ORAL ARGUMENT - 4/23/97
96-0994
SHEPHERD V. LEDFORD

ANDREWS: The question before the court today is whether the Ft. Worth CA correctly held that art. 149.1b of the Family Code impermissibly restricts a medical malpractice claim its right to file a medical malpractice claim under art. 4590i, §10.01. For several reasons we believe that the CA was incorrect in so ruling. The first reason is that §1.91b, of the Family Code, does not conflict with §10.01. They both address different subject matters and address different rights.

Secondly, the Ft. Worth CA at its opinion at page 8, indicated and the implicit assumption is in its holding is that the plaintiff in this case Mrs. Ledford only had one avenue that being filing of her medical malpractice case in which to assert her status as a wife. As I believe I will be able to show the court both of these assumptions as well as this court's articulated approval of the limitations period under 1.91b mandate that the CA be reversed and the case rendered.

GONZALEZ: I am concerned about the stipulation that Lahoma Ledford and John Ledford had a gallant common law marriage prior to and at the time of John Ledford's death. Why have you not waived this issue?

ANDREWS: One particular and a very important reason. As the court will note all through the transcript up through today, we have never contended that the Ledfords did not have a valid common law marriage. As the court will see in our first motion for summary judgment, that was found on page 62, and the second one that was filed prior to trial there has been never any contention that they could not prove up the elements of their common law marriage.

GONZALEZ: That's not what it says. This says they had a valid common law marriage before and after. It didn't say anything about the elements.

ANDREWS: The import of that stipulation was as I have stated in the motion for summary judgment had the stipulation indicated that they proved up her marriage, or she proved up her marriage within a year after the death of Mr. Ledford, then in fact I would have waived our affirmative defense limitations. But as I will point out to the court and have in my brief, the stipulation can only be construed in light of the attitude of the parties, the pleadings, and the entire intent surrounding that the time that the stipulation was entered, as I have pointed out, we have never contended that they couldn't establish a common law marriage. What we always contended and she admitted in request for admissions was that she didn't prove it up within a year. And my motions for summary judgment on file, in my verified denial before the court at the transcript at page 367, in my motions for directed verdict, my objections to the charge, my motion for judgment n.o.v., and through today, I have never contended that she either didn't have

a common law marriage or couldn't prove it up. What I have contended all along is that she failed to meet her limitation statute. And that was the import of the stipulation entered into. And the court has to look at all the circumstances in the intent of the parties.

I would refer the court to the Jackson v. Lewis case, which is an _____ case. But in that particular instance the defendant stipulated as to the reasonableness and necessity of medical expenses so that they could be admitted. And then the jury entered a damage award of zero. The plaintiff argued that that stipulation proved up his damages and he was entitled to them. Just in this situation, the plaintiff in that case attempted to take the stipulation one step further than what the stipulation actually admitted.

CORNYN: Doesn't your stipulation though undermine the reason for §1.19 of the Family Code, that is because of the legislature's hostility or reluctance to recognize common law marriages, and because of the difficulties inherent in proof of common law marriages, they have established this limitation. But if you conceded that it in fact existed what's the purpose for barring the claim?

ANDREWS: The purpose of barring the claim is that at the time and at the moment that Mrs. Ledford filed her lawsuit in 1991, she could not assert her standing. And that is what we have prosecuted all through the trial of this case and through the appellate process. Again I wish to reiterate what I said to Justice Gonzalez. We never took the position at all that she couldn't have proven it unlike as I understand in another case here today there is a question of whether or not there was a valid common law marriage even in existence.

CORNYN: You in fact agreed she was the common law wife?

ANDREWS: I don't believe that there was any dispute prior to the death that she could have proven it up.

CORNYN: Let me be sure I understand. Is there a stipulation that she was the common law wife?

ANDREWS: Yes. We stipulated that...

CORNYN: So it's not just a matter of not disputing it. You've agreed that she is?

ANDREWS: We agreed that prior to her death she could have met as the stipulation indicates, and I believe as all of the record surrounding the stipulation indicates, that she and her husband lived as common law married and were common law married in Texas prior to his death. However, the stipulation doesn't recite that she therefore was precluded or never had to prove up her relationship within the 1 year period or that she was never required to meet the statute under 1.91b.

CORNYN: Why isn't the stipulation a substitute for proof?

ANDREWS: We've all along taken the position in this case that whether or not the relationship existed is separate and apart from whether or not they were able or did prove up the relationship within the requisite time period. And that is what the formal elements of proof, which was not disputed as a matter of law, because Mrs. Ledford admitted in her request for admissions at the TC level, that she in fact was common law married, that she in fact did not commence any civil, judicial or administrative proceeding in any court in the one year, or no one did on her behalf either.

OWEN: Does your argument depend on our construing that statute as the statute of limitations as opposed to a statute regarding evidentiary matters?

ANDREWS: Yes your honor. And in fact I believe that Justice Gonzalez in his dissent in the Russell case has clearly stated and this court in Moessler as well has indicated that 1.91b is a statute of limitations.

OWEN: If we were to hold otherwise in this case do you lose or is there some other argument that you have that's not dependent on our saying this is a limitations statute as opposed to an evidentiary hurdle?

ANDREWS: I'm not entirely sure I understand the thrust of your question.

OWEN: If the statute is designed to preclude proof in a proceeding of a common law marriage more than 1 year after the relationship ended, as opposed to limitations, do you lose or is there some other argument that you have that's not based on a statute of limitations per se?

ANDREWS: I believe the only answer I can have at this point is the way that 1.91a has been construed, which is the part of the statute that establishes how a common law marriage may be established. In answer to your question to the best I can answer it, I don't believe that 1.91b can be construed in any other manner, but a statute of limitations...

OWEN: But my question is if we disagree with you, and it's not a limitation, we say it's not a statute of limitations, it's a standard by which you can object to the introduction of evidence in a proceeding, if we hold that do you have any other arguments why your stipulation doesn't basically mean that you have stipulated yourself out of the case?

ANDREWS: Yes in the respect that as the legislature has recently amended 1.91b to extend that time period. Again I am trying to respond to your question because I believe that the legislature made it quite clear under the historical note under §2c, that even though a cause of action may be, and I'm talking about the amended act, even though the cause of action may be filed on or after the effective date of the amended act in 1995, if the claim was time barred prior to the new act, then even if a cause of action were subsequently filed attempting to assert the

benefits of the extended period, the claimant still could not do so.

OWEN: But under the new act it's rebuttal presumption it's not a limitations is it?

ANDREWS: Correct. But I think that the new act also serves a limitations period, because if they do not commence their action until after the anniversary of the 2 year period, then I think that the construction of that particular statute as amended would serve as a continued or an additional statute of limitations. So I don't think that 1.91b can be construed anything but a limitations in the proof aspect as this court in Russell noted, and has spent a lot of time in talking about the proof aspect in 1.91a, and the changes the legislature made in that, that both have to be construed as a limitations statute in that respect.

PHILLIPS: Could you speak to why you're entitled to recover under the survival statute?

ANDREWS: Several reasons. In the first place, Mr. Ledford died in testate. Therefore, the person's entitled to take under his estate were determined by dissent and distribution. If Mrs. Ledford is not his wife going back to the family law issue, then she certainly would not be an heir under the _____ statute. But that is basically subsumed in the argument about the family code. And I will not address that particular instance.

The way I read the probate code under §178, is that an administration is deemed necessary if two or more debts exist. As the Ft. Worth CA held in the McAdams case, they didn't really per se hold that, but the holding can be construed to mean that if in fact debts continue to exist at the death and certainly up until the time limitations runs on the underlying claim, which would be in our case 2 years, the fact that an administration was deemed necessary mandated that a personal administration be taken out and a personal administrator be appointed. There wasn't any dispute in this case that Mrs. Ledford was suing as an heir. And under this court's decision in Frazier v. Guinn, the court held that in the time period necessary in order to take out an administration, which is 4 years under the statute, if heirs plea and prove that no administration is necessary, then they may sue and prosecute the claim as heirs on behalf of the estate.

Our contention all along was that Mrs. Ledford did not plead, as the court is probably aware allowed a trial amendment or refused a trial amendment and the Ft. Worth CA reversed that aspect in the case, and held that under the family settlement doctrine applicable to wills Mrs. Ledford could in fact prosecute the claim.

We believe that the evidence adduced at trial established that there was at least 2 deaths if not more existing up through death and time of trial so as to preclude her ability to prosecute the claim as the heir. And that is why we believe that the J.N.O.V. should have been affirmed by the Ft. Worth CA.

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RESPONDENT

LAWYER: May it please the court, counsel, and members of the courtroom. We believe that Mrs. Ledford had standing to bring her wrongful death and survival action and believed that the CA was correct in its decision that the stipulation obviated any need to have a statute of limitations applicable to the case. And further that notwithstanding any other law provision under 4590i prevails over a statute of limitation provisions such as 1.91b of the Texas Family Code.

We also believe that relevant to this issue is the legislative history with regard to the passage of this provision of 1.91b. The bill was introduced by Rep. Patricia Hill, and the original intent was to do away with common law marriages altogether in the State of Texas. That provision wasn't condoned by the other members of the congress, and they eventually worked out this compromise wherein the 1 year provision to assert claims was adopted. In the legislative history Congresswoman Hill kept asserting that this would not affect agreements already established and that it was not the intent to dissolve marriages that were already considered common law marriages.

Her intent was to prevent what she perceived as an injustice in that the case law had this presumption that there was an agreement to be married even though there was not an actual agreement and there was conflicting testimony on other sides. She wanted to make it more difficult to prove up a common law marriage and that was indeed done.

If you construed this 1.91b as an evidentiary requirement and not a statute of limitations, I think Mrs. Ledford also has to prevail.

CORNYN: There wouldn't be any conflict with the statute of limitations if it were merely a evidentiary requirement as you put it?

LAWYER: Yes your honor I believe that is correct. I believe in this case and what was stated in the committee sessions and in the house and senate when they were debating this bill is that what they wanted to do was to clarify people's marriages, and they didn't want to dispute about what was marriage and what wasn't. For parties that had agreed to be married and there was no dispute about that, I don't believe the legislature intended to have this provision apply.

I have provided pieces of the legislative history in the transcript on pages 288-303, and you can take a look at that. In addition, there are some tapes of those hearings in which it was debated: Why is it that we want to pass HB 588? which eventually wound up to be 1.91b, and 191a of the Family Code.

CORNYN: Even if you're correct, the effect let's say of parties who consider themselves to be common law husband and wife if they separate, if they didn't seek to somehow establish the fact of their common law marriage within a year they would be barred thereafter from proving

that. Wouldn't that be the result?

LAWYER: That seems to be the result.

CORNYN: So to that extent, there would be a disruption of the status quo by passage of this statute in the sense that it would limit the party's right to prove the fact of a common law marriage?

LAWYER: If it's construed as a statute of limitations, I believe you are correct your honor. If it's just merely an evidentiary point - perhaps not.

CORNYN: I don't understand the distinction you are making though. Certainly if you're seeking to establish the fact that you are a spouse of a person for purposes of asserting some other claim, is that a statute of limitation to your mind or is that a question of legal standing to a assert a claim?

LAWYER: I believe it's more a question of legal standing than it is anything else. I think what the legislature wanted to do was to make it a little bit more clearer who were married and or where not under the common law provisions of Texas as they have stood from the origins of Texas and Texas jurisprudence. Rep. Hill, who sponsored the bill and argued for this bill quite a lot in the history of this bill her concern was: Well the way the courts are interpreting common law marriages now, one side can get up and say there was a common law marriage, and the other say there wasn't; and there is still this presumption in favor of the marriage. She wanted to do away with that. And in this case we just don't have a dispute. The family members didn't dispute it. We have affidavits by Mrs. Ledford, and John Ledford's brother and sister-in-law in the case that said: We thought they were married in our eyes. We presented proof also in response to the various motions for summary judgment, which are part of the transcript in this case, that Mr. and Mrs. Ledford filed income taxes together using the name Mr. John and Lahoma Ledford. There was a title for an '88 Chevrolet Pick-up truck in John and Lahoma's name. Mrs. Ledford was responsible for the medical bills of Mr. Ledford after he passed away. They acted as a man and wife in this case and I don't think it would be just to consider them elsewise. We just don't think that 1.91b applies in this case.

BAKER: If part B is a limitations statute is it an affirmative defense?

LAWYER: I would believe it is.

BAKER: And if it's an affirmative defense, can't everything you say be true and still apply to bar her claim? Isn't that the nature of an affirmative defense?

LAWYER: I think what's key in this case is that it says: A proceeding in which a marriage is to be proved under this section; I think you have to look at that as...

BAKER: Let me ask you this. If that follows that up, what do you do with the fact that part A says: within an administrative proceeding. Are there any administrative proceedings in family law cases?

LAWYER: I am not aware of administrative proceedings in family law cases.

BAKER: Does the word "any" cause you any problem to make it broader than what your argument is?

LAWYER: This provision is situated in the marital provisions in the family law code. I think it was intended to apply to cases where a marriage was involved and not...

BAKER: Isn't the fact of whether she was married or not rather intimately involved in this whole case because if they were not then she has no rights to recover; is that correct?

LAWYER: It would be true if she was not the common law spouse of Mr. Ledford. She would have no right to recover.

BAKER: So under a plain reading can't you say the proceeding was a _____ of her marriage is important and therefore she is required to prove it within 1 year of the second part?

LAWYER: In this case there is an exception. Mrs. Ledford never sought to prove it up.

BAKER: Well even if she did, if it's limitations, then it was not proved up within a year, which is what the other side argues.

LAWYER: If that's how the statute is construed, it's true. She did not file any action....

BAKER: I'm not clear either on your other argument that it's an evidentiary matter under part B. What is the basis of that argument?

LAWYER: The basis of that argument is if the legislature did not intend to abolish common law marriages, what was it that it really intended to do by attaching this one year provision in here? It seems to me that if you apply it in a proceeding where a marriage is sought to be proved up: For example: a divorce proceeding, then it would seem to me that you would have to apply from when the relationship ended as is stated here. I am not quite sure I am answering your question.

BAKER: Well you haven't yet. What's the rationale for making the conclusion that this Part B is an evidentiary issue rather than a limitations issue?

LAWYER: Because of the wording in the statute that says: any proceeding in which a marriage is to be proved. That seems to me to be an evidentiary matter and maybe you shouldn't

take this provision as a statute of limitations.

BAKER: But doesn't _____ the rest of Part A tell you what your evidentiary requirements are? Doesn't Part B tell you the time that you have to do it in?

LAWYER: It says commence not later than 1 year after the date on which the relationship ended.

BAKER: So it's your better argument that 4590i trumps because of the phrase: " any other law"?

LAWYER: That is one of my arguments your honor. I don't know whether it's my best argument.

BAKER: Doesn't it have more rationale than what you're trying to argue now?

LAWYER: Maybe I'm not getting my point across very well. My rationale is that Mrs. Lahoma Ledford was just never seeking to establish her marriage under this section of the Family Law Code and, therefore, just shouldn't apply to her. She was married in Oklahoma. Oklahoma has its own set of laws under which a common law marriage is deemed common law marriage. She went over to the State of Texas following her marriage in Oklahoma under the common laws there, and assumed she still had a valid common law marriage in the State of Texas. Therefore, we believe that she never sought to establish her marriage under this provision had she had to prove it up...

BAKER: But doesn't the fact that they raise §B, require her to at least show that she did something within 1 year of the date of his death under this Part B?

LAWYER: Under the facts of this case I don't think so because of the stipulation. We just had nothing left to prove up. There was no dispute with regard to the marriage, therefore, no statute of limitations should be applicable to Mrs. Ledford.

BAKER: Would you then agree that if it's an affirmative defense that you said before that it is, that they could waive it by not pleading it, which would make your argument a whole lot stronger?

LAWYER: It could be waived by not pleading it. However, I do have a question as to whether this was ever intended to apply to personal injury actions, wrongful death actions, or medical malpractice actions in the first place. It was never discussed in the legislature. It was never discussed outside the family law context...

BAKER: Why can't we assume the legislature might be able to say: when we passed this statute it's only going to apply to family law circumstances and that's the end of it, rather than

saying any judicial administrative or other proceeding?

LAWYER: They could have your honor. The reason why they didn't is a question to me because it seems plain when you examine the legislative history in this case, that it was never meant outside of the marital situations where it might come up, where there is a common law marriage and then one side wants to get a divorce. Under Texas jurisprudence once a common law marriage is established, it's considered to have the same effect as a ceremonial marriage does. Therefore, you can't get a common law divorce. You have to institute proceedings in a civil court and obtain a divorce from a common law marriage.

ENOCH: Addressing your argument about this statute deals with proof of an issue and not a statute of limitations. You have a stipulation here that says: Lahoma Ledford and John Ledford had a valid common law marriage. If the statute is a matter of the ability to prove the marriage, as opposed to simply a statute of limitations, would that stipulation not satisfy the element of proof, regardless of the affirmative defense of the statute not being proved officially, wouldn't this stipulation meet the element of proof necessary to have a cause of action under the wrongful death in this case?

LAWYER: We believe it does. There just simply wasn't any need to put on any proof after that point.

ENOCH: With this stipulation would there be any requirement in the case to prove the marriage at this point?

LAWYER: We believe not, and we didn't in fact introduce any evidence with regard to the common law marriage. There was a motion in limine in this case following the stipulation in which the TC decided that that was not an issue that needed to be raised any longer with regard to the validity of the marriage after the stipulation was signed off by counsel and entered by the judge. We believe that there is just no dispute left in which we have to put on any evidence whatsoever to establish the elements of the common law marriage, and therefore, there is no reason to apply the statute of limitations because there is no dispute. You can't even bring a death action to assert your wisest common law marriage because under the case of State v. Morales, is just not justiciable. You have to have something that needs to be decided in order for you to bring an action with regard to establishing your common law marriage.

I would also point out that under 1.92, which is the declarations provision in the Family Code, it requires signatures of both spouses. After the death of one spouse you simply can't go to the court and file your declaration that you get had a common law marriage. So where does that leave the parties?

BAKER: If you can't get them to sign, doesn't that leave you under part 2, which is the purpose of part 2?

LAWYER: Well I'm not sure that's what the legislature meant when...

BAKER: Well that's what they said.

LAWYER: Well that's how it reads. But when you look at the legislative history when they were deciding how to word the 1.91b provision, Cong. Armbrister brought up: well when does this become an issue? when does the marriage become in question? And that's how it was decided to use this language when the relationship breaks up. And, therefore, the legislature _____ it, what do you do in a case where someone dies? Is that what they meant by that? I believe that they just did not intend for this provision in the Family Code to be applied across the board to wrongful death actions, and medical malpractice actions as we've got here in the case today.

CORNYN: You do agree it's been applied in other than divorce cases; right?

LAWYER: Yes.

CORNYN: And those cases are just wrong?

LAWYER: I believe that those cases never really examined the legislative intent behind 1.91b, and I think that's what we need to do in order to give the effect of what the legislature meant to do when it enacted this provision. And I think if you examine the legislative history in this case you will agree that it wasn't meant to apply to cases such as we have before you today.

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LAWYER: I would like to address Mrs. Ledford's points of error which pertain to jury selection. If the court agrees that Mrs. Ledford is the wife of John Ledford, it will also have to reach the jury selection issue which the CA decided against us. And I think that the CA in its decision and for that matter the petitioner has confused bias in its ususal meaning, which is the language this court used in Compton, with bias in its legal meaning. And in Compton and in virtually all of the cases following including this one, the courts have quoted this court's opinion in 1963, which is the bias in its usual meaning is an inclination toward one side of an issue rather than to the other. But to disqualify it it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. It goes on to say that prejudice embraces bias, but not the converse.

We have a series of relatively vague and occasionally contradictory and conflicting questions to 4 different jurors. Some of them are correct, and some of them are not to establish legal bias. To juror Coddle counsel asked whether she can be fair and objective and neutral in looking at the medical facts? And she agrees that she can not. Another juror response to the same question: So you could not be fair and objective in looking at the medical facts? And she said this is true. Unfortunately that's a compound question because she goes on to ask as

they have been testified to so that both sides start evenly. Well that's a juror that says that's true, but she had already been stricken for cause, so her answer is kind of meaningless. It's at that point that Mr. Garrett says: I feel the same way. It's to a compound question: Can you be fair, or do we start out even? Can you be fair establishes legal bias if you say no. Do we start out even establishes bias in its ordinary sense. And I think that's all that was established here. At best it raises a fact issue for the trial judge.

GONZALEZ: Why is this even relevant because it's going to be remanded for a new trial? Are you asking rendition of judgment somehow?

LAWYER: Yes. I think at the very least it requires that it be remanded to the CA for proper consideration under the abuse of discretion standard rather than as a matter of law on which it was decided.

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REBUTTAL

SPECTOR: Is it your contention that Mrs. Ledford had to sue, file this case within a year?

LAWYER: No your honor. As I was going to point out, and which I believe is an error in assumption on the Ft. Worth CA's part, there are several methods available to individuals like spouses of informal marriages in Mrs. Ledford's position. Mainly application for heirship as we see what was done in the Flores case; in the _____, a declaratory judgment action to establish rights of the parties and establish what the relationship is.

SPECTOR: If she had gone into court and had a declaratory judgment that she was the wife, and then within 2 years sues, would you be able to contest that?

LAWYER: No, I don't believe I could. Because she would have had a judicial determination of her status, which is...

SPECTOR: But you wouldn't have had an opportunity to contest it?

LAWYER: I would not have at that point in time. But from a practical standpoint given the fact that she would have had 1.91a says: any civil, judicial or administrative proceeding, that therefore doesn't limit the person's ability to go and have their determination established. I believe in the Torres case when the parents filed their application for heirship in the probate code in order as I read the case to strategically preclude the ex-_____ husband or whatever from seeking any additional recovery in their wrongful death state action. The apartments who had settled with the punitive common law husband were not necessarily, I am not entirely sure of what the status of all the parties were or whether or not they were able to actually make appearance in the probate proceeding, but I do believe that if as 1.91a allows that a person proves up their marriage in whatever mechanism any civil, judicial or administrative proceeding, or

§1.92 affidavit _____. Obviously both former spouses have to live in order to file that affidavit with the court, or with the county, then that would serve as an ability to assert the status of the marriage relationship and preclude the issue that we are here today. In fact I think that that is precisely what needed to be done since individuals who elect to enter into an informal marriage have voluntarily foregone the formal ceremonial process of getting married and therefore eliminated the ability to track their marriage from a state public policy standpoint, then I think it is only reasonable that some mechanism be available to other parties who may have to deal with these people on the basis of the relationship like we do in this case, like they do in divorce actions, like in the other cases as pointed out by Justice Cornyn, where 1.91b has been held determinative _____ limitations.

ENOCH: Here is the stipulation. There's a valid common law marriage. What's the mechanism at the trial of this wrongful death for you to avoid now the proof of the common law marriage?

LAWYER: As Justice Baker pointed out, all underlying facts about the status of this case can be true and still my affirmative defense which is an avoidance defense since they didn't prove it up....

ENOCH: But your avoidance defense is they can't prove that they had a valid common law marriage.

LAWYER: Because she didn't prove it up within a year.

ENOCH: But she doesn't need to prove a valid common law marriage because the stipulation says she has a valid common law marriage. At the trial of this case when the plaintiff wants to produce their evidence that will produce a judgment if any against the defendants here, one of the elements of proof will be a valid common law marriage. You say you have a defense - they can't prove it because they didn't bring it up in a year. But they don't have to prove it because the stipulation says they have a valid common law marriage. What you're attempting to do is say: If they come forward with proof of a common law marriage, we challenge it because it wasn't brought within 1 year. But they don't have to bring forth proof of common law marriage because you agree they were married common law?

LAWYER: I think that the case cannot be looked at by this court in the absence of the entirety of the record. And that includes Mrs. Ledford's admitted admissions, which are included in the transcript. She admits under 169 of our rules of civil procedure that no civil, judicial or administrative proceeding was brought within a year by herself or anyone on her behalf to prove up her marriage. So in light of admission, I don't have...

ENOCH: So if there was an issue in the trial of the case, if there was an issue as to whether or not she had a common law marriage in the trial of the case she could not establish it?

LAWYER: Right. She's already admitted she didn't follow 1.91a.

ENOCH: But if proof of the marriage is not an issue in the case, then that circumstance would never come up?

LAWYER: If we didn't have an informal marriage kind of a situation. That is correct.

CORNYN: Under most circumstances would a defendant have to raise this by a verified denial?

LAWYER: Yes, and we did.

OWEN: On the surviving statute, do you have any dispute that all of the property of the deceases estate went to his common law wife? Is there any dispute about that?

LAWYER: No your honor there is not. Because assuming Mrs. Ledford is the wife under dissent and distribution since she was the only wife and there were no children of that marriage she will inherit both community and separate property. So that is correct.