshold issues of "when" and "where" the claimed common-law marriage was initially entered into, and needs to develop the evidence on each of the five standard elements of a common-law marriage as described previously in this section. In addition, the claims examiner needs to develop evidence to determine if the common-law marriage was ever dissolved and, if so, when.

Scenario B differs from Scenario A and the issues that need to be developed are: (1) was a common-law marriage established between the claimant and the employee; (2) if the divorce occurred more than one year prior to the employee's death, was the common-law marriage established at least one year prior to the employee's death and did it continue to the employee's death; and (3) if the divorce was made final during the last year of the employee's life, was there any interruption between the divorce and the creation of the common-law marriage.

Scenario C is slightly different from the other scenarios and the development issues are: (1) was a common-law marriage established between the claimant and the employee; (2) was it established at least one year prior to the employee's death; (3) did the common-law marriage continue up to the date of the licensed marriage; and (4) was the licensed marriage dissolved prior to the date of the employee's death.

Developing a Capacity Issue

Development efforts may be complicated if the evidence suggests that a claimed marital relationship was never created because one or both alleged spouses lacked the capacity to marry. Examples of evidence that can give rise to a question of capacity include:

- Either alleged spouse was underage at the time they attempted to establish a common-law marriage.
- Either alleged spouse had a prior legal marriage with another person before they attempted to establish a common-law marriage and that prior marriage was not dissolved prior to the date the common-law marriage was alleged to have occurred.
- Either alleged spouse established a common-law marriage with another person before they entered into a licensed marriage and the common-law marriage was not dissolved prior to the date of the licensed marriage.

If the main issue of capacity involves the age of one or both parties to the marriage, the claims examiner may need to ask for proof of the parties' ages on the date the common-law marriage was allegedly entered into. Depending on state law, a claims examiner may also need to develop evidence of parental or judicial consent.

If there is indirect evidence that one party to a marriage was not free to marry the other (*i.e.*, a medical record refers to a previous spouse), the claims examiner may use a generic development question to address the issue. For example:

Provide a narrative description of whether you or the employee have been legally married to any other persons, have children by any other relationship or have cohabitated with another person for a length of time such that a common-law marriage may have been established with that other person. For each situation, please identify the parties and/or children involved, the places and dates of the marriage, relationship or cohabitation and the date and manner in which each marriage, relationship or cohabitation was terminated, dissolved or annulled, either by death, court order or otherwise.

If the file contains evidence or an allegation that either the employee or the claimant was previously married and that that marriage may not have been dissolved, the development questions may need to be more direct. For example:

You claim that you are the eligible surviving spouse of [employee] by virtue of a common-law marriage that began in Oklahoma two years prior to [employee's] death. However, there is evidence in your case file (a marriage certificate) that suggests that you were legally married to another person prior to that time. Please provide a narrative description of your relationship with your prior spouse

and provide documents to support your description of how and when that prior relationship ended (e.g., a divorce decree or death certificate).

Or:

You claim to be the eligible surviving spouse of [employee] and have provided a copy of your marriage certificate in support. However, there is evidence in your case file (a marriage certificate) that the employee was married to [name of prior spouse] prior to your marriage. Additionally, there is no evidence in the case file that [employee] was ever divorced from [name of prior spouse]. Please provide a narrative description of your understanding of whether [employee's] marriage to [name of prior spouse] was ever dissolved by court order or otherwise and provide documents or other evidence to support your description of how and when that prior relationship ended (e.g., a divorce decree, death certificate, affidavit from witnesses).

The development letter in such a complicated case should be targeted narrowly. It should inform the claimant of the nature and extent of the evidence currently in the case file (or the lack thereof) that led to the additional questions and should provide a very specific request for additional evidence. Like all development letters, such a letter should always request documentation to support all aspects of eligibility that the evidence does not yet support. The letter should also make very clear to the claimant the key issue behind the additional request for information and how that issue affects the claimant's eligibility under EEOICPA.

Additional Considerations in Developing the Claim of a Stepchild

In the context of common-law marriage cases, a stepchild claim is presented when the claimant asserts that they are an eligible survivor by virtue of the fact that they are the child of a parent who was married to the employee via a common-law marriage and that they lived with the employee in a regular parent-child relationship. In such a case, the primary survivor-eligibility issues that must be determined are: (1) did a common-law marriage exist between the claimant's biological parent and the employee; and (2) if so, did the claimant live with the employee in a regular parent-child relationship during the common-law marriage.

It is important to note that in the stepchild case, it does not matter whether the common-law marriage between the employee and the claimant's parent endured for at least one year immediately prior to the employee's death, so development need not address that factor. Rather, the timing issues that must be developed in such a case are: (1) whether the alleged common-law marriage was created in a jurisdiction during a time when that jurisdiction allowed common-law marriages; and (2) did the claimant live with the employee in a regular parent-child relationship after the common-law marriage had been established and before it was dissolved (if ever). If, for instance, the child-claimant lived with the employee during a time when the employee was only dating the child-claimant's parent, then the child left for college prior to the creation of the common-law marriage

between their parent and the employee, the child-claimant is likely not an eligible stepchild. In a stepchild claim where a common-law marriage is alleged, the claims examiner should flesh out evidence of these other details in addition to developing the threshold evidence of “when” and “where” the common-law marriage was established and the five standard elements of such a marriage.

Developing Evidence of a Marriage Under Tribal Law

As set forth above, the domestic relations laws of both the Navajo Nation and the Pueblo of Acoma only apply when both parties of an alleged tribal marriage are members of the tribe, so the claims examiner should always develop this capacity issue in every tribal marriage case. The development of additional elements depends on the law of the tribe at issue. Notably, the Navajo Nation Code explicitly provides that Navajo “Peacemaker Courts” may enter an order, even after the fact, validating a common-law marriage between tribe members.²⁵ On occasion, such orders have been entered after the death of one or both of the parties and such orders are generally accepted as sufficient proof of the existence of a marital relationship. Therefore, in any case in which a claimant asserts that a common-law marriage was created under Navajo tribal law, the claims examiner should develop the two threshold issues of “when” and “where” along with the five standard elements of a common-law marriage and should also inquire as to whether an order (often referred to as a “Peacemaking Judgment”) has been entered by the Navajo Courts validating the alleged marriage.

The domestic relations laws of the Pueblo of Acoma differ significantly from those of the Navajo Nation. The Pueblo of Acoma Laws (2003) simply state that marriage involving members of their Tribe “shall be recognized if performed according to the laws of the state of their residence or according to tribal custom.”²⁶ Those same laws also state that “[r]ecognition of a marriage by the Pueblo of Acoma will be shown on a certificate of marriage” and that a “marriage registry shall be maintained in the Acoma Tribal Offices.” Therefore, in a Pueblo of Acoma case, the claims examiner should develop the issue of capacity (including tribal membership) and also whether there is a “certificate of marriage” and a written entry in the “marriage registry” maintained by the offices of the Tribal Court. If either the certificate or registry entry exists, it may not be necessary to develop the five standard elements of a common-law marriage depending on the circumstances of the case, *i.e.*, if the evidence of the timing of the marriage is sufficient to establish survivor eligibility in the particular case.

Documents and Supporting Evidence

Development letters should not only ask for written statements of certain facts but, as has been repeated throughout this handbook, should also request that the claimant submit any pertinent documents to corroborate and support the factual allegations relating to survivor eligibility. The regulations explicitly address the evidentiary limitations of written statements and the need for documented evidence:

Written affidavits or declarations, subject to penalty of perjury, by the employee, survivor or any other person, will be accepted as evidence of [a] survivor relationship for purposes of establishing eligibility and may be relied on in determining whether a claim meets the requirements of the Act for benefits if, and only if, such person attests that due diligence was used to obtain records in support of the claim, but that no records exist.

20 C.F.R. § 30.111(c) (2023). The “if, and only if” language makes clear that written statements alone (even those that are notarized) cannot be used to establish elements of survivor eligibility unless either supporting documents (“records”) are submitted or the written statement contains the attestation required by the regulation.

Depending on the situation and the extent of documented evidence of eligibility already submitted, the claims examiner may decide to provide the claimant with a list of examples of the types of documents that might support eligibility. For example:

In addition to the narrative description provided in your statement, please provide evidence to support the factual assertions in your statement. Be aware that the time frame of events is important. Accordingly, documents that bear dates may be particularly helpful to your claim. Also, make sure to address dates and time frames in any affidavit you submit. In the event no records exist to support your assertions, include in your affidavit a statement that you have used due diligence in attempting to obtain supporting records but that no such records exist. Examples of documents that may support a claim of common law-marriage include:

- *Affidavits – Affidavits are signed, narrative statements submitted by you or any other person who has personal knowledge of the information included in statement itself. You should submit a written affidavit describing the basis of your claim that you are or were the employee’s common-law spouse, as described above. You may want to ask other people to prepare affidavits also if you think others may have relevant information to provide. You can submit their affidavits to us along with your own or anyone making the affidavit may submit them to DEEOIC directly. Any such submission needs to clearly show your case number.*
- *Marriage and Divorce Documents – Marriage licenses and certificates may provide information relevant to your status as a common-law spouse. If you or the employee were married to other persons, you should submit marriage certificates and dissolution decrees regarding those other marriages. You should also submit any declaratory judgments or court orders which officially recognize the claimed marriage between you and the employee.*
- *Other Court Documents – If you or the employee ever filed a civil lawsuit regarding the employee’s occupational exposure or were involved in any other type of court action or workers’ compensation claim, documents from such cases may include information relevant to your common-law marriage claim.*

- *Death Certificates* – The employee’s death certificate may supply information relevant to your common-law marriage claim. Additionally, if you or the employee was a widow or widower at the time of your common-law marriage to each other, you may want to submit the death certificate of the former spouse.
- *Children’s Records* – Birth or death certificates of any children which you and the employee had together may provide relevant evidence of your relationship with the employee.
- *Real Estate Documents* – Deeds, rental and lease agreements may provide relevant information.
- *Tax Documents* – Federal and state tax returns may supply information relevant to your common-law marriage claim.
- *Banking and Loan Documents* – Relevant information may be found in dated statements from checking and savings accounts, car loan documents, promissory notes, security agreements and mortgage documents.
- *Contracts or Insurance Documents* – Any written contract or other standard insurance document may include information relevant to your claim as being the employee’s common-law spouse.
- *Employment Documents* – Employment documents such as beneficiary designation forms for employer-provided life insurance or health insurance applications may include information that is relevant to your common-law marriage claim.
- *Medical Records* – Records from doctors or hospitals may contain relevant information.
- *Vehicle Registration Documents* – If you and the employee owned any vehicles together, license and registration documents may show relevant information.
- *Tribal Documents* – If you and the employee are members of a federally recognized tribe and you claim a common-law marriage under tribal law, you should submit documents that show membership and any tribal court declarations concerning your claimed relationship.
- *Wills, Trusts and Power of Attorney Documents* – Testamentary documents such as wills and trusts may include information relevant to your claim to be the employee’s common-law spouse.
- *Utility Bills* – Utility bills may reveal relevant information.

- *Letters – Letters in which you and the employee referred to each other as spouses may be relevant to your claimed status. Also, letters to or from others that refer to your relationship with the employee may be relevant.*
- *Other Documents – You should submit any other formal or informal documents that may support your claim to be the employee’s common-law spouse. For instance, any document which shows your use of the employee’s last name as your own last name or that shows that your children from another marriage used the employee’s last name as their last name would be relevant. Any form that the employee ever completed wherein you were listed as spouse would be relevant.*

Burdens of Production and Proof

EEOICPA and its implementing regulations place the burden on claimants to produce all evidence necessary to establish their eligibility to EEOICPA benefits.²⁷ Similarly, the regulations require survivor-claimants to exercise due diligence in gathering evidence to support their eligibility in any type of case, including claims of survivor eligibility based on a claimed common-law marriage. If a claimant is responding to ongoing development efforts, the claims examiner should continue to develop any common-law marriage issues until sufficient evidence to support a determination of eligibility has been gathered. If the claimant repeatedly fails to respond to development letters sent to the claimant’s confirmed residence address, the claims examiner should note that fact in the case file and seek guidance from the District Director on whether the case is ripe to be sent to the National Office for review, or whether additional efforts should be made to gather further evidence before submission to the National Office.

In addition to their burden of production, the regulations also provide that claimants carry the burden of proof on each element of their eligibility for EEOICPA benefits.²⁸ Thus, if a claimant asserts that they are the surviving spouse of a covered employee by way of a common-law marriage, it is the claimant’s burden to prove that a valid common-law marriage was created. On the other hand, if a claimant’s eligibility depends on the invalidity of a common-law marriage, the burden of proof falls on the claimant alleging the invalidity of the marriage. For example, if a claimant asserts that they are the sole, surviving, eligible child of a deceased covered employee because there is no living, eligible surviving spouse, then that claimant carries the burden to prove that there is no eligible surviving spouse, which may require proof that there was no valid common-law marriage between the employee and a third party who claims to be a surviving spouse.

In certain circumstances, legal presumptions effectively reduce the number of elements that a claimant must prove in order to establish eligibility. For example, Pennsylvania law recognizes a rebuttable presumption of common-law marriage when only the two elements of cohabitation and reputation are established.²⁹ This means that if the claimant proves that they were domiciled in Pennsylvania prior to January 2, 2005 (the date after which no common-law marriage can be established in that state) and: (1) cohabitated with the employee; and (2) had a reputation in their community as being spouses, it is presumed that they contracted a common-law marriage. In the event of a competing

claim, the burden would then fall on the other claimant to prove that the marriage was not validly established. If there is no competing claimant but probative evidence exists that contradicts the existence of one of the required elements, that contradictory evidence may rebut the presumption and support a finding against the claimed common-law marriage. All United States jurisdictions recognize such rebuttable presumptions in favor of marriage, but while such presumptions may ultimately reduce the elements necessary for eligibility, claims examiners should develop all of the five standard elements of a common-law marriage if possible.

Character and Weight of Evidence

In developing an EEOICPA claim, it should be understood that it is well-established among common-law states that circumstantial evidence may be relied upon to demonstrate a common-law marriage.³⁰

There are different types of evidence. Direct evidence is evidence based on personal knowledge or observation and, if true, proves a fact without resort to inference or presumption. Circumstantial evidence, on the other hand, is generally described as evidence based on inference and not on personal knowledge or observation; that is, it is evidence of minor facts or circumstances from which the existence or nonexistence of a fact at issue may be inferred.³¹

While direct proof of a fact is generally considered the most probative and compelling evidence of that fact, claimants are not required by state law, EEOICPA or its regulations to provide direct proof of every element of a claimed common-law marriage. Thus, a claimed common-law marriage should not be denied simply for lack of direct evidence of one of the required elements if probative evidence of the other elements has been produced and the missing element is supported by circumstantial evidence. While development efforts should seek direct evidence of the required elements of a common-law marriage, claims examiners should inform claimants that any proof that tends to support their claimed eligibility will be received and considered.

Finally, contradictions in evidence do not always preclude a finding that a common-law marriage was created. Contradictions and inconsistencies in evidence go to the weight and probative value to be given individual pieces of evidence by the fact finder; the mere existence of contradictory or inconsistent evidence does not require a finding of insufficiency of the evidence on any particular element of eligibility. If, for example, the employee's death certificate reports that the employee was widowed at the time of his death but sworn affidavits of disinterested witnesses are submitted and sufficiently establish that the employee was in a common-law marriage at the time of his death, the documented evidence in the death certificate may be outweighed by the witnesses' statements. Depending on the character and source of information, it may be reasonable to assign greater weight to certain evidence even if it is contradicted by other, albeit less probative, information.

Submitting a Claim to the National Office

The Policy Branch does not need to review each common-law marriage determination made by a claims examiner. If all development efforts are complete and questions or other issues remain that require additional guidance beyond what is available in this handbook, then the case file may be forwarded to the Policy Branch for guidance. It is important that the claim *not* be sent to the National Office until it has been as fully developed as possible consistent with the procedure manual and the guidance in this handbook.

Endnotes

¹ See, e.g., *Lynch v. Bowen*, 681 F.Supp. 506 (N.D. Ill. 1988); *Metropolitan Life Ins. Co. v. Chase*, 294 F.2d 500, 503-04 (3rd Cir. 1961).

² The two Indian tribes mentioned only recognize marriages established between registered members of their respective tribes. The Navajo Nation is situated within the exterior boundaries of Arizona, New Mexico and Utah; thus, common-law marriage claims dealing with Navajo tribal law generally arise in claims involving those states. The Pueblo of Acoma tribal boundaries are located entirely within the state of New Mexico.

³ The following states relatively recently prohibited common-law marriages, so common-law marriages are valid in these states if they were entered into up to, and including, the indicated dates:

Alabama.....	January 1, 2017
Florida.....	January 1, 1968
Georgia.....	January 1, 1997
Idaho.....	December 31, 1996
Ohio.....	October 9, 1991
Pennsylvania....	January 1, 2005

⁴ In addition to the 19 common-law jurisdictions addressed in detail in the Appendix to this handbook, the rest of the jurisdictions of the United States either abolished common-law marriages earlier than 1968 or never allowed them, and therefore it is unlikely that a claims examiner will encounter a situation involving an alleged common-law marriage in those other jurisdictions. However, should one arise, any claimed common-law marriage in one of these other jurisdictions should be fully developed using the guidance in this handbook and the Solicitor's Office will then research the state law and provide an opinion on a case-by-case basis.

⁵ See, e.g., *Knight v. Superior Court*, 128 Cal. App.4th 14, 19-20, 26 Cal.Rptr.3d 687, 690-691 (Cal. App. 3 Dist. 2005); *Craig v. Carrigo*, 121 S.W.3d 154, 159-160 (Ark. 2003); *Estate of Lamb*, 655 P.2d 1001, 1002-1003 (N.M. 1982). Additionally, the United States Supreme Court recognizes the validity of common-law marriages, as long as no local statutory provision prohibits their creation. *Meister v. Moore*, 96 U.S. 76, 79 (1877).

⁶ See Kan. Stat. Ann. § 23-2502 (2016). Prior to this recent legislation in Kansas, the requisite age for common-law marriage in that state was twelve for girls and fourteen for boys.

⁷ See Colo. Rev. Stat. Ann. §§ 14-2-104, 14-2-109.5 (2016). Common-law marriages established in Colorado prior to September 2006 may be valid even if the parties are as young as twelve for girls and fourteen for boys. See *In re Marriage of J.M.H. and Rouse*, 143 P.3d 1116, 1119 (Colo. App. 2006) (recognizing a common-law marriage involving a 15-year-old girl).

⁸ See S.C. Code 1976 § 20-1-100 (2016) (providing that effective June 11, 1997, parties must be at least 16 years old to enter into a common-law marriage in South Carolina).

⁹ See 9 N.N.C. §§ 8-9 (1993); see also *United States v. Jarvison*, 409 F.3d 1221, 1225 (10th Cir. 2005).

¹⁰ See, e.g., *In re Marriage of Martin*, 681 N.W.2d 612, 617 (Iowa 2004).

¹¹ See, e.g., *Smith v. Smith*, 966 A.2d 109, 114 (R.I. 2009); *Torres v. Com. Dept. of Public Welfare*, 393 A.2d 1079, 1080 (Pa. Cmwlth. 1978).

¹² *In re Estate of Bourassa*, 949 A.2d 704, 706 (N.H. 2008) (holding that New Hampshire law requires a minimum 3-year period of cohabitation). See also N.H. Rev. Stat. § 457:39 (2016).

¹³ *Davis v. State*, 103 P.3d 70, 82 (Okla. Cr. App. 2004) (requiring “a permanent relationship, an exclusive relationship”).

¹⁴ See, e.g., *Winfield v. Renfro*, 821 S.W.2d 640, 646-648 (Tex. App. 1991).

¹⁵ See, e.g., *In re Estate of Burroughs*, 486 N.W.2d 113, 116 (Mich. App. 1992) (applying Texas law, holding that “[l]iving together in Michigan does not satisfy the Texas cohabitation element”).

¹⁶ See *Quinonez-Saa v. State*, 860 S.W.2d 704, 710 (Tex. App. 1993); *In re Trope’s Estate*, 124 P.2d 733, 735, 737 (Okla. 1942).

¹⁷ See *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. Civ. App. 1987); *In re Marriage of Grother*, 242 N.W.2d 1, 2 (Iowa 1976); *State v. Johnson*, 532 P.2d 1325, 1329 (Kan. 1975).

¹⁸ See, e.g., *Welch v. State*, 908 S.W.2d 258, 265 (Tex. App. 1995); *In re Marriage of Gebhardt*, 426 N.W.2d 651, 652-653 (Iowa App. 1988); *Coleman v. Aubert*, 531 So.2d 881, 882-883 (Ala. 1988).

¹⁹ See *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977). See also Mont. Code Ann. § 26-1-602(30) (2015) (a rebuttable presumption exists that a man and woman “deporting themselves as husband and wife have entered into a lawful contract of marriage”).

²⁰ See, e.g., *Sulfridge v. Kindle*, 2005 WL 1806482, *4 (Ohio. App. 2005); *Matter of Estate of Vandenhook*, 855 P.2d 518, 520 (Mont. 1993); *Nestor v. Nestor*, 472 N.E.2d 1091, 1095 (Ohio 1984); *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977).

²¹ See, e.g., *Brown v. Brown*, 215 S.E.2d 671, 672-673 (Ga. 1975).

²² See, e.g., *In re Gholson’s Estate*, 361 P.2d 791, 792-793 (Idaho 1961); *McArthur v. Hall*, 169 S.W.2d 724, 728 (Tex. Civ. App. 1943); *In re Trope’s Estate*, 124 P.2d 733, 736-737 (Okla. 1942).

²³ See, e.g., *Callen v. Callen*, 620 S.E.2d 59, 62 (S.C. 2005); *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020-1021 (Pa. 1998); *In re Bragg's Estate*, 334 So.2d 271, 272 (Fla. App. 1976) (common-law marriage was recognized in Florida prior to January 2, 1968).

²⁴ See 20 C.F.R. § 30.111(b).

²⁵ See 9 N.N.C. § 8 (2009).

²⁶ Pueblo of Acoma Laws § 4-2-2 (2003).

²⁷ See 20 C.F.R. § 30.111(a).

²⁸ See 20 C.F.R. § 30.111(a).

²⁹ *Commonwealth v. McLean*, 564 A.2d 216, 221 (Pa.Super. 1989) (“there is a rebuttable presumption of marriage where two essential elements exist: constant, not irregular or inconstant, cohabitation plus a broad and general, not partial or divided, reputation of marriage”)

³⁰ See, e.g., *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977); *Young v. General Baking Co.*, 12 N.E.2d 1016, 1018 (Ind. 1938).

³¹ Black's Law Dictionary, Tenth Edition (2014).

Appendix

The following summaries note the contractability of common-law marriage in the state and tribal jurisdictions where such marriages may still be entered into as of 2023, as well as in the states that only recently prohibited common-law marriages. Claims examiners are not expected to be experts in applying state or tribal laws, and these brief summaries do not address every complexity of common-law marriage.

Alabama

In 2016, the Alabama legislature passed a law banning recognition of newly contracted common-law marriages. The state continues to recognize common-law marriages that were established prior to January 1, 2017. To establish a valid common-law marriage in Alabama prior to 2017, individuals must establish that they: (1) had the legal capacity to marry; (2) intended to marry; and (3) held themselves out as married. Ala. Code § 30-1-20 (2022).

Colorado

Recently, the Supreme Court of Colorado explained that rather than a strict set of factors, “common[-]law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement.” *Hogsett v. Neale*, 478 P.3d 713, 714 (Colo. 2021). Such conduct may be evidenced by factors including, but not limited to, cohabitation, reputation, joint bank accounts or ownership of property, joint tax returns, use of another’s surname and the couple’s behavior when the relationship ended.

Common-law marriages entered into in Colorado on or after September 1, 2006 will not be recognized as valid unless, at the time the common-law marriage was entered into, each party was 18 year of age or older and the marriage was not otherwise prohibited (*i.e.*, bigamous or incestuous). Colo. Rev. Stat. §§ 14-2-104, 14-2-109.5 (2020).

District of Columbia

The District of Columbia has long recognized common-law marriages. *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993); *Hoage v. Murch Bros. Constr. Co.*, 50 F.2d 983 (1931). Because ceremonial marriage is readily available within the District, claims of common-law marriage are closely scrutinized and proponents of such marriages bear the burden of proving the parties cohabitated as spouses following a mutual agreement to presently enter into marriage. *East v. East*, 536 A.2d 1103, 1105 (D.C. 1988).

Florida

In 1967, the Florida state legislature abolished common-law marriage providing no common-law marriage entered into after January 1, 1968, shall be valid. Florida Stat. § 741.211 (2022). Prior to 1968, establishing a valid common-law marriage in Florida

required: (1) present assent to become man and wife; (2) general reputation of marriage in the community; and (3) continuous cohabitation. *Carretta v. Carretta*, 58 So.2d 439, 441 (Fla. 1952); *Marden v. Marden*, 276 So.2d 493, 494 (Fla. App. 1973). Common-law marriage under Florida law could be established by the testimony of the contracting parties or those present when they mutually agreed to take each other as man and wife or, in the absence of such evidence, by evidence of habit or repute. *In re Bragg's Estate*, 334 So.2d 271, 272 (Fla. App. 1976), citing *LeBlanc v. Yawn*, 126 So. 789, 790 (Fla. 1930); *Carter v. Carter*, 309 So.2d 625, 628 (Fla. App. 1975).

Georgia

In 1996, the Georgia state legislature abolished common-law marriage providing no common-law marriage shall be entered into in Georgia on or after January 1, 1997. Ga. Code § 19-3-1.1 (2022) (“Otherwise valid common-law marriages entered into prior to January 1, 1997, shall not be affected by this Code section and shall continue to be recognized in this state”). Prior to that law, a party attempting to prove the existence of a common-law marriage in Georgia was required to prove the parties’ capacity to contract marriage, agreement to live together as spouses and consummation of that agreement. *In re Estate of Smith*, 2009 WL 1532555, *1 (Ga. App. 2009); *Brown v. Brown*, 215 S.E.2d 671, 672 (Ga. 1975).

Idaho

In 1995, the Idaho abolished common-law marriage, providing “[c]onsent alone will not constitute marriage; it must be followed by the issuance of a license and a solemnization as authorized and provided by law.” Idaho Code § 32-201 (2020). However, common-law marriages established in the state prior to January 1, 1996 are recognized. *Wilkins v. Wilkins*, 48 P.3d 644, 649 (Idaho 2002) (requiring evidence of capacity, consent or agreement to marry and assumption of the rights, duties and obligations of marriage).

Iowa

Iowa has long recognized common-law marriage. *In re Dallman's Estate*, 228 N.W.2d 187, 189 (Iowa 1975); *In re Marriage of O'Connor-Sherrets and Sherrets*, 2008 WL 4877763, *1 (Iowa App. 2008). Certain elements are required to establish the existence of a common-law marriage in Iowa and the burden of proof is on the person or persons asserting the claim to establish evidence of a present intent and agreement by both individuals to marry along with evidence of continuous cohabitation and a public declaration of the marital relationship.

Kansas

While Kansas has long recognized common-law marriage, state law requires both parties must be at least 18 years of age at the time the marriage is established. Kan. Stat. Ann. § 23-2502 (2021) (“The state of Kansas shall not recognize a common-law marriage contract if either party to the marriage contract is under 18 years of age”); *Flora v. State*,

197 P.3d 904 (Kan. Ct. App. 2008). The basic elements required to prove the existence of a common-law marriage in Kansas are: (1) the capacity of the parties to marry; (2) a present marriage agreement; and (3) a holding out of each other as [spouses] to the public.” *Sullivan v. Sullivan*, 413 P.2d 988, 992 (Kan. 1966); *Chandler v. Central Oil Corp., Inc.*, 853 P.2d 649, 652 (Kan. 1993).

Montana

Montana recognizes common-law marriages. Mont. Code Ann. 40-1-403 (2021) (“Common-law marriages are not invalidated by this chapter”). In Montana, a party asserting the existence of a common-law marriage must prove that: (1) the parties were competent to enter into a marriage; (2) the parties assumed a marital relationship by mutual consent and agreement; and (3) the parties confirmed their marriage by cohabitation and public repute. *In re Estate of Ober*, 62 P.3d 1114, 1115 (Mont. 2003); *Snetsinger v. Montana University System*, 104 P.3d 445, 451 (Mont. 2004). The Montana Supreme Court has also held that “[a] common-law marriage cannot exist if the parties have kept their marital relationship a secret. That is, to establish a valid common-law marriage, the couple must hold themselves out to the community as [married].” *In re Estate of Ober*, 62 P.3d at 1117.

Navajo Nation

Title 9 of the Navajo Nation Code governs the validity of marriages between tribal members and states that “[m]arriages may be validly contracted within Navajo Indian Country by meeting the requirements of 9 N.N.C. §§ 3 and 4.” 9 N.N.C. § 1B (2005). Section 3 of Title 9 of the Navajo Nation Code sets out five methods by which two parties may contract a valid marriage: (1) by signing a Navajo Nation marriage license in the presence of two witnesses; (2) by engaging in a licensed religious marriage ceremony in the presence of two witnesses; (3) by engaging in a licensed civil marriage ceremony conducted by any judge of the Navajo Nation Courts; (4) by engaging in a “traditional Navajo wedding ceremony” (sometimes referred to as a “traditional basket ceremony”) that consists of six specific elements; or (5) by contracting a common-law marriage. 9 N.N.C. § 3A-E. In order to contract a valid common-law marriage under the Navajo Nation Code, four elements must be established:

1. Present intention of the parties to be husband and wife;
2. Present consent between the parties to be husband and wife;
3. Actual cohabitation; [and]
4. Actual holding out of the parties within their community to be married.

9 N.N.C. § 3E. Section 4 of the same Title requires that the parties be unmarried at the time of the marriage, that they be at least 18 years of age, and that they not be of the same clan or related within a certain degree of consanguinity. 9 N.N.C. § 4. *See also United States v. Jarvison*, 409 F.3d 1221, 1225-1228 (10th Cir. 2005); *Beller v. United States*, 221 F.R.D. 679, 682 (D.N.M. 2003); *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

New Hampshire

New Hampshire recognizes the validity of common-law marriages. N.H. Rev. Stat. Ann. § 457:39 (2022) provides: “Persons cohabitating and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.” See also *In re Munson*, 168 A.3d 153 (N.H. 2016); *In re Estate of Bourassa*, 949 A.2d 704, 706 (N.H. 2008); *Delisle v. Smalley*, 96 N.H. 58, 59, 69 A.2d 868 (1949).

Ohio

Ohio law recognizes common-law marriages contracted in that state prior to October 10, 1991. *Gearhart v. Gearhart*, 2008 WL 62286, *2 (Ohio App. 2008); *State v. Phelps*, 652 N.E.2d 1032, 1035 (Ohio App. 1995). See also Ohio Rev. Code Ann. § 3105.12 (2020). The elements of a common-law marriage in Ohio are: (1) a present agreement to enter into a mutual contract to marry, made by parties competent to so contract; (2) followed and accompanied by cohabitation as husband and wife; and (3) a holding out by the parties to those with whom they normally come into contact, resulting in a reputation as a married couple in the community. *Phelps*, 652 N.E.2d at 1035; *Nestor v. Nestor*, 472 N.E.2d 1091, 1094 (Ohio 1984).

Oklahoma

Oklahoma recognizes common-law marriages established within its borders. See *Standefer v. Standefer*, 26 P.3d 104, 107 (Okla. 2001); *Davis v. State*, 70 (Okla. Crim. App. 2004). The elements necessary to establish a common-law marriage in Oklahoma are: (1) a mutual agreement or declaration of intent to marry; (2) consummation of that agreement by cohabitation; and (3) the individuals publicly holding themselves out as spouses. *Stinchcomb v. Stinchcomb*, 674 P.2d 26, 28-29 (Okla. 1983); *Estate of Phifer*, 629 P.2d 808, 809 (Okla. App. Ct. 1981). Open and notorious cohabitation is evidence of a marriage agreement, other elements being present, while lack of such open cohabitation may be evidence tending to discredit the alleged agreement, thus casting upon the alleging party a greater burden in the actual proof of the agreement. *Quinton v. Webb*, 248 P.2d 586, 589 (Okla. 1952).

Pennsylvania

The Pennsylvania legislature abolished common-law marriages contracted after January 1, 2005. 23 Pa. Cons. Stat. Ann. § 1103 (2022). Thus, such marriages established in Pennsylvania on or before January 1, 2005 are valid and recognized. Generally, a common-law marriage is created under Pennsylvania law by words in the present tense, spoken with the specific purpose of creating a legal relationship of husband and wife. *Staudenmayer v. Staudenmayer*, 714 A.2d 1018, 1020 (Pa. 1998).

Pueblo of Acoma

The Pueblo of Acoma, like the Navajo Nation, is a federally recognized tribe that allows the creation of common-law marriages among tribe members. “All marriages [of] a Pueblo of Acoma member shall be recognized if performed according to the laws of the state of their residence or according to tribal custom.” Section 4-7-2 .A. (Pueblo of Acoma Laws 2003 (2019 Replacement)). Also, § 4-7-2.B states that “[r]ecognition of a marriage by the Pueblo of Acoma will be shown on a certificate of marriage.” “A certificate by a [Tribal Sheriff], that the marriage occurred, satisfies this requirement. The marriage registry shall be maintained by the Court.” *Id.*

Rhode Island

“This state recognizes common-law marriage.” *Smith v. Smith*, 966 A.2d 109, 114 (R.I. 2009) (citing *Souza v. O’Hara*, 395 A.2d 1060, 1062 (1978)). “[T]o establish a common-law marriage, we have adopted the clear and convincing standard of proof.” *Smith*, 966 A.2d at 114. “A common-law marriage requires evidence that the parties seriously intended to enter into the husband-wife relationship.” *Id.* (internal quotations omitted). “In addition, the conduct of the parties must be of such a character as to lead to a belief in the community that they were married.” *Id.* (internal quotations omitted). “The elements of intent and belief are demonstrated by inference from cohabitation, declarations, reputation among kindred and friends, and other competent circumstantial evidence.” *Id.* (internal quotations omitted). “Although intent may be inferred from cohabitation, declarations, reputation, and other competent evidence. . .cohabitation alone is not conclusive of intent to be husband and wife, and such evidence may be rebutted by counter-proof.” *Id.* “Furthermore, it is required that the parties must *mutually* and *presently* intend to be husband and wife rather than merely become engaged to be husband and wife at some point in the future.” *Id.* (emphasis in original).

South Carolina

South Carolina currently recognizes common-law marriages. S.C. Code 1976 § 20-1-360 (2021) (“Nothing contained in this article shall render illegal any marriage contracted without the issuance of a license.”); *Callen v. Callen*, 620 S.E.2d 59, 62 (S.C. 2005). A common-law marriage in South Carolina must be proven by a preponderance of the evidence. *Kirby v. Kirby*, 241 S.E.2d 415, 416 (S.C. 1978). “A common-law marriage is formed when two parties contract to be married.” *Callen*, 620 S.E.2d at 62. “No express contract is necessary; the agreement may be inferred from the circumstances.” *Id.* “The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party’s intent.” *Id.* Courts have held that the facts and circumstances must show an intention on the part of both parties to enter into a marriage contract, and is usually evidenced by a public and unequivocal declaration by the parties. *Owens v. Owens*, 466 S.E. 2d 373, 375 (S.C. Ct. App. 1996). “Further, when the proponent proves that the parties participated in ‘apparently matrimonial’ cohabitation, and that while cohabiting the parties had a reputation in the community as being married, a rebuttable presumption arises that a common-law marriage was created.”

Callen, 620 S.E.2d at 62. The intent to be married is usually evidenced by a public and equivocal declaration of the parties, but that is not necessary; the necessary intent may exist without ever being publicly and formally declared. *Tarnowski v. Liberman*, 560 S.E.2d 438, 440 (S.C. Ct. App. 2002) (citations omitted). Therefore, the existence of a common-law marriage is often proved by circumstantial evidence. *Barker v. Baker*, 499 S.E.2d 503, 507 (S.C. Ct. App. 1998). Effective June 11, 1997, parties must be at least 16 years old to enter into a common-law marriage in South Carolina. S.C. Code 1976 § 20-1-100.

Texas

Texas recognizes common-law marriages contracted within the state and there are three elements of a Texas common-law marriage: (1) the parties agreed to be married; (2) after the agreement, they lived together in Texas as a married couple; and (3) while they were living together in Texas they represented to others in Texas that they were married. *Lewis v. Anderson*, 173 S.W.3d 556, 559 (Tex. App. 2005); *Winfield v. Renfro*, 821 S.W.2d 640, 643-645, 648 (Tex. App. 1991). See also Tex. Fam. Code Ann. § 2.401(a)(2) (2019). All three required elements must occur concurrently and must co-exist, *i.e.*, although they may initially arise at different times, they must all exist at the same time in order to establish a common-law marriage under Texas law. *Winfield*, 821 S.W.2d at 645-646, 648, 653. To establish the first element, “the evidence must show [that] the parties intended to have a present, immediate and permanent marital relationship and that they did in fact agree to be husband and wife.” *Winfield*, 821 S.W.2d at 645; *Eris v. Phares*, 39 S.W.3d 708, 714 (Tex. App. 2001). However, the existence of this agreement may be inferred from evidence of the cohabitation and representations of the parties. *Winfield*, 821 S.W.2d at 646. Also, an agreement to be married may be proved by direct or circumstantial evidence. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). To establish the second element, the evidence must show that the parties lived together in Texas as a married couple; cohabitation in another state is insufficient to establish the second element. *Winfield*, 821 S.W.2d at 646-648. To establish the third element, the parties must represent to others in Texas that they are married; representing to others in another state that they are married does not establish this element. *Winfield*, 821 S.W.2d at 648-651. Spoken words are not required to establish the third element; it can be established by conduct and actions of the parties. *Winfield*, 821 S.W.2d at 648; *Eris*, 39 S.W.3d at 715. However, the marriage must be “widely known in the community” and “occasional introductions as husband and wife do not establish the element of holding out.” *Winfield*, 821 S.W.2d at 651 (citations omitted). Proof of cohabitation and representations to others in Texas that they were married may constitute circumstantial evidence of an agreement to be married. *Eris*, 39 S.W.3d at 714. Finally, if the parties have been separated and ceased living together for a period of two years, “it is rebuttably presumed that the parties did not enter into an agreement to be married.” Tex. Fam. Code Ann. § 2.401.

Utah

Utah recognizes common-law marriages under very limited circumstances. Utah first repealed the doctrine of common-law marriage in 1888, only to later readopt it with the enactment of Utah Code Ann. § 30-1-4.5. The current version of the statute provides that a marriage that has not been solemnized is legal if either a court or administrative order establishes that the marriage arises out of a contract between a man and a woman who: (1) are of legal age and capable of giving consent; (2) are legally capable of entering a solemnized marriage; (3) have cohabitated; (4) mutually assume marital rights, duties and obligations; and (5) hold themselves out as – and have acquired a uniform and general reputation as – husband and wife. Utah Code Ann. § 30-1-4.5 (2021); *In re Marriage of Kunz*, 136 P.3d 1278, 1282 (Utah App. 2006); *State v. Green*, 99 P.3d 820, 823 (Utah 2004). If there is no order establishing that a common-law marriage exists, the State of Utah will not recognize the relationship as a legal and valid marriage. *See Kunz*, 136 P.3d at 1282; *Behrman v. Behrman*, 139 P.3d 307, 310-311 (Utah App. 2006).