UNITED STATES GOVERNMENT
Memorandum

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD

February 12, 2016
L-2016-4

TO : Kimberly Price-Butler
Director of Policy and Systems

FROM : Karl T. Blank
General Counsel

SUBJECT: State of Texas Common Law Marriage Procedure

This is in reply to a request from the former Chief of RRA Application and Calculation for my opinion on whether the Railroad Retirement Board's (RRB) procedures for determining common-law marriages in the State of Texas should be updated based on the Social Security Administration's (SSA) newly established procedures published on September 27, 2013. For the reasons explained in the following discussion, it is my opinion that the RRB's procedures should be updated to be consistent with SSA's procedures for determining common-law marriage in the State of Texas.

Section 2(c)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. §231a(c)(1)) establishes that the spouse of an employee who is receiving a regular employee annuity under the RRA shall be entitled to a spouse's annuity, if the spouse has attained retirement age as defined in section 216(1) of the Social Security Act (42 U.S.C. §416(1)) or has attained age 60 when the employee has completed 30 years of railroad service. Section 2(c)(3) of the RRA (45 U.S.C. §231a(c)(3)) further provides that for purposes of a spouse's annuity, the term "spouse" shall mean the wife or husband of the annuitant who was married to the annuitant for not less than one year immediately preceding the date of application for a spouse's annuity. Section 2(d)(4) of the Act (45 U.S.C. §231a(d)(4)) states that when determining whether an applicant for benefits is the wife, husband, widow,

widower, child, or parent of an employee under the RRA, the rules set forth in section 216(h) of the Social Security Act (42 U.S.C. §416(h)) shall be applied. Section 216(h) of the Social Security Act states that:

> "An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the court of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died."

As a result, the Board must evaluate the laws of the State of domicile when determining an applicant's status as a husband or wife for purposes of eligibility for a spouse annuity under the RRA. See also regulations of the Board at 20 CFR 222.11.

Pursuant to the requirements of the foregoing provisions, the RRB Field Operations Manual (FOM), specifically FOMI, Article 9, section 925.20, *Common Law Marriage*, sets forth general guidelines, subject to the exceptions set forth in the individual States, for determining common-law marriages. The specific guidelines for determining whether a common-law marriage exists in the State of Texas are set forth in FOMI, Article 9 – Appendices, specifically *Appendix D – Common Law and Similar Marriages*.

An informal or common-law marriage exists in Texas if the parties (1) agreed to be married, (2) lived together in Texas as husband and wife after the agreement, and (3) there presented to others that they were married. See Tex. Fam. Code § 2.401(a)(2) *Mills v. Mest*, 94 S.W.3d 72, 73 (Tex. App.— Houston [14th Dist.] 2002, pet. denied). The existence of an informal marriage is a fact question, and the party seeking to establish existence of the marriage bears the burden of proving the three elements by a preponderance of the evidence. *Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App.— Houston [14th Dist.] 1993, no pet.). An informal marriage does not exist until the concurrence of all three elements. *Eris v. Phares*, 39 S.W.3d 708, 713 (Tex. App.— Houston [1st Dist.] 2001, pet. denied) (citing

Winfield v. Renfro, 821 S.W.2d 640, 645 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

To establish an agreement to be married, "the evidence must show the parties intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be husband and wife." *Eris*, 39 S.W.3d at 714; *Winfield*, 821 S.W.2d at 645. A proponent may prove an agreement to be married by direct or circumstantial evidence. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). The testimony of one of the parties to the marriage constitutes some direct evidence that the parties agreed to be married. *Eris*, 39 S.W.3d at 714.

Cohabitation need not be continuous for a couple to enter into a common law marriage. See *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. App.—San Antonio 1987, no writ).

But an agreement to be married and cohabitation are not enough to prove an informal marriage. "The cohabitation must be professedly as husband and wife, and public, so that, by their conduct towards each other, they may be known as husband and wife." *Grigsby v. Reib*, 153 S.W. 1124, 1130 (Tex. 1913).

The statutory requirement of presenting to others is synonymous with the judicial requirement of holding out to the public. *Lee v. Lee*, 981 S.W.2d 903, 906 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Holding out may be established by the conduct and actions of the parties. *Id.* Occasional introductions as husband and wife are not sufficient to establish the element of holding out. *Id.* at 907; *Flores v. Flores*, 847 S.W.2d 648, 652, (Tex. App.—Waco 1993, writ denied); see also *Ex parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960) (evidence that couple was introduced as husband and wife to a few friends was not evidence that they held themselves out as married). Whether the evidence is sufficient to establish that a couple held themselves out as husband and wife turns on whether the couple had a reputation in the community for being married. *Eris*, 39 S.W.3d at 715; see also *Danna v. Danna*, No. 05-05-00472-CV, 7 2006 WL 785621, at *1 (Tex. App.—Dallas Mar. 29, 2006, no pet.) (mem. op.) (a —couple's reputation in the community as being married is a significant factor in determining the holding[-]out element‖), quoted in *Smith v. Deneve*, 285 S.W.3d 904, 910 (Tex. App.—Dallas 2009, no pet.); *Giessel*, 734 S.W.2d at 31 (holding that couple held themselves out as married when they had reputation in

community for being married even though they had kept marriage secret from a few family members). Proving a reputation for being married requires evidence that the couple consistently conducted themselves as husband and wife in the public eye or that the community viewed them as married. *Danna*, 2006 WL 785621, at *2.

The act of one of the parties to an alleged common-law marriage in celebrating a ceremonial marriage with another person, without having first obtained a divorce, tends to discredit the first relationship and to show that it was not valid. See *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex. 1981); *Flores*, 847 S.W.2d at 652.

The General Counsel has previously held that where parties mutually consent or agree to be husband and wife, reside together or cohabitate, and hold themselves out to the public as husband and wife constitutes a valid common-law marriage in the State of Texas. See L-91-72; L-87-109; L-81-218; and L-80-232. As noted above, in determining status under state law, the RRA refers to the Social Security Act.

The SSA Program Operations Manual System (POMS) is the primary source of information used by Social Security employees to process claims for Social Security benefits. While the SSA manual cannot control determinations by the RRB, the interpretation accorded under section 216(h) of the Social Security Act may be useful in similar cases under the RRA. In this regard, SSA, in updating its POMS, set forth a Change of Position (COP) which I will discuss briefly. Previously, Texas statutory law required an unproven common-law marriage to be proved in a proceeding (for examples, see SSA General Notice (GN) 00305.076A) that commenced no later than one year after the date the relationship ended or was considered void. However, it did not apply any state law time limits for proving a common-law marriage until August 1, 1994, as explained in GN 00305.076A. Thus, SSA applied the one-year time limit for proving a common-law marriage in Texas to applications filed on or after August 1, 1994 through August 31, 1995.

On September 1, 1995, Texas changed the statutory one-year time limit for proving the existence of a common-law marriage to a two-year time limit. Under the two-year time limit, an unproven common-law marriage must be proved in proceedings (see examples listed in GN 00305.076A) that commenced no later than two years after the date the relationship ended or

was considered void. SSA applied the two-year statutory time limit from September 1, 1995 through January 16, 2003.

On January 17, 2003, SSA changed its position that a claimant's failure to prove a common-law marriage within the applicable time limits absolutely barred the claimant from ever proving the existence of a common-law marriage, based on Court decisions issued after enactment of the statutory time limits. As a result, for all applications filed or pending as of January 17, 2003 or later, SSA presumes that no common-law marriage occurred unless a claimant has:

- shown that the common-law marriage has already been proved; or
- filed an application for benefits within the applicable time limits and provided proof (i.e., cohabitation and holding out) of the existence of a common-law marriage by a preponderance of the evidence.

Therefore, at any time after January 17, 2003, a claimant can rebut the presumption that a common-law marriage did not occur by proving by a preponderance of evidence that it occurred. To meet the preponderance of evidence standard, evidence of cohabitation and holding out must prove the establishment of a common-law marriage. If the time limit for proving a Texas common-law marriage is not met and the presumption cannot be rebutted, the parties are considered never to have been married (i.e., the marriage is void). Entitlement to benefits based on the marriage is precluded.

Based on the above discussion, it is my opinion that the RRB should adopt in determining the status of a common-law marriage in the State of Texas, procedures consistent with SSA's current POMS, including SSA's COP as set forth above.

Please take your necessary action to update the RRB's FOM.