AGENTS FOR CHANGE

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Agents for Change
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U.S. Supreme Court Clarifies Meaning of "Testimonial" Victim's Statements, Highlights "Forfeiture Doctrine."

Two important cases implicating issues surrounding domestic abuse and evidence were decided in tandem on June 19, 2006, in an opinion authored by Justice Scalia, and joined wholly by 7 other justices, and in part by Justice Thomas. The court ruled that the victim's panicked initial 911 call statements in *Davis v. Washington* were non-testimonial, since they were produced in the midst of a real, on-going domestic dispute (emergency), and were thus not obtained by the police for the purpose of reconstructing past events, crimes, etc. (in which case they would have been testimonial, and not admissible). Thus, the court made clear that this victim's circumstance was different from that in the precedent *Crawford* decision, where the victim's statements were made hours after the alleged incident had occurred.

The court also noted generally that the victim's disposition (calm or panicked) is important to take into account, as calm statements imply that the victim is recounting past events, whereas, as was the case in *Davis*, frantic statements indicate that the victim is speaking in the context of a current threat to her safety. The victim in *Davis* was not deemed an "ordinary witness" subject to the Sixth Amendment's Confrontation Clause. The Court also left untouched the lower court holding that even if parts of a non-testimonial statement are testimonial, it is still admissible if harmless beyond a reasonable doubt.

Conversely, in *Hammon*, the Court deemed the victim's statements testimonial, and very similar to those in *Crawford*. The police were called to the Hammon's house by a neighbor. The police found Ms. Hammon on her front porch looking "somewhat frightened", but told the police officers when they arrived that "nothing was the matter." When the police entered the home, they saw a gas heating unit that was broken and flames were coming out of the front of the unit. There were pieces of glass also on the floor in front of the heating unit. Mr. Hammon stated that everything was fine and they had just had a fight. The officer testified that Mr. Hammon attempted several times to interrupt Ms. Hammon and was upset when the officer made Mr. Hammon stay separated from Ms. Hammon. Mr. Hammon was charged with domestic battery. Ms. Hammon failed to appear at his bench trial.

The Court found that the officers were eliciting information for the purpose of constructing past events and determining previous criminal history. Moreover, unlike *Davis*, there was no emergency present. The Court since Ms. Hammon was protected by the police, telling a story about the past and clearly not in danger, Ms. Hammon's statements were testimonial because they were to establish events that have occurred previously and were not about events as they were happening.

Finally, the Court made a clear statement about the "Forfeiture Doctrine". One can forfeit their right to confrontation under the Sixth Amendment if they threatened or "coerced the silence from a witness or victim." An example would be where a defendant has previously told the victim that "she better not call the police, or tell anyone about this," and such threats prevent a just-abused victim from acting in a panicked fashion, or otherwise have the effect of impressing upon authorities the erroneous notion that nothing is wrong.

Cont. page 3

New Laws are coming!

Check more information in this issue plus Registration Form enclosed.

Fill out the Form and send us your registration by mail of via fax at 612 343 0786 as soon as possible.

Places are limited!

MCBW member programs are eligible for scholarship reimbursement!

Attorneys specially invited to attend! We have applied for 8 standard CLEs credits for the first day and 2 Elimination of Bias plus 2 standard CLEs. credits for the second day.

This year we have six sessions in the following locations: Hokah on August 7th and 8th, Worthington on August 14th and 15th , Princeton on August 17th and 18th , Duluth on August 21st and 22nd, Fergus Falls on August 28th and 29th, and Belle Plaine on September 7th and 8th.

Check it out! This year we are not having a session in the Metro area.

Instead, we are having two sessions in locations that are less than one hour driving from Metro (Princeton and Belle Plaine.)

For questions please contact Dorian Eder at 612 343 9845 or by email to Dorian@bwlap.org

NEW !!! JOIN BWLAP'S LIST-SERVE FOR LEGAL ADVOCACTES

BWLAP has launched its new list-serve for Minnesota legal advocates in June! The goal of this new email list is to connect advocates to each other, share new resources, and strategize about solutions to common problems. Dorian Eder will be moderating and answering your legal questions on the list.
For more info call Dorian at (612) 343 9845 or email to dorian@bwlap.org

Hello Summer Interns!

As summer came around we needed to say goodbye and a big thank you to our Spring interns, Sarah , Meghan , Amy , Rebecca, Julie and Ann. BWLAP will always be thrilled to work with you in the future!s
It is time now to say welcome to our new summer interns: Moriah, Jessica, Sarah, Kristin, Imran, and Christine.
BWLAP is able to do all the work it does and all the services it provides thanks to the hard work of its interns.
A big welcome and thank you to you all!

The 2006 Session of New Laws!

Co-Sponsored by the Minnesota Coalition for Battered Women and the Family Law Section of the Minnesota Bar Association

Day 1: New State and Federal Statutes and Case Law
Minnesota's Legislative Session Wrap-Up
Family Law Update
Orders for Protection and Harassment Order Updates
Criminal Law Updates
The Violence Against Women Act of 2006 – Changes and Highlights with a Special Focus on Immigration
Administrative Law (MFIP, Public Housing, etc.)Updates
8 standard CLEs have been applied for.

Day 2: Enhancing Your Practice
Morning Concurrent Session (Choose One)

Fundamentals of Legal Advocacy for Battered Women: *This session is designed for new staff, volunteers, board members or directors who are or will be advocating for battered women in courtroom setting. Topics include: Roles and Responsibilities of the Legal Advocate; Orders for Protection: Best Practices; Standard Criminal and Civil Procedure.*

Advanced Legal Advocacy Skills: *This session is designed for experienced advocates who want to expand their legal advocacy knowledge regarding civil and family court procedures. Topics include: Civil Procedure and Remedies Available; Writing and Filing a Motion in Family Court; Assisting Pro Se Women in Filing for Divorce.*

Best Practices in Battered Women's Representation: *This session is designed for new and experienced attorneys representing battered women in Order for Protection and Family Court hearings. Topics include: Understanding the Impact of Domestic Violence on Your Clients; Effective Representation in Domestic Violence Cases; The Nuts and Bolts of Orders for Protection.*

2 Elimination of Bias and 2 Standard CLEs applied for.

Afternoon Joint Session:
A Team Approach to Meeting the Legal Needs of Battered Women

This session will bring advocates and attorneys together to discuss strategies for working more closely together for the benefit of battered women and their children.

We will discuss some of the philosophical and ethical differences between advocacy and legal representation, and generate guiding principles for working together as a team.

One Ethics CLE applied for.

The Court stated, "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing…extinguishes confrontation claims on essentially equitable grounds.' That is, one who obtains the absence of a witness by wrong doing forfeits the constitutional right to confrontation." If such wrongdoing is found to have occurred, then the Forfeiture Doctrine can be used to admit a victim's statements.

In surprising, but much needed dissent, Justice Thomas disagreed with the Courts ruling that Ms. Hammon's statements were testimonial. Thomas argued that when ever the "police respond to a reported crime… the purpose of an interrogation… [is] both to respond to the emergency and to gather evidence." Adding that the "pronouncement of the primary motive behind the interrogation [is] nothing more than a guess by [the] courts." Finally in statement that makes it look like Justice Thomas "gets" domestic violence, "[T]he fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency." Thomas concludes that the standard set by the majority of the Court is not workable and does not accomplish the purpose of the Confrontation Clause.

Immigration Corner

Common Law Marriage and Immigration Law*

Issue

In the case of an alien, battered woman who entered into a common law marriage in Texas and subsequently took up residence in Minnesota, is her common law marriage recognized for the purposes of adjusting her status in the context of immigration?

Brief Answer

Common law marriage is only recognized by a handful of states. However, it is well documented that Texas recognizes common law marriage as long as the parties act in accordance with the statutory guidelines of Tex. Fam. Code §2.401. Therefore, it is likely that the common law marriage entered into in this case is valid under Texas law. Common law marriage in Minnesota was abolished in 1941. However, the Supreme Court of Minnesota has consistently held that common law marriages obtained in other jurisdictions by parties who were not residents of Minnesota at the time of the marriage, will be recognized in Minnesota as long as the marriage is considered valid in the jurisdiction in which it was obtained. Finally, the Immigration and Nationality Act provides that the general rule is that if the place where the marriage took place recognizes the marriage as valid, then it should be considered valid everywhere and therefore valid for immigration purposes.

Discussion

A. Validity of Common Law Marriages in Texas

It is well known and documented that common law marriage is recognized in the state of Texas. Texas Family Code § 2.401 (current through May 26, 2006), provides the elements of an informal marriage under Texas law. Essentially, in order to have a common law marriage in Texas, the parties must agree to be married, live together as husband and wife, and publicly represent themselves as husband and wife. Tex. Fam. Code §2.401.

Each element of a common law marriage can be shown through circumstantial or direct evidence. *Russell v. Russell*, 865 S.W.2d 929,933 (Tex. 1993). However, until the three elements coexist, there is no common law marriage. *Winfield v. Renfro*, 821 S.W.2d 640,648 (Tex. Ct. App. 1991).

i. Agreement to be Married

In order to establish that the parties agreed to be married, 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. In *Winfield*, the court found sufficient evidence of an agreement to be married in the male party's purchase of a home in which both parties cohabitated and in the fact that the male party kept personal belongings at the home.

ii. Living Together as Husband and Wife

While there is no specific guideline for establishing that the parties lived together as husband and wife, in *Pesina v. Anderson,* 1995 Minn. App. Lexis 881 (Minn. Ct. App. 1995), the court found sufficient evidence of cohabitation in the fact that the parties resided together and one party worked for wages to support the other party and her children.

iii. Representation to Others

To satisfy this element, the parties must represent in the state of Texas that they are married. Again, in *Pesina,* 1995 Minn. App. Lexis 881, the court found ample evidence of representation in the fact that the parties shared the same last name, applied for an insurance policy as husband and wife, filed tax returns as husband and wife, and that the parties' extended family referred to the couple with the same last name.

B. Validity of Common Law Marriages in Minnesota

If the parties in the present case had a valid common law marriage when they resided in Texas, the question arises as to whether that marriage is valid where they currently reside in Minnesota.

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In 1941, the Minnesota legislature abolished common law marriage; Minn. St. 517.01 states that only common law marriages contracted in Minnesota prior to April 26, 1941 are valid. Therefore, any common law marriages contracted in Minnesota today are invalid. However, in response to the common law marriage legislation, the Supreme Court of Minnesota adopted the rule that the validity of a marriage is determined by the law of the place where the marriage is contracted. Therefore, if the marriage is valid by law where it was contracted, it "is valid everywhere unless it violates a strong public policy of the domicile of the parties." *In re Estate of Kinkead*, 57 N.W.2d 628 (Minn. 1953).

This rule seems to imply that a valid common law marriage in another jurisdiction would be considered valid in Minnesota despite Minn. St. 517.01's abolishment of recognition of common law marriage in Minnesota. However, the Supreme Court of Minnesota narrowed this rule on the recognition of common law marriages in 1979. Specifically at issue is the parties' place of residence at the time of the common law marriage. The court held that parties who are residents of the state of Minnesota cannot enter into a valid common law marriage by merely visiting a state that allows common law marriage. *Laikola v. Engineered Concrete,* 277 N.W.2d 653 (Minn. 1979). However, the Court held that it will recognize a common law marriage if the couple takes up residence, but not necessarily domicile, in another state that allows common law marriages, "and the parties thereby establish the public reputation in that state of having assumed the marital relationship." *Id.* at 658; *Yi Ning Ma v. Mei Fang Ma*, 483 N.W.2d 732 (Minn. Ct. App. 1992).

Therefore, as long as the couple seeking to have their common law marriage recognized in Minnesota was not residents of Minnesota at the time the marriage was contracted, the state of Minnesota will recognize such a marriage unless it would violate strong public policy to do so.

In this case, the parties claim to have a common law marriage in the state of Texas. Minnesota courts have previously recognized Texas common law marriages. Specifically in the case of *Pesina v. Anderson,* 1995 Minn. App. Lexis 881 (Minn. Ct. App. 1995), the court recognized a common law marriage contracted in Texas as valid in Minnesota and reaffirmed the rule that the validity of a marriage is determined by the law of the place where the marriage was contracted. Therefore, it is likely that if the parties in this case had a valid common law marriage in Texas (see elements *supra*), were not residents of Minnesota at the time of the marriage, and it would not violate public policy to recognize the marriage in Minnesota, such a marriage would be deemed valid by Minnesota courts. *Pesina,* 1995 Minn. App. Lexis 881.

C. Validity of Common Law Marriages for the Purposes of Immigration

If a valid common law marriage in Texas is recognized as valid in Minnesota, the essential question becomes whether such a marriage will be considered valid for the purposes of immigration.

The federal courts have consistently held that "immigration laws should be applied uniformly across the country, without regard to the nuances of state law." *Cazarez-Gutierrez v. Ashcroft,* 382 F. 3d 905, 913 (9th Cir. 2004); *Kahn v. INS*, 36 F.3d 1412, 1415 (9th Cir. 1994). Specifically the United States Supreme Court has found that "in the absence of a plain indication to the contrary, Congress [,] when it enacts a statute [,] is not making the application of a federal act dependant on state law." See *Jerome v. United States,* 318 U.S. 101, 104 (1943); *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 43 (1989); *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 119 (1983); *NLRB v. Natural Gas Utility Dist. of Hawkins County,* 402 U.S. 600, 603 (1971); *United States v. Turley,* 352 U.S. 407, 411 (1957). This statement could be implied to mean that in regards to immigration proceedings, state law cannot be determinative of a specific issue and instead a uniform standard that reflects the federal policy on a particular issue should be controlling.

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In regards to common law marriage, such principles are applicable here. Today, common law marriages are valid under the laws of nine states and the District of Columbia, but are not recognized under the laws of forty-one states, including Minnesota. *See* Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life,* 75 Geo. L. Rev. 1829, 1831 n.11 (1987); Dorian Solot, Common Law Marriage Fact Sheet, http://www.unmarried.org/common.html, (last updated Aug. 2005). Without a uniform federal policy on whether common law marriages will be recognized as valid for immigration purposes, the differing state laws on common law marriage would control and an alien's appeal to an Immigration Judge would be at the mercy of whichever state law the Immigration Judge chooses to apply.

The Ninth Circuit has specifically addressed the issue of conflicting state law regarding waivers of deportation and common law marriage. In *Kahn v. INS*, 36 F. 3d 1412 (9th Cir. 1994), the court held that the Board of Immigration Appeals could not adopt state law as a conclusive measure of family ties for the purposes of granting a deportation waiver, stating that the "INA was designed to implement a uniform federal policy, and the meaning of concepts important to its application are not to be determined according to the law of the forum, but rather require a uniform federal definition." *Kahn* 36 F. 3d 1412 at 1415.

In an effort to create a uniform federal standard for the recognition of common law and ceremonial marriages, the INA has defined a "qualifying marriage" for the purposes of immigration. It can be argued that such a definition should be used in the immigration process, as opposed to a state's definition of a valid marriage, in order to maintain a uniform standard. Where marriage is relevant to gaining admittance to the United States, the INA defines a "qualifying marriage" as one which was entered into in accordance with the laws of the place where the marriage took place. 8 U.S.C. §1186a(d)(1)(A)(i)(I). Therefore, common law marriages, although recognized by only a handful of states, can be valid for immigration purposes if the laws of the place of residence, or last previous residence of the party, legally recognize them.

There is no case law specifically stating that a common law marriage formed in Texas and recognized in Minnesota is also valid for immigration purposes. However, the general rule is that if the place where the marriage took place recognized the marriage as valid, then it should be considered valid everywhere for immigration purposes. *Id.* In the case at bar, if the parties had a valid common law marriage in Texas, it will also be recognized as valid in Minnesota, and is therefore also likely a valid marriage for immigration purposes.

i. Battered Spouse Waiver

It is important to note that if the party in the case at bar is a battered woman, she may be eligible for an adjustment of her status based on the fact that she is a "battered spouse." Under 8 U.S.C. §1229b, the Attorney General may "cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that the alien has been battered or subjected to extreme cruelty by a spouse or parent who is a United States citizen…or… lawful permanent resident." 8 U.S.C. §1229b(2)(A)(i).

The question then becomes, are common law spouses considered "spouses" for the purposes of 8 U.S.C. §1229b(2)(A)(i)? The statute seems to leave this question open; however, the Fifth Circuit has implied that common law spouses would be considered spouses for immigration purposes. In *Hernandez-Grado v. Gonzales*, 159 Fed. Appx. 562 (5th Cir. 2005) (UNPUBLISHED), Ms. Hernandez-Grado sought cancellation of removal arguing that she qualified for relief because she had been battered by her spouse. Ms. Hernandez-Grado claimed that her battering spouse was her common law husband. The court found that Ms. Hernandez-Grado did not prove that she had a valid common law marriage under Texas law and therefore she was not battered by a "spouse" and hence did not qualify for relief from removal.

While the Court did not specifically state that a common law spouse meets the criteria for a "spouse" under 8 U.S.C. §1229b(2)(A)(i), the Court's denial of Hernandez-Grado's claim because her common law marriage was not valid implies that had the marriage been valid under Texas law, she would have met the criteria set forth in 8 U.S.C. §1229b(2)(A)(i). Therefore, in the case at bar, if the parties had a valid common law marriage in Texas and one party was battered by the other, it is likely that the court would deem the parties spouses for the purposes of the battered spouse waiver.

Conclusion

Texas law recognizes common law marriage as long as the parties follow the statutory guidelines of agreeing to marry, cohabitating together, and publicly representing themselves as husband and wife. If the parties in this case have completed these elements, they have a valid common law marriage in Texas.

The parties now reside in Minnesota and although common law marriage in Minnesota was abolished in 1941, the state will recognize common law marriages from other jurisdictions as long as the marriage is valid and does not violate public policy. Therefore, a valid common law marriage in Texas will be valid in Minnesota as long as it does not violate public policy.

The INA (Immigration and Nationality Act) demands that immigration courts utilize a uniform federal standard when it comes to evaluating immigration issues. The federal standard on qualifying marriages for the purposes of immigration establishes the general rule that a marriage that is considered valid in the jurisdiction where it was contracted is considered valid everywhere for immigration purposes. It can be argued that a common law marriage, even though not recognized in the majority of states, if valid in a minority state, is

considered valid everywhere in order to comply with the federal uniform standard of qualifying marriages.

Finally, a battered woman is eligible for a waiver based on the fact that she has been abused by a spouse. It can be argued that because the parties had a valid common law marriage under Texas law, they are spouses for all intents and purposes of the battered spouse waiver and should be considered so in immigration proceedings.

*Research and article produced by our law intern Jessica Peyton.

Punto de Vista Latino

Fue aprobada nueva legislación para los garantes ("Sponsors", por su nombre en inglés) de familiares o empleados inmigrantes.

A partir de Julio 21, 2006 rige una nueva reglamentación que cambia la forma en que los garantes ciudadanos de los Estados Unidos, se comprometen con el Estado, en relación a sus familiares os empleados inmigrantes.
La nueva reglamentación, que puede verse en la página de USCIS (United Status Citizenship and Immigration Services,) tiene las siguientes características:

- Reduce la documentación que el garante debe remitir a los servicios de inmigración. Por ejemplo, de ahora en más, deberá enviar sólo la mas reciente declaración de impuestos, copia de sus ingresos salariales sólo por los últimos seis (6) meses y una carta de su empleador.
- Crea una nueva forma (I-864 EZ) que es una versión corta del compromiso de garantía, para ser usada en casos en que el garante se basa exclusivamente en sus ingresos salariales.
- Establece una nueva forma (I-864 W) para ser usada en casos en que el inmigrante esta exento del requisito de garantía, esto es:
    1. Inmigrantes que han trabajado, cuando menos, 10 años en los Estados Unidos.
    2. Niños adoptaos que inmediatamente calificaran para recibir la ciudadanía estadounidense.
- Permite dos garantes por familia. En este caso, cada garante es responsable por los inmigrantes que aparecen mencionados en la correspondiente forma.
- A los efectos del cálculo de los ingresos mínimos necesarios para ser garante de nuevos inmigrantes, la nueva reglamentación flexibiliza la definición de "miembros residiendo en una Residencia Familiar." Así:
    1. Permite que los garantes incluyan como parte de la "familia" todos los familiares que viven en la casa, aunque no sean dependientes, siempre que se firme un Contrato entre el garante y la persona viviendo en la Residencia Familiar.
    2. Elimina el requerimiento de que las personas viviendo en la Residencia Familiar, deben haber vivido allí por los menos seis meses antes de enviar la forma I-864 A.
    3. Reduce el monto de pertenencias que ciertos garantes deben mostrar para cubrir los ingresos necesarios de los que viven en la Residencia Familiar.
    4. En el caso adopciones de inmigrantes huérfanos, que adquirirán la ciudadanía una vez admitidos en los Estados Unidos, el adoptante deberá garantizar sólo por la diferencia entre la suma indicada por los estándares de pobreza federal y los ingresos de la Residencia Familiar.

A Call for Pro/Low Bono Attorneys

BWLAP is calling for pro/low bono attorneys to represent battered women throughout the State. If you are an attorney and interested in helping battered women in a variety of legal situations, please e-mail us at info@bwlap.org and let us know. If you are an organization that has a list of attorneys who will represent battered women in either a pro or low bono way, let us know. Through pro/low bono attorneys, we can make sure that all battered women receive the representation that they need and deserve.

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BWLAP is a Minnesota-based, statewide, non-profit organization that provides legal information, consultation, training, litigation support, and policy development assistance to battered women, their advocates, civil/ criminal justice, and social service systems.

Cell Phone Donations

BWLAP is still collecting old cell phones . Many of you have old cell phones gathering dust at the bottom of a desk drawer. These phones can be put to good use and you may also be able to get a tax deduction based on the value of the phone you donate. Please consider donating cell phones that you no longer use, no matter the condition. Drop off used phones at our office or you can mail them to us.

Thank you!

BWLAP extends its heartfelt gratitude to our funders:

It is only with the help of our funders that we may help others. *Thank you!*

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